

**AREPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**ELRC CAUSE NO. E124 OF 2022**

**ZACHARIA ONTITA OMWOYO.....**  
**CLAIMANT**

**VERSUS**

**DEBENHAM & FEAR**  
**LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent in the position of general labourer on 14/5/018. The Claimant had a written contract produced before court and earned a gross monthly salary of Kshs. 16,608.00 per month. The Claimant adopted a witness statement dated 21/2/2022 as his evidence in chief and produced exhibits '1' to '4' in support of his case.

On 1/12/2021, the Claimant was shown but not served with a notice of intended termination of employment. On 3<sup>rd</sup> January, 2022, the employment of the Claimant was terminated for alleged gross misconduct. The Claimant said he was not given a notice to show cause nor was he given a hearing to explain why his employment should not be terminated. The termination was unlawful and unfair and seeks the following reliefs: -

(a) Payment of redundancy and terminal benefits including: -

- (i) Salary arrears for December 2021 in the sum of Kshs. 16,608.00.

- (ii) One month salary in lieu of notice Kshs. 16,608.00
- (iii) Severance pay for each completed year of service (Kshs. 8,304 x 4 years) = Kshs. 33,216.00
- (iv) 12 months compensation for unlawful termination and for violation of labour rights.
- (v) Salary expected till retirement after 35 years.

Under cross-examination, the Claimant said there were complaints that himself and a driver had delivered less goods to a client and he was surcharged from his salary. CW1 said the alleged loss of goods if at all must have been human error. CW1 said he was given a warning letter for the alleged loss of the goods.

CW1 denied having committed any misconduct. That he was given a letter to sign which he did under duress admitting having sent Mpesa messages reflecting fictitious parking fees payments. CW1 admitted that salary was paid to his account in December 2021 but his employment had been terminated then. CW1 said the Respondent paid NSSF and NHIF dues on his behalf. The Claimant prayed for the reliefs sought to be granted

### **Defence**

RW1 Caleb Okangi Obeya, testified for the Respondent and adopted a witness statement dated 24/5/2024 as his evidence in chief. RW1 said that the Claimant was employed by the Respondent as a General Labourer on 14/5/2018. That the Respondent company is an importer and distributor of fast-moving consumer goods.

That as part of the internal audit process for petty cash all parking transactions are verified for accuracy.

That it was discovered that on 1/12/2021, certain text messages sent by the Claimant to the Respondent via his cellphone as proof of parking fees payments, were not genuine. They were falsified M-PESA messages.

The matter was investigated following an initiative by RW1. That the Claimant was not co-operative in this process. That the Claimant had been issued with a written warning for loss of goods in the past.

That the Respondent issued the Claimant with a letter of termination dated 1/12/2021 for his consistent gross misconduct.

That the Claimant was given time to offer an explanation but had failed to do so hence the decision to terminate his employment.

RW1 produced the letter of warning dated 30/9/2021 which was issued pursuant to a notice to show cause dated 30/9/2021. RW1 produced two 'SMS' MPESA messages for payment of parking fees on 30/11/2021 in the sum of Kshs. 200.00 and another for 30/11/2021 for Kshs. 50.00 which were said to be fraudulent.

RW1 also produced a letter of termination of the Claimant dated 1/12/2021. The letter refers to a show cause letter issued to the Claimant dated 30/9/2021 to explain loss of goods. The letter also refers to the incident that took place on 1/12/2021 when the Claimant was questioned

about parking fee. The Claimant was said to have provided an invalid MPESA transaction indicating a different amount paid as parking fee on 26/11/2021 in the sum of Kshs. 200.00.

The Claimant was given one month termination notice from 1<sup>st</sup> December 2021 to 30/12/2021 during which time the Claimant was sent on 12 days compulsory leave to allow investigations to be completed plus 3 weeks unpaid suspension from 14/12/2021 to 30/12/2021.

RW1 stated under cross-examination that the Claimant had only one written warning. That the number of warnings before termination depended on the nature of the offence committed and could be up to a maximum of three written warnings.

RW1 said that the Claimant was on compulsory leave pending investigation from 14/12/2021 to 30/12/2021. No report of investigations was produced before court. That the Claimant was rude when he was summoned to the office of the Chief Finance Officer. RW1 did not have minutes of the meeting.

RW1 said that the only notice to show cause issued to the Claimant was dated 30/9/2021 in respect of loss of goods. RW1 said the reason for termination was loss of goods belonging to Claimant and for falsifying parking fees. RW1 prayed the suit be dismissed.

## **DETERMINATION**

The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are: -

- (a) Whether the Respondent had a valid reason to terminate the employment of the Claimant established following a fair procedure.
- (b) Whether the Claimant is entitled to the reliefs sought.

In terms of section 41 of the Employment Act, 2007, an employer who intends to discipline an employee for gross misconduct is obliged to give opportunity to the employee to explain why he should not be disciplined and/or his employment terminated. The formal way of doing this is by the Respondent issuing to the employee a notice to show cause to explain alleged misconduct against him or her.

That upon making a written explanation and the Respondent is not satisfied, the Respondent is obliged to invite the employee to a disciplinary hearing to give opportunity to the employee to further explain himself or herself.

The employee should be informed of the right to be accompanied by a fellow employee and the right to call a witness(s) in his or her defence if he or she has one.

The Respondent is obliged to keep a record of those proceedings and if a decision adverse to the employee is taken to give reasons for the decision in a letter of warning, any other disciplinary measure taken or termination of employment.

In the present case, the Respondent did not follow a fair procedure in terms of section 41 of the Employment Act 2007 in disciplining the Claimant. The Claimant was not issued with a notice to show cause; he

was not called to a hearing to defend himself but instead was accused of presenting fake MPESA messages for parking fees and was immediately given a letter dated 1/12/2021, which doubled up as a suspension letter pending investigations and the actual letter of termination with effect from 30/12/2021.

Accordingly, the Respondent denied itself opportunity to establish a valid reason to terminate the employment of the Claimant following a fair procedure. The court relies on the decision of ELRC in the case of ***Kenya Union of Commercial Food and Allied Workers versus North Farmers Sacco Limited [2014] KEELRC 813 (KLR)*** in which the court emphasized the need for the employer to adhere to the provisions of section 41 of the Employment Act, 2007 before terminating the employment of an employee. The case of ***Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR)*** is also on point in this regard.

The court finds therefore that the termination of the Claimant was unlawful and unfair and in violation of sections 36, 41, 43 and 45 of the Employment Act, 2007 in that the Respondent did not follow a fair procedure and had not proved a valid reason to terminate the employment of the Claimant.

### **Notice Pay**

The Claimant is entitled and the court awards the Claimant: -

- (i) One month salary in lieu of notice in the sum of Kshs. 16,608.00. Salary for December 2021 was paid and so the claim for arrear salary is denied.

### **Compensation.**

The Claimant had served the Respondent for a period of 4 years. The Claimant was unlawfully and unfairly terminated from employment without any compensation. There being no proof of a valid reason, the court finds that the Claimant did not contribute to the termination. The Claimant was given no notice to prepare himself for the loss of salary which was life support for himself. The Claimant was apparently surcharged for alleged loss of goods in September 2021, given a letter of warning and the same reason was used to terminate his employment as per the letter given to him. This is an aggravating circumstance.

Relying on the case of *Mary Chemweno (Supra)* the court awards the Claimant the equivalent of six (6) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.  $(16,608 \times 6) = \text{Kshs. } 99,648.00$ .

### **Severance Pay**

The claim for payment of severance pay is not tenable, this not being a termination on grounds of redundancy in terms of section 40 of the Employment Act, 2007. Furthermore, compensation in terms of section 49(1)(c) and 4 of the Act is sufficient for purposes of vindicating the damage occasioned the Claimant by the unlawful and unfair termination of employment.

### **Salary to date of retirement**

The claim to pay salary up to the date of Claimant's retirement age is not merited and is dismissed.

Judgment is entered therefore in favour of the Claimant against the Respondent as follows: -

(a) Kshs. 16,608.00 in lieu of one-month notice.

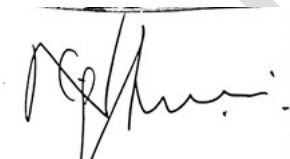
(b) Kshs. 99,648.00 being the equivalent of 6 months' salary in compensation for the unlawful and unfair termination.

**Total award Kshs. 116,256.00**

(c) Interest at court rates from date of judgment till payment in full.

(d) Costs of the suit.

Dated at Nairobi this **9<sup>th</sup> day of February 2026**



**Mathews Nduma**

**JUDGE**

Dated, signed and delivered in open court at Nairobi this **16<sup>th</sup> day of February 2026**

**J. W. KELI**

**JUDGE**

**In the presence of:**

Mr. Omollo for Claimant

Mr. Mureithi for Respondent

Mr. Kemboi – Court Assistant

ORIGINAL