



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1917 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**MOURICE MUDAVADI.....CLAIMANT**

**VERSUS**

**D. M. ENTERPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

1. Vide his memorandum of claim 26<sup>th</sup> and filed on 28<sup>th</sup> of October 2015, the Claimant avers that he was employed by the Respondent, a limited liability company incorporated in Kenya as a mechanic on 1<sup>st</sup> December 2011. His starting salary was Kshs.15,000 per month.
2. The Claimant avers that he worked diligently and to the Respondent’s satisfaction until 15<sup>th</sup> March 2015 when, upon reporting to his usual place of work, he was instructed by the Respondent’s caretaker not to enter the Company premises. That he was later called into the CCTV room and asked to identify on the CCTV people who were stealing parts. He avers that in the CCTV footage he could only see workers carrying out their duties.
3. The Claimant further avers that Mr. Arish Patel, the Director of the Respondent was all the while threatening that he would be sacked if he did not identify and name the culprits.
4. That when he reported to work on 16<sup>th</sup> March 2015, he was arrested and taken to Industrial Area Police Station where he spent the whole day before being released at 8.30 pm after recording a statement. That upon his resumption of duty on 17<sup>th</sup> March 2015 he was locked out of the gate and informed that he had been dismissed from employment.
5. The Claimant avers that the lock out amounts to an unfair and unlawful summary dismissal as no show cause letter or charges were served upon him to answer. Further that he had not done anything wrong to warrant dismissal.
6. He seeks the following remedies against the Respondent: –

*(a) A declaration that the Respondent's action of summarily dismissing the claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.*

*(b) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs.671,250/=*

*(i)... One month's salary in lieu of notice being Kshs.15,000*

*(ii)... Service/gratuity calculated at 15 days salary for every completed year of service being*

*x Kshs.15,000 x 2 years..... Kshs.15,000*

*(iii).. Overtime for 4 hours worked daily being x ) Kshs.62.5 x 4 hours x 30 days x 40 months (being 3 years and 4 months worked) x 1.5 (being 1½ rate for normal working days)..... Kshs.450,000*

*(iv).. Prorated leave for 3 months between January and March 2015 being Kshs.15,000 x ..... Kshs.3,750*

(v)... Salary for days worked in March, 2015 being

Kshs.500 x 15 days..... Kshs.7,500

(c) Interest on (b) above from the date of filing suit till payment in full.

(d) Cost of this suit plus interest thereon.

7. In response to the memorandum of claim, the Respondent filed a memorandum of reply dated and filed on 23<sup>rd</sup> November 2015.

8. The Respondent avers that contrary to the assertions of the Claimant that he was dismissed, he voluntarily deserted duty resulting in his termination.

9. The Respondent further avers that the Claimant was in cahoots with other employees who were caught on company CCTV camera stealing spare parts. That the Claimant was arrested by police officers from the Industrial Area Police Station but even before the investigations were completed he went back to the company and demanded to be paid his dues which the Respondent did. That upon payment the Claimant undertook not to lodge any complaint whatsoever against the Respondent.

10. The Respondent attached a witness statement of Peter Nyipolo but in respect of **Cause 1586 of 2014, Charles Owino Odera v D. M. Enterprises Limited.**

### **Evidence**

11. The Claimant's evidence was taken on 11<sup>th</sup> November 2019. The case was thereafter adjourned to 4<sup>th</sup> February 2020 for the Respondent's case. The suit could not proceed on 4<sup>th</sup> February 2020 because Counsel for the Respondent was indisposed. This having been the second adjournment by the Respondent, it was granted the last adjournment and the suit fixed for hearing of Respondent's case on 4<sup>th</sup> June 2020. The file was however not brought before the Court for mention on 4<sup>th</sup> June 2020.

12. The matter was on 15<sup>th</sup> June 2020 mentioned in the absence of Respondent's Counsel and fixed for further mention on 20<sup>th</sup> July 2020.

13. On 20<sup>th</sup> July 2020, the matter was in the presence of both parties, fixed for hearing on 2<sup>nd</sup> November 2020.

14. On 2<sup>nd</sup> November 2020, Counsel holding brief for Respondent's Counsel was again granted one last adjournment and the suit fixed for hearing on 27<sup>th</sup> January 2021.

15. When the Respondent failed to attend Court on 27<sup>th</sup> January 2021, the Court upon being moved by Counsel for the Claimant closed its case and gave directions for filing of submissions.

### **Determination**

16. I have considered the pleadings, the evidence on record and the submissions filed by the Claimant. The Respondent did not file any submissions. The issues for determination are whether the Claimant was unfairly dismissed from employment and if he is entitled to the prayers sought.

### **Whether the Claimant was unfairly dismissed.**

17. The Claimant testified that he was never charged with any criminal offence. That the Bond to Attend Court filed by the Respondent in its bundle of documents as exhibit DM1 are in respect of **Criminal Case No. 1076 of 2015** against **Evans Njeru and Vincent Keya**. That the payment voucher filed as Respondent's document DM2 is a debit note with his name but for money received by F. M. Kamau and not himself. He testified that he does not know F. M. Kamau.

18. Under cross examination the Claimant testified that he did not desert duty. That he was arrested and detained for a whole day. That when he reported to work the following day he was not allowed into the premises. That Mr. Narendra, a Director of the Respondent told him and 15 other employees never to report to work and directed the guard never to allow them into the premises.

19. The Claimant further reiterated the averments in the memorandum of claim.

20. In the submissions filed on behalf of the Claimant, it is his case that under Section 45, the employer is required to prove not only that the reason for termination is valid but also that it complied with fair procedure. He relied on the case of **Donald Odeke v Fidelity Security Limited, Cause No. 1998 of 2011** and **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**.

21. He further relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the Court held that the employer must demonstrate that there were valid grounds to justify termination.

22. In the instant case the Claimant was not subjected to a hearing. There is no evidence that the Claimant deserted duty as alleged by the

Respondent in the defence.

23. The Claimant's uncontroverted evidence is that he was arrested at work and detained at Industrial Area Police Station but released at 8.30 pm after recording a statement. There is no evidence that he was ever charged with any criminal offence.

24. The Claimant further testified that the Respondent's Director Mr. Narendra told him and 15 other employees never to report back to work.

25. I find that the Claimant has proved by his uncontroverted evidence that he was unfairly dismissed from employment by the Respondent.

#### **Remedies**

26. The Claimant prayed for one month's salary in lieu of notice which he is entitled under Section 49(1) of the Employment Act and I accordingly award him the same.

27. In view of the fact that the Claimant did not confirm the salary he was receiving, I will adopt the averment stated in the payment voucher filed by the Respondent as the Claimant's correct pay being Kshs.500 per day. I accordingly award the Claimant **Kshs.14,000/=**.

28. The Claimant prayed for service/gratuity. In view of the fact that there is no evidence that the Claimant was registered with NSSF or any other Scheme, I award him service pay at 15 days per year worked at **Kshs.22,500/=**.

29. The Claimant did not prove that he worked overtime and the prayer is declined.

30. The Claimant is awarded prorated leave of 4.5 days at **Kshs.2,250/=**.

31. He is also awarded 15 days salary for days worked in March 2015 at **Kshs.7,500/=**.

32. The Claimant further prayed for compensation which I award him at 6 month's salary taking into account his length of service, the circumstances under which he lost his job and all other relevant factors under Section 49(4) of the Employment Act. I award him **Kshs.90,000/=**.

33. **In total I award the Claimant Kshs.136,250/=.**

34. The Respondent shall pay the Claimant's costs and interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**JUDGE**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**