



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1562 OF 2010**

**NOAH OMUSULAH AKATO.....CLAIMANT**

**VERSUS**

**ALPHA KNITS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 16<sup>th</sup> December 2010. In his suit he sought to resolve the issue he framed as unlawful summary dismissal contrary to Sections 41 and 44 of the Employment Act 2007. He averred that he was employed by the Respondent on 20<sup>th</sup> January 2003 as a machine operator and was later promoted to accounts office due to good performance. The Claimant averred that in October 2010 he applied for and obtained leave which was to commence on 1<sup>st</sup> November 2010 and terminate on 30<sup>th</sup> November 2010. He averred that on return to work after the leave he was locked out and handed the letter of termination dated 4<sup>th</sup> November 2010. He averred that as at the time of termination he was earning Kshs. 10,063/- a month. He filed suit after his efforts to seek redress from the Respondent bore no fruit. He averred that the summary dismissal was without according him a chance to be heard contrary to the Employment Act. He thus sought reinstatement and in the alternative salary for December 2010, three months notice, leave dues for the year 2011 and damages for unlawful dismissal and costs of the suit.
2. The Respondent was opposed to the claim and filed a Memorandum on 27<sup>th</sup> January 2011. In the Memorandum the Respondent averred that the Claimant was never employed as a machine attendant and he was never promoted to accounts department as alleged. It was averred that the Claimant applied for leave on 14<sup>th</sup> September 2010 and the leave was authorised on 22<sup>nd</sup> October 2010 and was to commence on 1<sup>st</sup> November 2010. It was averred that the Claimant was summarily dismissed after committing an offence of carelessness and negligence. The Respondent averred that the Claimant was given an opportunity to defend himself and he gave a feeble explanation and even admitted his mistake. It was averred that the summary dismissal was fair and justified given the Claimant's actions. The Respondent averred that an employee Titus Muthembwa was employed by the Respondent and introduced to the Claimant to enable the employee familiarize himself with all the functions of the personnel office. It was averred that the Claimant assigned the employee duties of analyzing the muster roll and as a result wrong hours were put on the muster roll and the Claimant summarised the wrong hours and made the employer make wrong payments to its staff leading to a loss of Kshs. 19,195.95. It was averred that the Claimant was solely to blame for the failure to check the work of the employee he had been

assigned to coach. It was averred that no dispute was reported to the Minister for Labour as required under Section 62(1) and 62(3) of the Labour Relations Act and no conciliator was appointed and no certificate of disagreement was issued in terms of Section 69(a) of the Act. The Respondent averred that after coming to Court the Claimant also reported the dispute to the Minister through the Tailors & Textile Workers Union who formally reported a dispute. The Respondent thus sought the dismissal of the suit with costs as the grievant had not followed the right procedure in bringing this suit and the Respondent cannot be pursued in two different fora.

3. The Claimant testified before me on 3<sup>rd</sup> June 2014. He stated that he was the Claimant in the case and he went on leave in November 2010 and on return was not allowed into the office. He was then given a letter by the clerk for his termination and he did not know why he was terminated. He testified that he was dismissed without any fault on his part. He claimed the salary for December 2010, 3 months notice and service for the years worked from January 2003, and a certificate of service and any other relief.
4. In cross-exam by the advocate for the Respondent Mr. Masese, he stated that he was employed in 2003 and he was the author of the letter of explanation exhibited by the Respondent. He testified that in his explanation he stated that one of the clerks had made an error. He testified that the supervisor had asked him to check and comment and he went through the muster roll and found there were hours that his colleague had made though payments had not been made at the time since it was not 31<sup>st</sup>. He testified that the person who had made the error had only worked for one month in that department and was a casual. He testified that it was not his duty to supervise the new employee and that he had explained to the new employee what was done. He testified that there was a supervisor who was personnel officer who could resolve any problems. He stated that he had other duties and his duties were in dyeing and embroidery. He testified that he only summarised what the new employee had done and only did calculations on the hours. He gave his summaries and the new employee gave his summaries. He testified that he was given a summary to prepare by the supervisor. He stated that he was told there was a problem in the weaving and socks department and that he went on leave on 1<sup>st</sup> November and the problem related to 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> October. He stated that he could see there was an error but he was not the one who committed it. He testified that when he was called by the supervisor he checked on the work done in good faith but he now felt there was an ulterior motive. He stated that his letter of dismissal shows that he was careless in the execution of his work. He testified that he was not asked about the payroll posting or the error. He understood the letter of dismissal to mean that the mistake made by his colleague was now heaped on him. He testified that he explained that if the error could be corrected on the computer it could be corrected in the payroll for the next month. He stated that regarding the employee Isaac Gitau, he was the one who gave him his leave letter and that he did not know if Gitau was paid for the leave he took as he never went back.
5. The Respondent called one witness Francis Kangethe who testified that he was the HR Manager of the Respondent from January 2006. He testified that he knew the Claimant who had worked in his office as a junior clerk. He testified that the Claimant earned a basic salary of 8,163/- and house allowance of 1,900/-. He testified the Claimant was not a machine attendant and that the Claimant never worked in accounts department. He testified that he knew of Muthembwa who was recruited on 12<sup>th</sup> October as a clerical trainee. He testified that the employee was handed over to the Claimant to train on duties pertaining to personnel office. He stated that what he came to realise later was that there were so many anomalies which were passed over to computer section for payment in the payroll. He testified that the data was entered by the IT person after the data was given by the Claimant. He stated that the duty to give the correct figure was the duty of his clerks and that was the Claimant. He testified that before payment the payslips were returned showing there were no deductions of staff absences and the muster rolls were not tallying and shift pay was not properly done. For instance there was a person paid for being absent and the person to blame was the Claimant as the trainee was only 7 days in the job. He testified that the Claimant is the one who authorised the trainee to prepare the payroll. He testified that he raised this with the Claimant and asked him to show cause why action should not be taken. He showed the Court the October

- payroll anomalies in the document at Appendix 4A of the Response. He testified that the Claimant admitted the mistake through the letter the Claimant wrote in response to the show cause. He stated that the Claimant had been paid salary for November and when he came back he was dismissed from employ of the company. He testified that the Claimant reported the dispute to the Union and after conciliation had begun the Claimant abandoned the matter there and came to Court. He testified that the Claimant's dues had been calculated and were ready for collection.
6. He was cross examined by the Claimant and he testified that the clerks in the office were three in number and there was no training officer. He testified that the Claimant came to the department he sent the Claimant to long serving staff to train the Claimant and that was the procedure. He testified that there was no letter given for the training. He stated that he told the Claimant he could not assign wages preparation to the trainee. He testified that he assigned the duties to the Claimant and if he had not assigned the duties to the Claimant he would have assigned it to the other clerk. He testified that the tasks were specifically assigned to the Claimant. He stated that the Claimant was blamed for the unpaid leave for Gitau as the Claimant processed the unpaid leave and did not indicate unpaid leave and only gave an indication Gitau was on leave. He testified that he personally attended the Claimant and explained to him the management had decided to terminate the Claimant's services because of the anomalies. He testified that the anomalies were pointed out by the supervisor in the weaving department. He stated that the Claimant said the issue would be carried forward and rectified in the next month when asked to show cause.
  7. Parties filed written submissions. The Claimant filed on 19<sup>th</sup> November 2014 and in his submissions indicated that he joined the Respondent as a junior clerk and received his forced termination on 30<sup>th</sup> November 2010 and at the time his salary. He testified that he dealt with the muster roll for the embroidery, dyeing, sewing and hand-flat departments. He testified that he applied for leave on 14<sup>th</sup> September and the leave was to commence from 1<sup>st</sup> November and when he reported to his place of work he was given a summary dismissal letter dated 4<sup>th</sup> November 2010. He submitted that the dismissal letter showed that errors were committed by a trainee and some absent hours were mistakenly not adjusted for weaving which was a normal occurrence and that is why payslips were issued and corrections made before the IT department and Finance department made final payments. He submitted that he was not a coach or a training officer.
  8. The Respondent filed submissions on 4<sup>th</sup> December 2014. In the submissions the Respondent submitted that the Claimant was employed on 21<sup>st</sup> January 2003 as junior clerk and his duties were *inter alia* to prepare the monthly payroll based on the hours the respective employees worked. The data would be fed into the system by the Information Technology personnel and the information would be relied on while effecting the salary payments. It was submitted that the Respondent employed a clerical trainee who was specifically assigned to the Claimant to train and the Claimant assigned to him the duties of analyzing the payroll instead of training him on duties pertaining to clerical duties. The Respondent submitted that the Claimant was negligent in the performance of his duties and he failed to countercheck or input in the October payroll which amounted to gross misconduct warranting the dismissal of the Claimant under Section 44(4)(c) of the Employment Act. The Respondent submitted that the Claimant was given a show cause letter on 29<sup>th</sup> October 2010 and asked to explain how the anomalies had taken place and why disciplinary action should not be taken against him. The Respondent submitted that the Claimant in his response admitted having assigned the trainee the duty of posting the hours on the payroll. The Respondent relied on the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** on the issue of fairness of a hearing. It was submitted that the ratio in the case and the cases cited in that case was that hearing need not be oral. The Respondent submitted that the Claimant was not fit for reinstatement as he was dismissed four years ago. The Respondent submitted that the Claimant's case was thus fit for dismissal.
  9. There is no dispute that the Claimant was employed as a junior clerk and was responsible for preparation of the payroll in the embroidery, dyeing, sewing and hand-flat departments. He testified that he was dismissed due to errors on the payroll which he attributed to a trainee Titus

Muthembwa. The Respondent on the other hand testified that the Claimant was dismissed for just cause as he had allowed errors to be posted on the payroll by the clerical trainee under his care.

10. The Court in evaluating the evidence adduced is of the view that the Claimant was assigned specific duties which he was aware of. He denied being given a role to train the clerical trainee. He however admits the clerical trainee posted the erroneous data and he felt he was being blamed for the errors of the trainee. In his reply to the show cause letter he stated that the overpayment could be recovered from the next month's payroll. In my view this was a casual approach to his duties. Whereas it is not ideal for employees to be bereft of guidance by the HR department in execution of duties, the Claimant had a role to play in preparation of the payroll. He failed to execute his duties properly. He was heard in terms of Section 41 as the law does not only contemplate an oral hearing. Representation can be made in writing as was done in this case. This is buttressed by the case of **KRA v Menginya** above. The Claimant was thus dismissed for just cause. I have however a problem with the manner of his dismissal. The Claimant proceeded on leave on 1<sup>st</sup> November 2010. On return at the end of his leave he was given a letter dated 4<sup>th</sup> November 2010. This was contrary to the expectations of fairness. If he was found guilty of infraction he should have been notified immediately and dismissal given. He however went on leave and was dismissed 4 days later and not notified about it until his leave was over. In the premises I hold the procedure adopted in terminating him was wrong and unfair within the meaning of the law. He was entitled to dues in spite of his termination. He went to seek redress through the Ministry and abandoned the exercise and came to Court. This is not the ideal way to resolve disputes as the mechanisms in place are geared toward a fair determination of issues. If he was dissatisfied with the process of the conciliation he should have sought a certificate of disagreement. The Respondent's witness states that the Claimant's dues were calculated and were awaiting collection. To those dues I would add one month's salary as notice and one month's salary as compensation for unlawful termination. I will not order a reinstatement of the Claimant as he is gainfully employed. He is also entitled to a Certificate of Service in terms of Section 51 of the Employment Act. There will be no order as to costs.

11. In the final analysis the Claimant is entitled to
- a. Dues as calculated by the Respondent
  - b. Kshs. 10,063/- as notice
  - c. Kshs. 10,063/- as damages for unlawful dismissal.

Orders accordingly.

Dated and delivered at Nairobi this 4<sup>th</sup> day of **March** 2015

**Nzioki wa Makau**

**JUDGE**