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Case Action:	Judgment
Judge:	Monica Mbaru
Citation:	Lihanda Ada Yohana v Kenya Nut Company Limited [2018] eKLR
Advocates:	-
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History Magistrates:	-
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Case Outcome:	-
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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO 415 OF 2016

LIHANDA ADA YOHANA.....CLAIMANT

VERSUS

KENYA NUT COMPNY LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a General Worker on 4th October, 2012 at a monthly wage of Ksh.6,146.00 until 4th November, 2014 when the claimant claims his employment was unfairly terminated without warning, notice or a hearing.

The claim is that the claimant was victimised in the work place on allegations of theft.

He was not given a hearing to give a defence.

The claimant is seeking the following dues;

- a) 3 months' notice pay Ksh.18,438.00;
- b) Pay for days worked Ksh.3,309.00;
- c) House allowance Ksh.808.00;
- d) Underpayment Ksh.5,654.00;
- e) Annual leave Ksh.6,146.00;
- f) Severance pay Ksh.3,000.00;
- g) Compensation;
- h) Costs; and
- i) Certificate of Service.

The claimant testified that he was allocated duties of milking the cows by the respondent. upon milking he would be given a little of milk for his consumption. On the evening of 4th November, 2014 the claimant took his bottle of milk together with a colleague but the management said he had stolen milk. A new manager had come in and changed the policy. The security officer brought this to

the attention of management. The claimant was never issued with a notice to show cause why his employment should be terminated for the alleged stealing of milk and he was not invited to any disciplinary proceedings as alleged. On 14th November, 2014 he was unfairly dismissed from his employment.

In defence, the respondent admit they employed the claimant as a General Worker but employment was terminated following stealing and or intending to steal, a case of serious gross misconduct warranting summary dismissal. The claimant was issued with a notice to show cause and a decision taken to dismiss him from employment.

The defence is also that the offence of stealing by servant amounted to gross misconduct and the action taken is justified. The claimant was also noted for chronic late work attendance and notified that when any other misconduct arose he would be dismissed vide notice dated 14th March, 2014.

On 8th October, 2014 the claimant was found in possession of the respondent's property, cow milk without authorisation and he admitted to stealing the milk and his statement has been filed. On 14th November, 2014 employment was terminated after the claimant failed to show good reasons why it should not.

The claims made for notice pay are without merit as such does not arise in summary dismissal or at all. The claimant was paid for days worked and which included the house allowance due. the alleged underpayment does not arise with the claimant having been paid the legal wage. The claim for annual leave and travel allowance claims are without merit and not based on any justified cause. The claim for severance pay is misconceived and the compensation sought is not due in a case of justified summary dismissal.

In evidence the respondent called Peter Monari the Security officer and who testified that on 8th October, 2014 he was called by security after the claimant had been found with stolen milk. The supervisor Mary Njeri was present and Limo, a colleague of the claimant was also present. There was a disciplinary hearing and the claimant admitted to having taken a litre of milk. Such was not allowed as it amounted to theft by servant and resulted in summary dismissal. The defence that there was a policy to give employee a litre of milk is not true.

Mr Monari also testified that upon summary dismissal the claimant attended and cleared and was paid his entire terminal dues including pay for days worked, leave days due and a Certificate of Service was issued. An amount of Ksh.13,003.00 has since been paid and acknowledged by the claimant.

At the close of the hearing both parties filed written submissions.

The court has put into account the pleadings, the evidence and the written submissions.

The claimant in his evidence admitted that he was found with one litre of milk. That such possession was lawful as the respondent had allowed the employees to take a litre of milk for own consumption as a policy. That he had milked for the day and had his bottle of one litre milk. That there was a new manager who had come in and did not know of this policy and hence he was victimised as a result.

The respondent challenged the claim on the basis that there was no policy to allow employee to each carry a litre of milk and the milk found with the claimant was theft by servant which warranted summary dismissal. The claimant was heard and where he confessed to his action.

On the claimant's admission that he was found with one litre of milk and such was the property of the respondent and without any policy or letter of approval allowing his taking away such property, such being unauthorised possession of such material and property, the resulting sanction of summary dismissal is justified. The claimant had relied on the case of **Nicholas Otinyu Muruka versus Equity Bank Limited, Cause No.25 of 2013** to support his case but the facts therein and leading to the citations made are foundationally different from his case. In the claimant's case in the pleadings and in his evidence he admitting to being in possession of one litre of milk but lacked the requisite authority to hold such property from the employer. Such possession was not justified as having been approved. Even though the respondent did not produce the policy forbidding the employees from taking milk, the claimant is the one who relied on such policy that he was allowed to take a litre of milk with him. this being the employer's property, where such a policy existed to justify the claimant taking the property away, then as a rule he ought to have submitted the policy he was basing the possession of milk on as the defence was that such possession and taking away of milk was not allowed.

The above put into account, where the claimant was the milkman and was found with one litre of milk and which fact he admitted, the sanction of summary dismissal was too harsh. Even where stealing or intent to steal was the case and summary dismissal is the sanction, a warning or surcharge for the property taken would have sufficed. The option of summary dismissal was however taken and which is lawful.

The claimant is seeking 3 months' notice pay and compensation which are not available in a case of summary dismissal which is found to be lawful.

The claimant submitted his pay slip and therein in is payment for basic pay and a house allowance. Based on the Wage Orders, the gross pay is commensurate with the same and the claims made for a house allowance, underpayment are not justified.

The respondent has submitted the schedule for the final payments to the claimant and which comprise;

- a) Payment for days worked in November, 2014;
- b) Earned leave days;
- c) Overtime due;
- d) House allowance due; and

Total Ksh.13,003.00

Such pay addresses all the claims made.

On the claim for severance pay, the claimant's case did not stand out as one which justify the award of such a remedy. Such is misplaced.

Accordingly and based on the findings above, the claim is hereby dismissed save that where the claimant has not collected his Certificate of Service, such shall be dully issued in accordance with the applicable law. each party to bear own costs.

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of :.....



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