



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 93 OF 2013

JAPHETH MOGAKA ONYARU .....CLAIMANT

VERSUS

ALPHA DAIRY PRODUCTS LTD .....RESPONDENT

### **J U D G M E N T**

The claimant has brought this suit against the respondent claiming terminal dues and compensation for unfair termination of employment. The facts of the case are that he was employed by the respondent on 2/1/2009 as an accountant at a starting monthly salary of ksh.42060 and worked until 3/9/2012 when he was terminated for the reason that there was an alleged loss of stock in the stores department. That as at the time of his termination his salary increased to Ksh.51940.05.

That on 31/7/2012 he was arrested and taken to police but he was never charged in any court of law. That after the release by the police he was not allowed back to work and all his junior staff were instructed by the respondent not to take instructions from him. In addition his computer also dismantled and his data taken away by the respondents directors. That from July 2012 till 3/9/2012 he was never paid his salary. He denied stealing his employer's stock or in any manner dealing with stores department.

The respondent did not file any defence in the suit and did not attend the hearing on 22/7/2013 when the claimant testified alone as CW1. His evidence was basically a confirmation of the averments and the facts pleaded in the claim and will not repeat them herein. The claimant filed submission after the hearing.

I have carefully read the claim and considered the evidence and the written submission by the claimant. It is not disputed that the dispute concerns employment and labour relations between the parties to the suit. As such the court is satisfied that it has the jurisdiction to entertain the suit. The following are the issues for determination:

- 1. Whether indeed the claimant employment was terminated by the respondent.**
- 2. If the answer to (1) above is positive, whether the termination was unfair.**
- 3. Whether in the circumstances of 1 & 2 above the claimant is entitled to the prayers sought.**

In answer to the first issue, the uncontested evidence by the claimant is to the effect that he was working well and even received commendation from the management about the good progress of his branch office. That abruptly and without any proper investigations the claimant was accused of loss of stock which according to him was not true and that he was not dealing with stocks in the stores department.

That according to him there was no loss and the data used to declare the alleged loss of stocks worth ksh.62 million was erroneous. That he was shortly arrested at the instigations of the respondents and was never charged. That his office computer was dismantled and the data taken away by the respondent who also told the staff under the claimants supervision not to take any instructions from him. That the respondent also told the claimant to stay away from the work place for an unspecified period and upon request for his outstanding salary he was denied.

The above conduct from the respondent who was the employer constituted both a breach of contract of employment and also constructive termination of the employment contract. It is now trite that where an employer is guilty of material breach of employment contract like failure to perform his obligation such as payment of salary and in addition makes it difficult or totally impossible for the employee to perform his obligation under the contract, that will automatically amount to constructive termination of the employment at the instance of non other than the employer himself. Consequently the answer to the first issue is in the affirmative.

As regards the second issue, it is obvious that Section 45 makes any termination of employment unfair unless the employer proves a valid and justified reason for that termination in addition the proof that the termination was through a fair procedure. The burden of proof of the reason and fair procedure heavily lies on the employer in claims founded on unfair termination as the one before the court.

The respondent did not dispute the claim and as such the court will find in favour of the claimant who has shown on a balance of probability that he was harassed and forced out of his employment through unfair procedure and for an invalid reason. It was invalid in my view because according to his uncontested evidence, dealing with stocks in the stores department was not within the cause of employment or what is otherwise called his job description. Consequently the answer to the second issue is in the affirmative.

The answer to the third and last issue for determination is obviously that in view of the courts findings on the first and the second issue above, the claimant is entitled to his employment terminal dues and compensation for unfair termination. He has prayed for one months salary in lieu of notice, accrued salary for July and August 2012, accrued leave for one year, severance pay at 15 days per year for 3 years worked, 12 months salary for lost employment and certificate of service.

Upon considering the payslips dated April and June 2012, the court awards the claimant all his prayers save for severance pay. The prayer which ought to have been entitled 'service pay' is never the less disallowed in view of Section 35(5) of the Employment Act which bars an employee who is a member of his employer's pension scheme or NSSF from claiming service pay as in this case.

Based on the said payslips, I will assess the claimant dues based on his salary at the time of his termination which was ksh.51940.05 as opposed to the pleaded salary which was obviously an error. In making the award the court will also treat the prayer for loss of employment as referring to compensation for unfair termination.

Consequently, I enter judgment for the claimant against the respondent as follows;

- a. **The claimant's employment was unfairly terminated by the respondent.**
- b. **The respondent is ordered to pay to the claimant**

- (I) one month salary in lieu of notice .....51,940.05**
- (ii) salary for July and august 2012 .....103,880.10**
- (iii) accrued leave upto 2012 of 21 days ..... 36,358.05**
- (iv) 12 months for unfair termination.....623.280.60**

**815,458.80**

**c. the respondent shall also issue the claimant with a certificate of service.**

**(d)the respondent will also pay costs and interest.**

Orders accordingly.

**Signed dated and delivered this 30th August 2013**

**ONESMUS MAKAU**

**JUDGE**