

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E608 OF 2020**

**MARK JOHN KIYAKA.....**  
**CLAIMANT**

**VERSUS**

**WAIGANJO INVESTMENTS**  
**LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before the Court is the Claimant's Statement of Claim dated 8<sup>th</sup> September 2020, and filed on 2<sup>nd</sup> October 2020. Under the claim, the Claimant seeks the following reliefs as against the Respondent:-

- a) Compensation for wrongful termination amounting to Kshs.1,277,079.36/= only, being the salary for 12 months
- b) Three (3) months' pay in lieu of notice for termination amounting to Kshs.319,269.84/= only
- c) Punitive damages
- d) Severance pay
- e) Certificate of service
- f) Payment of his 26-day day amounting to one (1) month's salary
- g) Costs of this suit and interest thereon on a, b, c, and g from the date of filing until payment in full.

2. The Respondent entered an appearance on 27<sup>th</sup> October, 2020, and filed a Statement of Defence and Counter Claim, which are evenly dated. The Claimant subsequently filed an undated reply to the defence and the counterclaim.
3. The Claimant's case was heard on 25<sup>th</sup> March, 2025, when he testified in support of his case, adopted his witness statement, and produced his list and bundle of documents, both dated 8<sup>th</sup> September, 2020.
4. The Respondent did not call a witness, and his counsel proceeded to close his case on this hearing date.
5. Submissions were filed for both parties, which have been duly considered.

### **The Claimant's Case**

6. The Claimant states that he was reinstated to his position as Chief Accountant in 2018 after the Respondent acknowledged an earlier unfair termination.
7. He avers that he served diligently and without any disciplinary issues, and even handled accounting responsibilities for additional associated companies under the same Managing Director.
8. It is his case that despite this clean record, the Respondent dismissed him again on 31<sup>st</sup> July 2019 without issuing a notice to show cause or conducting any disciplinary hearing.

9. The Claimant states that his dismissal was illegal, unfair, and procedurally flawed, violating the Employment Act and the applicable labour laws. He states further that he sought payment of his dues in late 2019, but the Respondent did not comply.
10. The Claimant states that he now claims compensation for wrongful termination, including punitive damages, one year's salary (Ksh960,000), three months' notice pay, severance pay, a certificate of service, and payment for 26 outstanding leave days.
11. On cross-examination, the Claimant told the court that he was suspended vide a suspension letter issued a week before the termination. He confirmed that he was recalled back to work on 23<sup>rd</sup> July, 2019, and issued with a termination letter without a disciplinary hearing.
12. The Claimant further stated on cross-examination that he had a sit-down with the Respondent's Human Resources Officer and that it was during this sitting that he was given the termination letter.
13. It is his position that he was suspended for producing a photocopy of the payroll, but contends that he did not produce two payrolls, but only made a photocopy, which he was asked to do by the Respondent's Managing Director.

14. He confirmed that he was paid KShs.40,000, which is the salary balance for the month of July.
15. Under re-examinations, the Claimant told the court that when he prepares the payroll, he would usually share it with the Human Resources Department. He further stated that the meeting he attended was routine between him and HR, and that such meetings were common.
16. The Claimant prays that the court allow his claim and award him the reliefs sought.

### **The Respondent's Case**

17. The Respondent states that the employment contract between the parties herein was governed by the Employment Act, the company's Memorandum and Articles of Association, and various internal policies and circulars.
18. The Respondent further states that the Claimant failed to report to work for one month without notice, permission, or explanation, even after being recalled. It avers further that his absence was treated as desertion, which constituted gross misconduct, and as a result, the Claimant was summarily dismissed under Section 44(4)(a) of the Employment Act.
19. The Respondent further argues that the Claimant's alleged termination does not meet the definition of termination under Section 45 of the Employment Act, as the Claimant abandoned and absconded from his duties. It is its position

that the Claimant's act of presenting two different payrolls is described as fraudulent, contrary to the law, and against public policy.

### **The Counterclaim**

20. The Respondent in its counterclaim states that the Claimant allegedly attempted to commit fraud by submitting duplicate payrolls for July 2019 and failed to justify why he presented a second payroll without withdrawing the first.

21. It states further that despite being allowed to defend himself and receiving a final warning on 23<sup>rd</sup> July 2019, he abandoned his duties, causing financial loss to the company.

22. The Respondent states that due to the Claimant's absenteeism and work abandonment, he was summarily dismissed and paid all terminal dues. It avers that the Claimant also failed to give the required one-month notice, amounting to voluntary self-termination.

23. The Respondent counterclaims for one month's salary in lieu of notice and Kshs.200,000 incurred in recruiting the Claimant's replacement.

24. It is the Respondent's prayer that the Claimant's suit be dismissed with costs, and its counterclaim be allowed with costs and interests thereon.

### **Analysis and Determination**

25. Upon careful consideration of the parties' pleadings, the Claimant's oral testimony, and the rival submissions, the following issues arise for determination: -

- a) Whether the Claimant was terminated or whether he absconded duty;
- b) If terminated, whether the termination was fair;
- c) Whether the Claimant is entitled to the reliefs sought; and
- d) Whether the Respondent has proved its counterclaim.

**Whether the Claimant was terminated or whether he absconded from duty**

26. The Claimant's position is that despite his diligent service and clean record, the Respondent terminated his employment on 31<sup>st</sup> July 2019 without issuing him with a notice to show cause nor according him a hearing prior to the termination. He further asserts that his dismissal was illegal, unfair, and procedurally flawed, in violation of the Employment Act.

27. On its part, the Respondent contends that the Claimant failed to report to work for one month without notice, permission, or explanation, even after being recalled. It avers further that his absence was treated as desertion, which constituted gross misconduct, resulting in his summary dismissal under Section 44(4)(a) of the Employment Act.

28. Under Section 44(4)(a) of the Employment Act, 2007, absence from work without lawful excuse is one of the grounds for summary dismissal of an employee. Desertion on the other hand, goes beyond mere absence from the place of work, but depicts an employee not at all keen on turning up for work. An employer is required to maintain a work attendance register to discharge the burden of proving that an employee was at some point absent from duty.

29. In the instant case, the Respondent merely alleged that the Claimant deserted duty, but did not lead any evidence to prove that, indeed, the Claimant absented himself from duty without lawful cause or at all.

30. Further, in instances of absence from duty without permission, it is incumbent upon an employer to make reasonable efforts to find out from the employee whether there exists any lawful reason for the employee's absence.

31. In the case of **Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR**, the court held that it is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee.

32. Further, in the case of **Simon Mbithi Mbane v Inter Security Services Ltd [2018] eKLR**, the court stated:-

***“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”***

33.The Respondent not having led any proof that the Claimant deserted duty and further not having shown that it made any effort to find out the Claimant’s whereabouts and possibly his reasons for desertion, leads me to the conclusion that the Respondent has not proved the allegation of desertion.

34.In the premises, I find and hold that the Claimant was terminated from the service of the Respondent.

**Whether the Claimant’s termination was fair**

35.A termination is fair, where the employer adheres to the tenets of fair process provided for under Section 41 of the Employment Act, 2007, as well as the Rules of Natural Justice enshrined in Article 47 of the Constitution. Further, even where fair process is adhered to, the law requires an employer to prove that the reason(s) for terminating an employee’s contract of service are valid, fair, and justified as clearly set out under Sections 43, 45, and 47(5) of the Employment Act, 2007.

36.Section 41 of the Employment Act, 2007 states: -

**“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”**

37. The Claimant’s position is that he was recalled from administrative suspension, only to be given a letter of dismissal without being issued a show cause letter, and further that no disciplinary hearing was held prior to his summary dismissal. It is his evidence that he met the Respondent’s Human Resources Officer, who handed him the dismissal letter during a routine Human Resources meeting.

38. In the case of **Mary Mutanu Mwendwa v Ayuda [2013] eKLR**, the Court held that the Employment Act has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer, and is entitled to have a representative present.

39. The Claimant's evidence on procedure remains uncontroverted. The Respondent, stuck to its assertion of desertion and did not therefore lead evidence to show that the Claimant was accorded procedural fairness.

40. Accordingly, I find the Claimant's summary dismissal a clear violation of mandatory due process requirements under Sections 41 and 45(2)(c) of the Employment Act, which renders the termination procedurally unfair.

41. On whether the Claimant's dismissal was substantively fair, his assertion is that he was not given any reason for the dismissal. On cross-examination, however, he confirmed that he was suspended for producing two payrolls, but argues that he did not produce two payrolls, but only made a photocopy, which he was asked to do by the Respondent's Managing Director.

42. Section 43 of the Employment Act states: -

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract***

***genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***

43. In its pleadings, the Respondent alleges that the Claimant fraudulently produced two payrolls, and that the second reason for the dismissal is absence from work.

44. In ***British Leyland UK Ltd v Swift (1981) I.R.L.R 91*** Lord Denning described the test of reasonableness in the following words: -

***“The correct test is; was it reasonable for the employers to dismiss him” If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”***

45. The court record does not bear evidence of fraud investigations, disciplinary minutes, or testimonies. Further, the Respondent did not produce any evidence to corroborate one month of absence and therefore failed to show that it had valid, fair, and justified grounds to dismiss the Claimant.

46. I thus hold that substantive justification for the dismissal was not proved. The dismissal is substantively unfair.

**Whether the Claimant is entitled to the reliefs sought**

47. **Under his claim, the Claimant seeks 12 months' salary as compensation for wrongful termination amounting to Kshs.1,277,079.36, three (3) months' pay in lieu of notice amounting to Kshs. 319,269.84/=, an award of punitive damages, severance pay, a certificate of service, payment of 26 days worked amounting to one (1) month's salary, costs of this suit, and interest thereon.**

**Compensation**

48. Having proved a case of wrongful dismissal, the Claimant is entitled to compensation pursuant to Sections 49 and 50 of the Employment Act, 2007. **(See Benjamin Langwen v National Environment Management Authority (2016) eKLR.)**

49. In awarding such compensation, the court is guided by the provisions of Section 49(4) of the Act. In **Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018]**

**eKLR**, the Court held that, in granting 12 months' salary compensation for unfair termination, it considered the Claimants' long service.

50. The Claimant herein was intermittently in the service of the Respondent, having been earlier terminated only to be reinstated and shortly dismissed summarily. It is also not contested that the Claimant was on suspension when he was recalled to pick up his letter of dismissal.

51. These events are, in my view, indications that the Claimant did not exactly have a good record of service and could have contributed to his own dismissal. In the circumstances, I deem an award of 5 months' salary sufficient compensation for the wrongful dismissal.

### **Three (3) months' pay in lieu of notice**

52. The employment contract between the Claimant and the Respondent does not provide for notice period in the event of termination/dismissal. The finding that the Claimant's dismissal is unfair and unlawful, entitles him to the one month statutory notice and not the three months sought herein.

### **Punitive damages**

53. The Claimant did not lead any proof that the Respondent engaged in extreme and malicious conduct against him as to warrant an award of punitive damages. This claim fails and is dismissed.

### **Severance pay**

54. Severance pay is only available to employee terminated on account of redundancy under Section 40 of the Employment Act. The Claimant's case was not a redundancy; hence, this claim does not hold and is dismissed.

### **Certificate of service**

55. This is a statutory entitlement under Section 51.

### **Payment for 26 leave days**

56. The Claimant's entitlement to 26 leave days was not disputed. The Respondent offered no evidence to show that the days were taken or paid for at dismissal. I thus allow the claim.

### **The Respondent's Counterclaim**

57. The Respondent's position is that the Claimant absconded duty, which triggered his obligation to give notice, but which he did not.

58. The Respondent did not, as shown in the rest of this decision, prove that the Claimant deserted duty; hence, its claim on this account is untenable and is dismissed.

59. The Respondent similarly did not prove that recruitment costs were actually incurred, as no witness was called and no documents were produced in this respect.

60.I therefore, find the Respondent's counterclaim totally devoid of merit and is for dismissal. It is dismissed with costs.

61.In whole, the Claimant's claim succeeds in terms of the following orders: -

- a) That the Respondent shall pay the Claimant 5 months' salary as compensation for the wrongful dismissal at Kshs.532,116.40/-
- b) One salary in lieu of notice at Kshs.106,423.28/-
- c) Payment for 26 leave days at Kshs. 106,423.28/-
- d) Costs and interest from the date of this judgment until payment in full.
- e) The Counterclaim is dismissed with no orders on costs.

62. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Malinzi present for the Claimant

Mr. Odira present for the Respondent

Ms. Esther S - C/A