



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 1460 of 2010**

**GEORGE ODHIAMBO OWAKA.....CLAIMANT**

**VERSUS**

**WELLS FARGO LIMITED.....RESPONDENT**

**JUDGEMENT.**

The claimant by way of an amended memorandum of claim filed on 14th July, 2011 sought the intervention of this Court to declare termination of his employment with the respondent wrongful and unlawful since the respondent did not assign any reason for the termination. Consequently the claimant seeks from the court judgment against the respondent for damages particularised as follows:

	<u>Kshs.</u>
a) three months pay in lieu of notice	29,286
b) N.S.S.F amount deducted but not remitted	13,420
c) N.H.I.F amount deducted but not remitted	4,320
d) Service gratuity (22yrs x 9,762x 12)	2,577,168
e) Leave allowance (21 days per yr. 8yrsx 7,962)	<u>1,640,016</u>
	4,266,210

The respondent in its memorandum of response denied that it wrongfully terminated the plaintiff's employment claiming that after being granted leave on compassionate grounds he failed to return to duty as agreed thereby considered to have absconded duty. According to the respondents, they were justified in terminating his services on that ground.

When the matter came for hearing before me, the claimant testified that he was employed by the respondent as a guard earning Kshs. 7,000/- per month. It was his evidence that during the service he never faced any disciplinary action. He testified that he asked for permission to travel upcountry to bury his son who had died on 25th November, 2005. He was allowed one week and was directed to return to work on 2nd December, 2005. He however did not return as agreed since according to him he could not raise the return fare among other problems. He claimed that he called a Mr. Manduka a personnel officer

for the respondent and informed him of his problem and asked him to extend his leave and according to him Mr. Manduka agreed to do so. However when he reported to work two days later he was informed that his job had ended. According to him he was not paid any dues. Further, monies were deducted from his salary on account of NHIF and NSSF but were never remitted to the respective bodies.

On cross examination he admitted that during his employment he had received verbal warnings. According to him when one is summoned he is told to sign someplace where they are never allowed to read. He further admitted that he took leave during the time he worked for the respondent. It was his evidence in cross examination that the respondent offered to pay him Kshs. 1,000 as his final dues which he refused to take.

In re-examination by his counsel he stated that funerals take different lengths of time depending on the age of the dead. He further stated that he ran out of funds since he had no contribution from friend's

The respondent called one witness a Mr. Patrick Kipkemboi Maiyo who stated he works for the respondent as a Human Resource Officer and that he had served in the post for 3 years. He confirmed that the claimant had asked for 7 days leave and was to resume duty on 2nd December, 2005 but did not do so. According to him the claimant came back on 13th December, 2005. He denied the claimant communicated his absence. According to him the claimant is not entitled to any notice pay or any compensation since he absconded duty.

In cross-examination by the claimant's advocates he stated that on termination a person has to be given an opportunity to explain himself prior to termination. He further stated that the remarks would be made on the back of the personal files whenever a person calls. He however did not have the file for the claimant with him in court. He further conceded that he did not have any record that the claimant did not report to work on the 4th of December, 2005.

On being asked by the court, the claimant stated that he joined the respondent on 1st September, 2009 after the plaintiff had left the respondent's employ. The court further noted that the claimant's employment contract was neither produced by him nor the respondent. However the question of whether he was an employee of the respondent or not was not in dispute. In determining the contractual relationship between the claimant and the respondent therefore the court will rely heavily on statute, case law and established practice in the industry.

Section 4 of the Industrial Court Act confers on the court jurisdiction to settle employment and industrial relations disputes in order to secure and maintain good employment and labour relations in Kenya. In exercising this jurisdiction the court is guided by the constitution, the relevant labour laws, practices and policies in the industry as well as international conventions and best practices. The operating statute concerning the current claim is the Employment Act, 2007. This Act makes provisions for procedure to be followed in bringing to an end an employment relationship and the consequences of not observing the rules.

The respondent by a letter dated 14th December, 2005 (WF2) addressed to the claimant through the respondent's own address purported to notify the claimant that as a result of his failure to resume duty he was deemed to have deserted his employment with effect from 9th December, 2005. No evidence was however led to show that the letter ever reached the claimant at all and why it was never considered necessary to forward the said letter to the claimant's home address considering that the last interaction between the claimant and the respondent was when he left officially to attend his child's burial upcountry. On the other hand, whereas the claimant admits that he did not resume duty on 2nd December, 2005 as he had indicated and for reason's he gave, it was his testimony that when he reported to his workplace two days later he was informed that his job had ended. Further Mr. Maiyo, the only respondent's witness called admitted in cross-examination that he did not have anything to show that the claimant neither called Mr. Manduka nor that he ever reported to his place of work on the 4th December, 2005 as claimed by him.

Considering the foregoing and the fact that the claimant had left his place of work for not only a

legitimate reason but also under emotionally distressful circumstances for him, the respondent ought to have been a little more sensitive and considerate to the claimant. Loss of a child can be distressful and depending on which ethnic or cultural community one hails from, funerals can prove to be very expensive.

At Common Law there is obligation of good faith and fair dealing when it comes to termination of employment by an employer. In the course of dismissal employers

ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

Since it is the respondent who alleged that the respondent deserted his work justifying his termination without notice, the onus is on the respondent to prove that indeed reasonable steps were taken not only to contact the claimant to bring the fact of desertion to his notice but also to prove that he did not report to his place of work on the 4th of December, 2005 as alleged by him. Failure to discharge this burden renders the termination of the claimant's services wrongful within the meaning of section 35 and unfair within the meaning of section 45(1) of the Employment Act, 2007.

Section 35 of the Act provides at the relevant part that:

35. (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be:

a) .....

b).....

(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

And section 45 of the Act provides:

45 (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

From the analysis of the facts above, the Court is of the view that the respondent has failed to show that it complied with the provisions of section 35(1)(c) and further that the reason for terminating the claimant's services was a valid reason and in any event fair. The Court therefore finds that the termination of the claimant's services was contrary to sections 35 and 45 of the Employment Act, 2007.

Having so found, the next question would be: Is the claimant entitled to the remedies sought in his memorandum of claim?

Regarding claim for payment of three month's salary in lieu of notice, the court declines to allow this prayer. The claimant was on a monthly pay and since neither the claimant nor the respondent produced before court the contract of employment, the court can only allow one month's pay in lieu of notice as provided under section 35(1)(c) and not section 35(2) which can only be invoked in the event of the presence of a contract stipulating a longer notice period.

Concerning the claim on NHIF and NSSF deductions, the court takes the view that these monies do not belong to the claimant and that the respective statutory bodies are the ones entitled to claim them from the respondent. If indeed they were deducted from the claimant's salary and never remitted, the best persons suited to claim them are NSSF and NHIF respectively. The claimant is at liberty in the circumstances to complain against the respondent to these bodies for appropriate action.

In respect of service pay, the claimant was a member of NSSF and section 35(6) excludes payment of service gratuity to employees who are members of a registered pension or provident fund scheme under the Retirement Benefits Act; (b) a gratuity or service pay scheme established under a collective agreement; (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and (d) the National Social Security Fund. To that extent, the prayer under this head also fails.

Regarding leave, the claimant admitted in cross-examination that he took his leave during the time he was working for the respondent his claim for leave allowance therefore is unsustainable.

Concerning the claim for two month's house allowance, this claim was not supported by any evidence. It is not clear whether the respondent at one time failed to pay him his house allowance and for which month's. If the claim is founded by implication of section 35(1)(c) of the Employment Act, 2007 then such implication would be erroneous as that section talks of payment of salary in lieu of notice. House allowance as the name implies is an allowance and not a salary hence not contemplated by section 35(1)(c). This claim also fails.

Reverting to the issue of unfair termination, the court having found that the respondent unfairly terminated the claimant's services within the meaning of section 45 of the Act. The issue that I have to grapple with at this point is the quantum of damages payable as a result thereof. Before I do that it may be useful to observe that to the extent that an employee invests much of his productive life in the service of the employer leaving little or no time for other livelihood in most cases, the employee in these circumstances acquires a legitimate expectation that while observing his part of the contract his services should not be terminated unless for good cause. This observation become more graphic especially in the echelons of the claimant whose prospects of securing alternative employment become very scarce once terminated. It is laudable that the Employment Act, 2007 came up with the notion of unfair termination and a provision under section 49(1)(c) that a claimant who unjustifiably terminated can be compensated up to 12 months based on gross monthly wage at the time of dismissal. This situation was never obtaining under the repealed Employment Act where damages payable for wrongful termination was co-terminus with the length of notice stipulated in the contract of employment and nothing more. While making the foregoing observation, the court is alive to the right of an employer to terminate the services of an employees but for reason's recognised by law not whimsically or driven by improper motives.

Back to the case in point, the claimant was terminated during emotionally distressful times. As observed earlier, the loss of a sibling can be very emotionally devastating and the funeral process, depending on which ethnic or cultural group one comes, can be very expensive. There is therefore real probability that the claimant may have honestly ran out funds including fare to come back to work. The claimant as a guard was of very modest means hence the possibility of being completely without money after the burial of his son is not too remote. Terminating his services during this time and for the reason of a delay not by any meaning inordinate was cruel and insensitive on the part of the respondent. In circumstances, the court awards the claimant the equivalent of salary for twelve months based on his earnings at the time of dismissal.

In conclusion the court enters judgement in favour of the claimant subject to statutory deductions, in the sum of Kshs. 126,906 made up as follows:

	Kshs
1. One month's salary in lieu of notice	9,762

2. One year salary for unfair termination (9,762x12) 117,144
3. The claimant will have cost of the suit at court rates.

Dated at Nairobi this 18th day of October 2012

**Abuodha J  
Judge**

**Delivered in open Court on 18th October, 2012**