



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 205 OF 2013

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 17TH SEPTEMBER, 2014)

MARK AYEGO FEDHA CLAIMANT

-VERSUS-

NAKUMATT HOLDINGS

ACTING FOR:-

NAKUMATT NYANZA KISUMU RESPONDENTS

JUDGMENT

The claimant herein Mark Ayego Fedha filed his statement of claim in person on the 18/7/2013. His claim is for unfair termination of services by the respondents. He gave oral evidence and stated that he worked for the respondents from 2003 to 2013 as a shop assistant. On 6/5/2013, a customer came to the shop and had some goods bought but not billed.

The supervisor arrested that customer and they turned the heat on the claimant alleging that the claimant was involved in this fraud. The claimant states that he was intimidated and was forced to put in writing that he knew about those goods. He was then told to go home. Later he was invited to a disciplinary committee meeting in Nairobi but he never got the invitation letter. He later received a letter from his human resource manager asking him to explain why he didn't attend the disciplinary committee meeting. He never received any other letter from the respondents even a termination letter. He came to court seeking redress to secure his rights including service pay. He also seeks for orders of reinstatement and in the alternative payment of his terminal dues amounting to Kshs 953,423.85 as enumerated under para 4.0 of his memo of claim.

The respondents on the other hand filed their memo of response to statement of claim on 15/8/2013 through the firm of Nyaberi & Co. Advocates. In their defence they stated that the claimant was summarily dismissed for stealing from the respondents. They also aver that the disciplinary process was followed and the claimant was invited to a disciplinary committee hearing which he failed to attend. They annexed pictures of claimant taken within the shop with goods he had allegedly stolen plus a shop – lifters form filled by the claimant admitting that he was caught shop – lifting at Nakumatt city on 6/5/2013 items worth Ksh 1,592/=. The respondents however did not call any evidence as they failed to attend court on the date and time fixed for hearing.

Upon hearing the claimant therefore, issues for determination are as follows:-

- 1. Whether the claimant was accorded due process before being dismissed.**

2. Whether the claimant is entitled to the prayers sought.

The claimant had told court that he was on duty at the shop at the till when he apparently passed some goods through the till but due to some error, the till did not record the items. The customer who had been buying the goods was arrested and then heat turned against the claimant as it was alleged that he was the one who had stolen these goods. The claimant contends that he was not given a hearing and was intimidated to accept he had shop lifted. The claimant is a member of a trade union, the Kenya Union of Commercial Food and Allied Workers Union (*hereinafter referred to as the Union*).

The union has a valid Collective Bargaining Agreement with the respondents signed on 7/8/2012. Under the Collective Bargaining Agreement Clause 17, an employee shall be summarily dismissed for gross misconduct as defined in the Employment Act 2007. Amongst the reasons for summarily dismissal are:-

“If an employee commits or on reasonable and sufficient grounds is suspected of having committed an offence against or to the substantial detriment of his/her employer or his/her employer's property.”

In the case of the claimant, he is accused of committing an offence that could lead to summarily dismissal. He signed a form admitting he had shop lifted which he now alleges he signed due to intimidation. He has not told court how he was intimidated to sign a form incriminating him. He was however given a chance to be heard as provided for under S. 41 of Employment Act *Exh 6*.