

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**CAUSE NO. 327 OF 2019**

**MICHAEL KIGUTA NGIGA** .....

**CLAIMANT**

**-VERSUS-**

**TWIGA FOODS LIMITED**.....

**RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 6<sup>th</sup> May 2019, the Claimant, sought redress for alleged unfair and unlawful termination of his employment by the Respondent. Therefore, he prayed for the following reliefs:-

***a) A declaration that the summary termination of his employment was irregular, unfair, unlawful and/or wrongful or illegal and in breach of the Employment Act.***

- b) Damages for unfair dismissal from employment equivalent to twelve (12) months gross salary totaling Kshs. 1,200,000.***
- c) Refund of Kshs. 200,000 being the unlawful deductions made from his salary.***
- d) Unpaid salaries for the month of February 2019 of Kshs. 100,000.***
- e) Compensation for work done overtime without pay.***
- f) One month's salary in lieu of notice totaling Kshs. 100,000.***
- g) Costs of the suit plus interest.***
- h) Any other relief that this Honourable court may deem fit and just to grant.***

2. The Respondent filed a Reply to the Memorandum of Claim dated 26<sup>th</sup> June 2019 opposing the claim in its entirety and praying for its dismissal with costs, to which the Claimant filed a Reply dated 23<sup>rd</sup> August 2019. Thereafter the matter

went to full trial whereby the Claimant gave evidence but the respondent did not.

### **Summary of the pleadings**

3. The Claimant averred that he was employed by the Respondent on 16<sup>th</sup> July 2018 with a gross monthly salary of Kshs. 100,000. He stated that the initial contract was probationary, but by the time of the termination on 12<sup>th</sup> February 2019, he had not consented to extension of the probation. Consequently, he averred that he had become a permanent employee entitled to the full protection of the law.
4. The Claimant contended that the termination of his employment amounted to a summary dismissal without a hearing, contrary to Section 41 of the Employment Act, 2007. He further alleged he was subjected to multiple unfair labour practices, including:-
  - a) Unlawful salary deductions totaling Kshs. 119,254 in January 2019 and Kshs. 200,000 overall, contrary to Section 19 of the Employment Act.

- b) Being forced to perform duties outside his job description, such as debt collection and bank reconciliation, without training.
  - c) Being forced to work overtime without pay and under threat of termination.
  - d) Being set unattainable performance targets.
  - e) Being subjected to verbal confrontations and an unbearable working environment.
  - f) Not being issued with a certificate of service.
5. The Respondent admitted that it employed the Claimant but stated that his gross salary was Kshs. 75,000, not Kshs. 100,000. It averred that the Claimant was employed on a three-month probationary contract from 16<sup>th</sup> July 2018, which was lawfully extended for a further three months from 15<sup>th</sup> November 2018 to 15<sup>th</sup> February 2019 with the Claimant's consent.
6. The Respondent further stated that the Claimant was issued a cautionary letter on 15<sup>th</sup> January 2019 and his employment was terminated while still on probation, The termination was

by a notice letter dated 12<sup>th</sup> February 2019, which took effect on 19<sup>th</sup> February 2019. The Respondent averred that the salary deductions was justified as the Claimant had failed to account for a lost company laptop and phone, or report to the police.

7. It denied all the allegations of unfair labour practices, asserting that the Claimant never complained in writing, never worked overtime, and was never assigned duties outside his contract. Finally, the Respondent averred that it was not required to give the Claimant one-month notice and that in fact he owes it Kshs. 54,511.10 and prayed for the suit to be dismissed with costs.

### **Proceedings and Evidence on Record**

8. The matter was partially heard on 15<sup>th</sup> February 2024 before Hon. Lady Justice L. Ndolo, when the Claimant testified by adopting as evidence his witness statement dated 6<sup>th</sup> May 2019 and produced 7 documents in the list of documents dated 6<sup>th</sup> May 2019 as exhibits. In brief his testimony reiterated the facts in his pleading as summarized above.

She maintained that his employment was terminated by a letter dated 12<sup>th</sup> February 2019, after working for approximately eight (8) months and denied that he was dismissed during the probation period.

9. The Claimant further testified that he was subjected to unlawful deductions amounting to approximately Kshs. 200,000/=, comprising of Kshs. 119,000/= for a company phone and laptop that were stolen, and Kshs. 80,000/= as a surcharge for unpaid goods. He stated that the Respondent deducted Kshs. 119,245 from Claimants terminal dues leaving for her only Kshs. 54,511.10. The Claimant stated that the deduction was unlawful.
10. The Claimant testified that upon loss of the company phone and laptop, he followed due procedure by reporting the matter to the police and providing an Occurrence Book number to the Respondent. However, the Respondent informed via email that the cost would be recovered from his payroll and refunded upon conclusion of insurance

investigations, but no refund was ever made. He was also not involved in any investigations.

11. On cross-examination, the Claimant admitted that he signed and accepted the offer letter dated 15<sup>th</sup> July 2018, which provided for probation and termination without reasons. He further admitted that the extension of his probation was communicated through a letter dated 15th November 2018, which he received. He also admitted that he did not provide any evidence of reporting the loss of company property to the police but he confirmed that Clause 12 of the offer letter provided for recovery of company property not returned. He further confirmed that his gross salary in the offer letter was Kshs. 75,000/= plus commission and not Kshs. 100,000/=. He also confirmed that there was no documentary evidence of overtime or additional deductions beyond the amount relating to the lost items.

12. In re-examination, the Claimant reiterated that the deductions were reflected in his payslip, that no refund was

made following the alleged insurance investigations, and that he was not accorded notice prior to termination. He further stated that he was on probation from 15th July 2018 to 12<sup>th</sup> February 2019 and that the extension of probation was done without consultation.

13. On 9<sup>th</sup> October 2025, the matter came up for defence hearing before me but the defence Counsel informed the Court that the Respondent had no witness present and voluntarily elected to close the Respondent's case without calling any witness. Consequently, the Court declared the hearing closed, and directed parties to file and serve written submissions within 14 days, beginning with the Claimant.

#### **Issues for determination and analysis**

14. Having carefully considered the pleadings, evidence and submissions on record, the following issues fell for determination:
  - a) Whether or not the claimant's employment was terminated during the probation period.

b) Depending on the answer to (a) above, whether the termination was unfair and unlawful.

c) Whether the claimant is entitled to the reliefs sought.

### **The Claimant's probationary contract**

15. The nature of the Claimant's contract at the time of termination is pivotal. Section 42(2) of the Employment Act, 2007 provides:

***"A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee."***

16. The use of the word "shall" in the above statutory provision connotes that the employer has no discretion to extend the total probationary period beyond six months. The extension beyond six months depends on the employee's agreement.

17. There is no dispute that the Claimant was employed on 16<sup>th</sup> July 2018 as an Area Sales Manager under an open-ended contract. The contract provided for a probation period of three months which could be extended once for an equal

period. The Claimant worked from 16<sup>th</sup> July 2018 to 19<sup>th</sup> February 2019, over seven months and the Respondent has not produced any evidence to show that the Claimant expressly agreed in writing to the extension of his probation beyond the six months, as required by Section 42(2). The appointment letter Clause 3( c) stated that:-

***“ Should there be sufficient reason upon the appraisal of your performance under clause 4(b) above, the period of probation may be extended for a further period of three (3) months but cannot be extended thereafter”.***

18. The claimant produced a letter dated 15<sup>th</sup> November 2018 extending the probation period beyond six months contrary to the contract of employment and which did not require him to signed as proof of his agreement. It follows that the failure by the Respondent to secure the Claimant’s agreement for the extension beyond the six months meant that the probationary period lapsed by operation of law after the first six months. His employment was therefore deemed as

confirmed for an indefinite term effective 15<sup>th</sup> January 2019 when the six months' probation lapsed.

19. In the case of **Francis Aboge Oduk v Hasbah Kenya Limited**, Onyango J held that:-

***“From the above terms, the claimant’s probationary period was supposed to end in March 2014. However, after the lapse of the period, the claimant’s contract was not terminated and neither was the probation period extended in writing as per the contract. Instead, the claimant continued to work for the respondent until 19<sup>th</sup> June 2014 when he was issued with a termination letter, effective immediately.***

***By failing to extend the claimant’s probation or terminate his contract upon expiry of the probation period, he became constructively confirmed as a regular employee after 5<sup>th</sup> March 2014.”***

20. The facts of the instant suit are on all-fours with the above decision and I see no reason to differ with same. Therefore, I find that by the time of termination of the Claimant's contract on 12<sup>th</sup> February 2019, he was no longer serving under probationary contract. His appointment had been confirmed by operation of the law and the contract had morphed from probation to a an open-ended contract terminable in accordance with Employment Act, 2007.

### **Unfair and unlawful termination of employment**

30. Section 45(1) & (2) of the Employment Act provides that:-

***“(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—***

***(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.”**

31. According to the above provision, for termination of employment to pass muster, there must be valid reason related to the employee's conduct, capacity, or compatibility, or based on the operational requirements of the employer, and/or a fair procedure must be followed. In the instant case the termination letter dated 12<sup>th</sup> February 2019 stated that:-

**“As you are aware, your probation with the company was for an initial 3 months beginning 16<sup>th</sup> July 2018. It was further extended for another 3 months with the expiry being 15<sup>th</sup> February 2019.**

**This probation period was to allow for you to perform the full range of responsibilities and demonstrate your ability to more fully and**

***consistently meet outlined expectations for the position.***

***According to your employment contract:***

***4. Probation***

***During the period of probation, the Employee's services may be terminated by either party giving 7 (seven) days' notice to the other or 7 (seven) days' pay in lieu of notice. No reasons need be given over termination***

***Management had taken the decision to terminate your employment effective 19<sup>th</sup> February 2019.***

***We thank you for your contribution towards the growth of the business over the period you have been with us and wish you all the best in your future endeavors.***

***Your Faithfully,***

***For: TWIGA FOODS LIMITED***

***Nyawira Mugura***

***Senior HR Officer."***

32. It is evident that the employer did not cite any reason for the termination and it never accorded the claimant any hearing before the termination. The employer presumed that the termination was done during the probation period. However, I have already found that it had expired a month before the termination.
33. The Court of Appeal, in **Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95** and **Isundu vs Lavington Security Guards Limited [2017] eKLR**, emphasized that employers must have justification for summary dismissal of their employees and must follow the mandatory procedure prescribed by the Employment Act.
34. The Respondent has not provided any valid or justifiable reason for the termination, nor did it follow the fair procedure mandated by Section 41 of the Act which states that:-

***“(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 summarily 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.”***

35. Having considered the Claimant’s uncontroverted evidence that the termination of his employment was not justified by a valid reason and that fair procedure was not followed, I find on a balance of probabilities that the termination was

unfair and unlawful within the meaning of section 45 of the Employment Act.

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

36. In view of the foregoing conclusion, I award the claimant declaration that the termination of his employment by the respondent was unfair and unlawful for violating section 45 of the Employment Act.
37. For the same reason, the claimant is entitled to an award of compensation for the unfair termination under Section 49 of the Employment Act. Considering that the he served for less than one year and that he did not cause his termination through misconduct, I award him one-month gross salary as compensation equaling to Kshs. 75,000 as per clause 5 of his appointment letter . He is also awarded one-month salary in lieu of notice being Kshs.75,000.
38. The claimant is further awarded the salary for the 19 days worked in February 2019 which was calculated by the

employer as Kshs. 47,500 plus commission of Kshs.26,550 equaling Kshs. 74,050

### **Refund of Kshs.200,000 deductions form salary**

39. As regards the deduction of Kshs. 200,000 from claimants in respect of stolen company laptop and a phone, the relevant law is Section 19 of the Employment Act, 2007 which provides that:-

***“Notwithstanding section 19(1), an employer may deduct from the wages of his employee -***

***(a)...***

***(b)A reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the willful default of the employee;”***

40. Section 19(3) bars the employer from deducting more than two-thirds of the employee’s wages at any one time. However, I hold the view that the said limitation is only applicable during the subsistence of employment, but not

where the parties are separating. The employer ought to have the right to recover all his liabilities from the employee's salary and terminal dues at the point of separation.

41. In the instant case, the respondent surcharged the claimant Kshs. 119,245 for the stolen company laptop and phone and not Kshs. 200,000 as alleged by him. The said surcharge is contained in the computation of his terminal dues which he produced as an exhibit. The claimant admitted that the items were stolen from him and he reported the theft to the Respondent and the police.
42. The Respondent did not adduce any evidence to prove that the theft of the items was due to claimant's willful default in order to justify recovery of the said sum of Kshs. 119,245 through salary deduction. Besides, the respondent did not adduce any evidence to prove that sum of Kshs 119,245 was the reasonable sum recoverable from the Claimant. It produced evidence of the market value. Finally, the

Respondent did not adduce evidence to prove that the Claimant agreed to the deduction before it was done.

43. For the foregoing reason, I find that the respondent did not prove that the deduction of the said money from the Claimant's salary was lawful. Therefore the Claimant was not liable to pay the respondent Kshs. 119,245 since an employer is only entitled to recover a reasonable amount as opposed to the market value of the lost items, and where the employee acted in willful default. Besides there is mention of insurance cover for the lost items which was expounded by the employer.
44. The claim for compensation for overtime worked lacks particulars and it has not been substantiated by evidence. In the circumstances, I decline to award him anything for the alleged overtime work.

### **Conclusion and Orders**

45. In conclusion, I find that the Claimant has proved his case on a balance of probabilities and proceed to enter judgment for him against the Respondent as follows:-

a) A declaration that the summary dismissal of the Claimant from employment was unfair and unlawful within the meaning of the Employment Act, 2007.

b) The Respondent shall pay to the Claimant the following sums:-

a) Compensation for unfair termination equivalent to one months' gross salary: Kshs. 75,000.

b) Unpaid salary for February 2019: Kshs. 74050.

c) One month's salary in lieu of notice: Kshs. 75,000.

d) Release of deducted sum of Kshs. 119,245

Total: Kshs. 343,295.

e) The award is subject to statutory deductions.

f) The Claimant is awarded costs plus interest at court rates from the date of filing suit until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**ONESMUS MAKAU**

**JUDGE**

**Appearance:**

Ochieng for the Claimant

Lanoi for the Respondent

ORIGINAL