



REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI**

CAUSE NO. 773 OF 2011

**PETER ONDITI
OGUGU.....CLAIMANT**

-VERSUS-

**ALL PACK INDUSTRIES LIMITED.....1ST
RESPONDENT**

**INDUSTRIAL PROMOTION SERVICES LIMITED.2ND
RESPONDENT**

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 19th May 2011 the Claimant alleged unfair termination of his employment by the Respondents and prayed for the following:-

a) Reinstatement without loss of benefits and status.

b) Alternatively, the Respondents jointly or severally pays him the following:-

- | | |
|---|---------------------|
| (i) Overtime Claims | Kshs. |
| 709,555.00 | |
| (ii) Accumulated Leaves | Kshs. |
| 93,090.00 | |
| (iii) Assumpsit Motivate Monthly Allowance | Kshs. |
| 60,000.00 | |
| (iv) Prorated Bonus | Kshs. |
| 14,760.65 | |
| (v) Deducted Out of Pocket Allowance | Kshs. |
| 150,000.00 | |
| (vi) Loss for revenue for unlawful detention of Logbook | <u>Kshs.</u> |
| <u>1,700,766.65</u> | |
| Subtotal = | Kshs. |
| 2,728,172.30 | |
| (vii) Maximum Compensation | Kshs. |
| <u>385,200.00</u> | |
| Total | <u>Kshs.</u> |
| <u>3,113,372.30</u> | |
| (viii) All interest charged on out of pocket allowance as per document discovered under Section 24 (3) (d) of The Labour | |

Institutions Act, 2007 computed by the Registrar.

- c) That the Honourable Court order the Respondents to jointly or severally pay costs hereof, and the compound interest at court rates.***
- d) That, the Honourable Court awards any other remedy it deems just to award.***

2. The Respondents filed a Reply to the Claim dated 16th September 2011 admitting the dismissal but denied that it was unlawful. It averred that the Claimant was involved in theft from the security company, contracted to guard the premises. They averred that the termination was warranted because of the Claimant's conduct. They averred that a summary dismissal letter was issued to him but he rejected the same forcing the employer to serve him by postage. Before the dismissal he was served with a show cause letter and he responded in writing.
3. They further averred that the deductions for recovery of allowances paid during the Claimant's training in Egypt was lawful under section 19 of the Employment Act because the Claimant would not be restricted from working elsewhere after the training. They denied that the Claimant was discriminated from others who went for training in Ivory Coast.
4. They further averred that the Claimant took a loan from the employer and committed his Motor Vehicle KAN 039J as

security for the loan. They denied the claim for overtime and accrued leave contending that whenever the Claimant was called upon to work outside working hours, he was compensated. They prayed for dismissal of the suit with costs.

Evidence

5. The Claimant testified as CW1 on 21st October 2025. He adopted his Memorandum of Claim filed on 23rd May 2011 and produces 19 documents annexed to the claim as exhibits. He also adopted Supplementary Affidavit dated 20th July 2011 by which he sought pension.
6. He contended that the suit was previously heard by Rika J and it was dismissed. Thereafter he applied for review and the suit was reinstated. He contended that the Court proceedings of 16th November 2016, the Respondents counsel admitted that there were no investigations done and no management meeting took place to discuss his case. He prayed for Judgment as per the reliefs sought in his pleadings.
7. In cross examination he stated that he was summarily dismissed for alleged attempted theft. He had worked for five (5) years for the 1st Respondent and other companies aligned to the 1st Respondent. He contended that he was supposed to produce a Delivery Notice before being allowed to move out but he was not allowed to do so. He was also supposed to produce a gate pass which he produced before he was allowed to drive out of the gate.

8. He admitted that his pay slip for July 2010 indicated a loan of Kshs. 3000 but denied the alleged loan. He contended that there was no loan agreement for the alleged loan. He left work on 13th August 2010 but denied the loan indicated in his pay slip for August 2010. He contended that the loan of Kshs. 54,612 indicated in the pay slip for November 2010 was his per diem while in Egypt.
9. He had the authority to go for the training in Egypt and the Human Resource was instructed not to deduct the money. He admitted that the reason indicated in the documents for the leaving was “personal” but maintained that it was an official company matter. He contended that the company was to benefit from the knowledge and therefore it was unlawful to recover the per diem.
10. As regards his Vehicle, he averred that he was instructed to leave the log book with the company before going to Egypt. He denied that it was a security for a loan he took to go to Egypt. He maintained that there was no relation between the log book and the training.
11. As regards the Claim time, he contended that his appointment letter provided that working hours was 8am to 5pm and every time he exceeded time, he was paid for the overtime worked. He was further entitle to Twenty one leave days plus monthly allowance for motivation (see letter DOC.

13(A) since 1st October 2007 but he was only paid up to December 2008. He prayed for the unpaid allowance since 1st January 2009.

12. The Respondent called its Human Resource Mr. Robert Mwachada as RW1. He adopted his written statement dated 20th January 2020 as his evidence in chief. He also produced Seven documents as exhibits. He admitted that the Claimant was employed as Die Maker by the 1st Respondent in 2005. He was summarily dismissed on 13th August 2010 for gross misconduct namely, attempted theft of the 1st Respondent's equipment. He also failed to report to his supervisor that there was a loss of over one hundred flat and notary dies belonging to the 1st Respondent.
13. He stated that the Claimant was served with a show cause letter dated 13th August 2010 and he responded. The Claimant was then dismissed for involvement in the loss of the 1st Respondent's equipment from the security company contracted to guard its premises.
14. RW1 further stated that the Claimant requested the 1st Respondent to sponsor his training in Egypt but the request was declined. The Claimant then took a loan from the 1st Respondent to facilitate his training after providing his log book as collateral. Therefore the claim for per diem was deemed as unfounded and baseless. Finally, he stated that the Claimant was in the management and under the 1st

Respondents policy, he was not entitled to overtime payment. He reiterated that the dismissal of the Claimant was lawful and the suit should be dismissed with costs.

15. In cross examination RW1 confirmed that both the show cause to the Claimant and the dismissal letter were dated 13th August 2010. The reason cited was requisition of items. He contended that the Claimant was required to respond to the show cause letter by 1:15pm and he complied.
16. He further stated that the decision to dismiss the Claimant was reached after consideration of witness statements, company policies and the Claimants response to the show cause letter. The dismissal was under section 44 (4) (g) of the Employment Act as it took effect on 13th August 2010. He contended that the incidence occurred on 6th August 2010 and investigations were done until 13th August 2010. The investigations were done by the company's security team.
17. He admitted that the investigations report was compiled on 18th August 2010 after the dismissal. He also admitted that he did not produce copy of the Human Resource Policies. He also did file the minutes of the meeting of the management that resolved to dismiss the Claimant. Finally he admitted that he had no objection to the reinstatement of the Claimant to employment.

18. After the close of the hearing, the Respondent filed written submissions. Having considered the pleadings, evidence and submissions, the following issues fell for determination:-

- a) Whether the dismissal of the Claimant was unfair and unlawful.
- b) Whether the reliefs sought are merited.

Analysis

Unfair and unlawful dismissal

19. The Claimant contended that the termination of his employment was unfair and unlawful but the Respondent were of a different view. Section 45 (2) of the Employment Act provides that:-

“(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—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

Reason

20. RW1 testified that the Claimant was dismissed after he was caught attempting to steal 1st Respondents equipment. He was served with show cause but his response did not exonerate himself from involvements in the loss of the 1st Respondent's equipment. The Claimant denied the alleged offence in his response to the show letter and also in his evidence herein.
21. The Respondent has however produced copy of statement written by Joyce Kamau, the day guard who caught the Claimant attempting to take away the employers property and demanded for gate pass. The Claimant never availed any gate pass and he left the items at the gate house. The Claimant never objected to the production of the said exhibit. I am satisfied that the said statement by the eye witness corroborates the testimony by the RW1. Consequently I must hold that the Respondent has proved on a balance of probability the reason for the summary dismissal of the Claimant.
22. The circumstances under which the Claimant was caught with the said items were sufficient to arouse reasonable suspicion on the part of the employer that the Claimant had the intention of stealing the same. Section 44 (4) of the Employment Act provide that:-

“ (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if-

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

Procedure

23. Section 45 (2) (c) of the Employment Act places on the employer the burden of proving that termination of employment contract was done in accordance with fair procedure. Section 41 of the Act then sets out the procedure for terminating employment for misconduct as follows:-

“ (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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summary dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

24. The above procedure is mandatory and the bare minimum is that before terminating the services of an employee on account of misconduct the employer must accord the employee an oral hearing. During the hearing the employer is required to explain the misconduct to the employee in a language he/she understands. The employee is entitled to have another employee present during the explanation and both the employee and his companion are entitled to respond

to the allegations. Finally the response by the employee and his/her companion must be considered before the verdict is made, which must be communicated to the employee in a fair manner.

25. In the instant case, only a show cause letter was served and dismissal letter followed the same day. The Claimant was not accorded a fair hearing before the termination as contemplated in section 41 above. This court has held uncountable times that even where an employee's offence is obvious the law entitles him/her to a fair hearing before dismissal or other disciplinary action is decided.

26. In this case the Claimant was denied fair hearing and I hold that his summary dismissal was rendered unfair and unlawful.

Reliefs

27. The primary prayer by the Claimant was reinstatement to his employment without loss of benefits and status. However, that discretion can only be exercised where the employee has not been away for over three years. Section 12 (3) (viii) of the Employment and Labour Relations Court Act provides that the court may make:-

“ An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under

circumstances contemplated under any written law.”

28. In view of the foregoing limitation, the prayer for reinstatement cannot issue as the period of separation is over Fourteen years. I will therefore award the alternative reliefs sought.

29. The Claimant prayed for compensation equaling to 12 months gross salary. The Claimant worked for Five years and he contributed to the dismissal through misconduct. Therefore I award him Five months gross salary as compensation for unfair termination, His gross salary was Kshs. 32,100 per month and therefore the compensation awarded is Kshs. 160,500.

Leave

30. The Claimant prayed for 87 leave days and produced leave application forms dated 3rd November 2008 showing accrued leave of 21 days. He never took leave in 2009 and 2010. The leave for 2009 was 21 days while in 2010 he earned 1.75 days x 7.5 month worked = 13.25. The total leave not taken was 55.1 days equaling to Kshs. 46496.10.

Motivation allowance

31. The Claimant prayed for Kshs. 3000 per month for 20 months and produced a letter dated 29th October 2007 in

support. He was paid the said allowance up to December 2008 and he Claims for January 2009 to August 2010. I allow the claim save that for August 2010, I award him Kshs. 1500. Hence award is for Kshs. 58,500.

Out of pocket deduction.

32. The Claimant alleged that he was authorized to attend training in Egypt for the benefit of the employer and he was paid per diem. However, the Respondent recovered the same from his salary. The Respondents averred that the Claimant attend a personal training in Egypt and he obtained a loan from the employer to cater for the training. It further averred that the Claimant surrendered his car's logbook as security for the loan advanced.
33. I have considered the evidence on record. There is nothing to prove that the Claimant took any loan from the employer. The Claimant duly attended the course in Egypt which was related to the work he was doing for the 1st Respondent and upon return he worked for over 12 months before the 1st Respondent dismissed him. The 1st Respondent benefited from the training undertaken by the Claimant. The Respondent produced Claimant's leave application form dated 7/10/2009 in respect of the Claimant's leave in Egypt bearing the following endorsement:-

“ should not be deducted from leave as he was on company business.”

34. The above endorsement was done on 9th October 2009 by the Head of Department Mr. Dick Gichana. It is therefore not correct for RW1 to state that the Claimant did not attend the training in Egypt in official capacity as an officer of the 1st Respondent. Consequently I award the claim for refund of the amount recovered from the Claimant as loan for his training in Egypt being Kshs. 150,000.

Bonus and overtime

35. The above two claims have not been elegantly pleaded and no evidence was adduced to show how the claims were computed. Consequently I decline to grant the same.

Conclusion

36. I have found that the dismissal of the Claimant was unfair and unlawful with the meaning of section 45 of the Employment Act. I have further found that the Claimant is entitled to some of the prayer sought but only as against the 1st Respondent who admitted to have been his employer. Consequently, I enter judgment for the Claimant against the 1st Respondent as follows:-

- a) Compensation.....Kshs.160,000/-
- b) Leave.....Kshs. 46,496.1/-

c) Motivation.....Kshs. 58,500/-

d) Out of pocket.....Kshs. 150,000/-

Total.....Kshs. 415,496.10

e) The award is subject to statutory deductions.

f) The Claimant is awarded costs and interest at court rate from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 17TH DAY OF DECEMBER, 2025.

**ONESMUS MAKAU
JUDGE**

Appearance:

The Claimant present in person

No appearance for the Respondent