



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 303 OF 2015**

**JOSEPHAT KAHINDI WANJE.....CLAIMANT**

**- VERSUS -**

**BAKE 'N' BITE (MBS) LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 08.05.2015 through M/s Kenga & Company Advocates. The claimant's case is as follows. He was employed by the respondent in 2007 as moulder or general clerk at a daily wage of Kshs.700.00. The daily wage increased over time and as at termination on 05.01.2015 the daily wage was Kshs.881.00. The daily wage was paid at the claimant's bank account on weekly basis being Kshs.5, 286.00. His further case is that on 01.01.2015 the respondent wrongfully, unlawfully and unfairly terminated the claimant's employment. Further although he was paid on daily wage basis, his employment had converted to one subject to minimum statutory terms and conditions of employment per section 37 of the Employment Act, 2007 the computed monthly pay being Kshs.21, 144.00. Further the termination was without a reason and due hearing but was capricious, malicious, wrongful, unlawful, unfair, unprocedural and the only reason given was that the claimant's services were no longer needed. The claimant claimed for:

- a. Two months' pay in lieu of notice per section 40(1) (f) as read with section 49(1) (a) and 50 of the Employment Act, 2007 and clause 5(a) (ii) of the collective agreement (CBA) of 23.09.2014 Kshs.42, 288.00.
- b. Payment for 7 years' annual leave per section 40(1) (e) and section 50 of the Act and clause 13(a) of the CBA.
- c. Severance pay in line with section 40 (1) (g) and section 50 of the Act and clause 8(c) (xii) of the CBA Kshs. 119, 545.00.
- d. Compensation for unfair termination 12 months' salaries Kshs.253, 728.00.
- e. Total claims Kshs.586, 339.00.

The claimant's further case was that despite demand the respondent had refused to pay the amount now claimed. He prayed for judgment against the respondent for:

- a. Payment of the Kshs.586, 339.00.

b. Interest on (a) from the date of filing suit until full payment.

c. Costs of the suit.

The respondent filed the memorandum of response on 29.06.2015 through Mogaka Omwenga & Mabeya Advocates. The respondent admitted employing the claimant at all material times effective August 2007 as a moulder or general clerk at a daily wage of Kshs.700.00. The respondent stated that the claimant was summarily dismissed on 16.01.2015 by letter of same date after being absent from 07.01.2015 to the date the letter was issued. The respondent admitted that by mutual understanding the claimant's daily wage was paid at the claimant's bank account on weekly basis being Kshs.5, 286.00 as at termination. The respondent admitted that the claimant's employment converted to one subject to minimum statutory terms of service per section 37 of the Act but since the claimant had been summarily dismissed, not all claims as made were due to him by operation of law and by reason of such conversion. Further the reason for termination was that the claimant had been absent from duty from 7<sup>th</sup> to 15<sup>th</sup> January, 2014 being 8 days without notice to the management. The claimant had absented himself from duty effective 07.01.2014 and after the meeting of 06.01.2015 at which the respondent's management had established that the claimant had utilised his position as a supervisor unethically by avoiding to pay debts owed to his subordinates. The claimant was a member of the Bakery Confectionery Food Manufacturing & Allied Workers Union (Kenya) and which was involved in resolving the dispute amicably but the claimant prematurely filed the suit. Further the claimant had not been declared redundant and his claims in that regard and the alleged unfair termination were unfounded. The claimant had been paid his dues and his case was unjustified. The respondent prayed that the suit be dismissed with costs to the respondent.

The respondent's counsel reported at the hearing that the respondent had been uncooperative in availing a witness and had failed to give sufficient instructions with the consequence that on 29.03.2022 counsel's application to cease acting was allowed. The claimant testified to support his and final submissions were filed.

The Court has considered the submissions made and makes findings as follows.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the parties are in agreement that the respondent employed the claimant as pleaded. The parties by their pleadings are also in concurrence that the claimant's casual engagement converted to one subject to minimum terms and conditions of service under the Employment Act, 2007 and as per section 37 of the Act. The parties are also in agreement that the claimant was a member of the trade union and the Court finds that the exhibited CBA applied as incorporated in the claimant's contract of service. The last daily wage payable per week and therefore computed by the claimant as monthly pay is found not in dispute as pleaded for the claimant. The Court returns those to have been the terms and conditions of service.

The **2<sup>nd</sup> issue** is to determine the whether the claimant was dismissed by way of summary dismissal as urged for the respondent or it was a termination by redundancy as urged for the claimant. The claimant testified that on 05.01.2015 he was verbally informed that his services were not needed. On 22.02.2022 by consent, the Court ordered that the documents filed for parties were admitted in evidence as filed. The Court has taken into account the documentary evidence. The respondent has exhibited the letter dated 14.01.2015 to the claimant's traded union explaining that the claimant had been promoted to a supervisor but had been demoted to his previous position of production (table-man) because of the complains by his subordinates that the claimant had borrowed money from several of them and failed to pay back. The letter further states that the claimant would threaten his subordinates whenever they demanded that the claimant pays the borrowed money back to them. The letter further states that when the repayment was not forthcoming, the staff sought the respondent's intervention. The letter stated that a meeting was held on 06.01.2015 with the claimant to establish if the staff complains were valid and it was established that the claimant had used his position wrongfully not to pay the debts owed to the staff. It was therefore concluded that the claimant had used his position unethically and he was to report on duty on 07.01.2015 but as a table-man and not supervisor. The letter also stated that he failed to report on duty as expected and summary dismissal followed per clause 7(a) (i) of the CBA (which states that it amounts to gross misconduct justifying summary dismissal if without leave or other lawful cause an employee absents himself or herself from the place proper and appointed for the performance of his or her work.) The letter concluded thus, **"The management is requesting the union office to advise about the matter because the subordinates are still searching for him and they are very bitter on the matter. Performance wise; he also could not meet the company expectations on efficiency & productivity. As a company, we also fear his financial strains would lead fraud to the Company. Attached are the copies of the claims."** The letter was signed by the respondent's Regional Operations Manager.

On that letter of 14.01.2015, the respondent attached copies of letters by staff seeking the respondent's intervention for the claimant to refund staff cash borrowed by the claimant. One claim was by one Cyrus Wanjau dated 04.02.2015 for Kshs. 1000.00. The other was by Daniel Kituu dated 04.02.2015 for Kshs. 2, 000.00. Donald Muhulo claimed Kshs.4000.00 with respect to Kshs.5, 000.00 advanced to the claimant on 05.06.2013. Another staff Wilberforce Mayeni claimed Kshs.1, 500.00 advanced to the claimant on 18.10.2014.

The respondent exhibited the letter of summary dismissal dated 16.01.2015 and received by one Baraka Kadenge for the claimant on 16.01.2015.

The Court has evaluated the evidence. While the claimant alleged that he was told on 05.01.2015 that his services were no longer needed, he has not pleaded and provided evidence on the particulars of the person who verbally terminated his employment as alleged. On a balance of probability, there is no ground to discredit the respondent's account as pleaded and as backed by the respondent's exhibited correspondence on the circumstances of the separation. The Court returns that after the demotion on account of the unethical borrowing and failure to repay debts owed to his subordinates, the claimant deserted duty thereby bringing the contract to termination per the letter of summary dismissal which appears to have been duly received by the union representative on behalf of the claimant. The letter of 25.05.2015 was by the respondent to the claimant's advocates explaining the circumstances of the separation and that the matter was before the union requiring a review by the advocates. The letter of 16.01.2015 was the letter of summary dismissal. Of the two letters, the claimant testified thus, "**My termination dispute went to the union. I see letter of 25.05.2015. Am aware about that letter. We went to union – but reached no compromise. I see letter dated 16.01.2015, the summary dismissal letter. I never received it. Baraka Kadenge who received it was shop steward. I did not authorise him to receive it on my behalf. That is all.**"

The Court has considered all that evidence and returns that the claimant knew the case against him. It was never that he was being rendered redundant. His case before the union was the respondent's decision to demote him in view of his unethical behaviour as a supervisor. His allegations of verbal redundancy decision are found misleading and unjustified. The Court finds that he was summarily dismissed and he fully contributed to his dismissal. The allegations of unfair, unlawful, wrongful and no reason for termination will collapse together with the collateral claim for compensation in that regard. Similarly, the claim and prayer for severance pay will collapse as there was no redundancy situation.

The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to other remedies as prayed for. The termination was by summary dismissal and under section 44 of the Act and clause 7(b) of CBA, the claimant was disentitled to notice pay as claimed. In absence of any other material, the claimant has on a balance of probability established the claim for leave pay and is awarded **Kshs.170, 778.00** as prayed for. The Court has considered the parties' margins of success and all circumstances of the case including that the claimant's pursuit through the union was pending conclusion as at filing of the suit and returns that the respondent will pay 50% of the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. Payment of **Kshs. 170, 778.00** by 02.06.2022 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
2. The respondent to pay **50%** claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01<sup>ST</sup> APRIL, 2022**

**BYRAM ONGAYA**

**JUDG**



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