



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 904 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPH ODONGO OWANDO.....CLAIMANT**

**VERSUS**

**MARIE STOPES KENYA.....RESPONDENT**

**JUDGMENT**

The Claimant, Joseph Odongo Owando filed this claim on 29<sup>th</sup> May 2014 vide a Statement of Claim dated 15<sup>th</sup> May 2014 against the Respondent, Marie Stopes Kenya. He avers that he was offered employment as a Driver by the Respondent vide a letter dated 18<sup>th</sup> September 1997 at a monthly salary of Kshs.8,500 which offer he accepted on 23<sup>rd</sup> September 1997 and reported on duty at the Respondent's office in Mombasa on 1<sup>st</sup> October 1997. That on 29<sup>th</sup> August 2013, the Respondent unilaterally and without notice, terminated and varied his employment terms from permanent and pensionable to a two-year contract effective from 1<sup>st</sup> September 2013. Under the new contract, he was to be paid a monthly salary of Kshs.41,150 plus the necessary allowances in accordance with Clause 3 of the Contract of Employment. He contends that the Respondent did not pay any of the terminal benefits due to him upon terminating his permanent contract and that at all times prior to the contract variation, he earned a consolidated monthly salary of Kshs.55,150.

He continues to aver that on 24<sup>th</sup> January 2014 he drove the Regional Doctor at Machakos, Dr. Raymond Biria, whom he was attached to, from Machakos and dropped him off at his house in South B Estate Nairobi at about 7.30 pm. That since the motor vehicle KAS 381W which he was driving had earlier on developed mechanical problems, he drove it to the Respondent's Kindaruma Road Office and sent a text message to the Fleet Management Officer, Mr. Gilbert Odadi informing him of the mechanical problem. That Mr. Odadi in turn forwarded the text message to Mr. Fidelis Mutua, the Respondent's Logistics Manager. Mr. Mutua then called and directed him to park the car at the office and report the next day by 8 am for the problems to be attended to. That he was told to use his own resources to get accommodation for that night with the promise that the expenses would be looked into the next day. That he reported to the office the following day, Saturday 25<sup>th</sup> January 2014 at 8 am as instructed and repairs were duly done on the said vehicle at a garage until about 6.40 pm. That he went back to the office at Kindaruma Road but found it closed. He then unsuccessfully tried to contact both Mr. Odadi and Mr. Mutua on their mobile phones. That he sought accommodation money from his relative where after he stayed in Kibera Nairobi for the night of 25<sup>th</sup> January 2014.

The Claimant avers that upon returning to his work station in Machakos on 26<sup>th</sup> January 2014, he verbally reported what had transpired from 24<sup>th</sup> January 2014 to his Team Leader Mr. Peter Nthiwa who later emailed him on 28<sup>th</sup> January 2014 seeking information on what had happened on the evening of 25<sup>th</sup> January 2014. The responded to the email reiterating his verbal report. That the Respondent vide a letter dated 29<sup>th</sup> January 2014 suspended him from service.

He was invited for a disciplinary hearing scheduled for 13<sup>th</sup> February 2014. He wrote to the Respondent on 10<sup>th</sup> February 2014 seeking to be informed of the particulars of the charges against him and also requested to be furnished with copies of the Respondent's Fleet Rules and Regulations. That the Respondent failed to furnish him with the same with one Mr. Kinyua emailing him that he should refer to his job description.

He avers that he was not given an opportunity to defend himself at the hearing and that vide a letter dated 19<sup>th</sup> February 2014, he was summarily dismissed with effect from 19<sup>th</sup> February 2014 for contravening **section 44(4)(e)** and the **Organization's Rules and Regulations**. That vide a letter dated 24<sup>th</sup> April 2014, he sought the Minutes of the disciplinary hearing from the Respondent through his advocates and the Respondent replied through the Federation of Kenya Employers vide a letter dated 28<sup>th</sup> April 2014, but without the required information that he had sought.

The claimant avers that his summary dismissal and/or termination of his contract of employment was in bad faith, malicious and a breach of

his contract of employment which breach he particularises as follows:

- a) Unilaterally and without any notice, terminating the Claimant's initial contract of employment which entitled him to permanent and pensionable terms, after more than 16 years of service;
- b) Failing to pay the Claimant his terminal and other dues under the contract of service after the termination of contract;
- c) Failing to pay the Claimant his accommodation and related expenses for 24<sup>th</sup> and 25<sup>th</sup> January 2014;
- d) Failing to furnish the Claimant with particulars of the charges levelled against him and the documents to be relied upon at the disciplinary hearing;
- e) Purporting to simultaneously summarily dismiss and terminate the Claimant's contract of employment; and
- f) Failing to pay the Claimant his terminal dues under the new term contract.

The Claimant prays for judgment against the Respondent for:-

- a) Setting aside of the Claimant's dismissal from service and substituting thereof an order reinstating the Claimant's service.
- b) Payment of the Claimant's terminal benefits for the unlawful termination of contract of employment on 29<sup>th</sup> August 2013 together with interest at court rates.
- c) Payment in the sum of Kshs.661,800 being the Claimant's salary for twelve (12) months for unlawful termination of his contract of employment on 19<sup>th</sup> February 2014 together with interest at court rates.
- d) General damages for unlawful dismissal together with interest at court rates.
- e) Costs of this suit.
- f) Any further orders that this Court may deem just in the circumstances hereof.

The Respondent filed its Memorandum of Response dated 18<sup>th</sup> September 2014 admitting that it employed the Claimant and confirming that motor vehicle KAS 381W which was being driven by the claimant had a mechanical problem. It avers that on 25<sup>th</sup> January 2014, Mr. Mutua instructed the Claimant to take the vehicle to the garage for repairs and advised him to immediately leave Nairobi and report back to his station at Machakos once the same was complete. That the vehicle had been successfully repaired by 6.30 pm but instead of the Claimant leaving for Machakos, he set out on his own errands with the said vehicle without authority from an authorised staff of the Respondent. That the vehicle is fitted with a stoic tracking system and the Stoic Report on the movement of the said vehicle is what prompted Mr. Nthiwa to inform the Claimant that the vehicle had been engaged past the official working hours and required him to explain reasons for the same. That the Claimant's response was inconsistent with the Stoic Report as he failed to explain the vehicle's movements past the official hours. That the respondent thus suspended him to allow for investigations.

That respondent avers that the Claimant was informed of the charges against him when he attended the disciplinary hearing as shown in its Appendix 4, being the Minutes of the said disciplinary hearing. That when he failed to give a satisfactory and sufficient defence to the charges he was summarily dismissed from employment. The Respondent contends that the Claimant is not entitled to 'terminal benefits for the unlawful termination of contract of employment on 29<sup>th</sup> August 2013 as there was no termination at all in the first instance. That revision of the Claimant's employment terms to a two year contract was a mutual agreement between him and the Respondent after it began facing financial constraints around July 2013 and was done to avoid declaring him redundant. The Respondent avers that the Claimant is not entitled to compensation as the termination of his employment was fair and lawful. It prays that the Claimant's claim is disallowed and dismissed with costs.

### **Evidence**

The Claimant testified that he was terminated before the end of his two year contract and was not given any dues. That he was further not paid his benefits of the past 17 years before the new contract. He confirmed that he attended a disciplinary hearing presided over by Fidelis Mutua and the Human Resource Manager. He stated he was not furnished with any documents before going for the hearing. He asked the court to look at his work from 1997 until he was dismissed.

Under cross-examination, the claimant stated he was a driver and a nurse aid. He stated that when he got the new contract, he was not given a termination letter but a lower salary than before. He stated that he did not write a letter of complaint. He stated that he did not give the office the receipts for accommodation because he did not have any. He stated that he had a loan with Stanbic Bank but could not remember a loan he owed the employer. When asked to refer to page 14 of the Claim, he confirmed there was a loan deduction. He confirmed he was aware his terminal benefits went to offset his loan.

In re-examination, the Claimant stated he was aware the vehicle was on tracking system.

RW1, FIDELIS MUTUA testified that he contacted the Claimant who confirmed the vehicle was on the road at 3 am. The claimant assured

him that he would leave for Machakos that day in the morning. That he took up the matter on Monday 27<sup>th</sup> January 2014 and reported to Mr. Odadi (Appendix 5 of Respondent's Further Documents) who referred the matter to the HR as a disciplinary issue. He stated that they took the Claimant through the tracking report during the disciplinary hearing. That the observation of the panel was that the Claimant's explanation was not corresponding to the instructions, job description as well as the rules governing his job. Under cross-examination, he confirmed that the Claimant had not been shown the Stoic Report prior to the hearing proceedings. In re-examination, he stated that Mr. Odadi received an alert from the tracking system which is automated to send alerts to configured members when the vehicle is out of parameters. That Mr. Odadi in turn sent the message to him.

RW2, DENIS ODUOR RADAK who is the respondent's Director of Human Resource testified that the Claimant's new contract had other benefits including leave allowance and bonus and that the Claimant was also a member of a pension scheme. They had a medical cover and the employer contributed to NSSF and NHIF. He confirmed getting a report on misuse of a vehicle on 25<sup>th</sup> January 2014 and that the Claimant was given an opportunity to explain in writing. That from the investigations and Stoic Report, what was curious is the hours the claimant moved and the distance. He denied that the Claimant communicated to the Team Leader about looking for money stating that since the office does not work on Saturdays and Sundays, they could not process his travel expenses. He stated that payments of Kshs.81,518.05 were made to the Claimant for terminal benefits as shown at Appendix 4 of Supplementary List and that the said cheque payment covered days worked in February, leave days and travelling allowance. That the total was Kshs.107,786.35 upon which the respondent applied PAYE to bring the amount to Kshs.81,000 which money was paid to offset the Claimant's loan.

Under cross-examination, RW2 stated that the Claimant was never notified before the money was paid to the bank offsetting his loan. In re-examination, he confirmed that all the Claimant's benefits from 1997 were paid to him and that there was no gap on terminal benefits that were denied to him. He further stated that the respondent signed the loan form because the Human Resource Policy requires the respondent to pay final dues to the bank. Further that the Respondent had no access to the Claimant's loan account and could therefore not tell the balance of his loan.

### Claimant's Submissions

The Claimant submits that the process and composition of the disciplinary panel could not grant him a fair hearing as contemplated under **Section 41 of the Employment Act**. He relied on the case of *Duncan Mbathi Mulevi v Wanandegge Cooperatives Savings & Credit Society Limited [2018] eKLR* where the court interpreted section 45(2) and observed that fair procedure is one that accords to justice and equity and basically relates to according the employee a fair hearing before terminating his services. That the tenets of a fair hearing before dismissal of an employee include sufficient notice of the charges, explanation of the charges in a language the employee understands, an opportunity to be accompanied by another employee or union official of the employee's choice and a chance to present his case.

He submits that his employment was unfairly and unlawfully terminated in both phases of his employment and that he envisaged to serve up to his retirement age under his initial permanent contract. He submitted that Mr. Mutua acted as the prosecutor, the witness and the judge thus violating the right to a fair hearing. He cited case of *Homepark Caterers Limited v The Hon. Attorney General & 3 others [2007] eKLR* where the court emphasised that a man must not be a judge or be seen to be a judge in his own cause. He further submits that despite the Respondent having more than 50 employees, it does not have a Human Resource Manual that sets out the manner of handling disputes which is contrary to **Section 12 of the Employment Act** as confirmed by RW2. That in the absence of such a policy, the Respondent could not guarantee any form of a fair hearing as required under statute. He further submitted that he has never been issued with a certificate of service to date.

It is submitted by the Claimant that he is entitled to all the benefits that accrued to him during his employment as was similarly explained by Ongaya J. in *Henry Kamau Ngare –v- Teachers Service Commission & another [2016] eKLR* that:

*“Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee's right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35(5) and section 40(1)(g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41(1) and 41(2)(b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee's crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee. In the opinion of the court, to do so would amount to unjust enrichment on the part of the employer where the service pay or pension benefits are payable directly out of the employer's resources as such pay is meant to compensate the service the employer would have already enjoyed from the employee...”*

That where terms of employment are not pensionable and the contract does not provide for fixed service pay, the employee in such circumstances is entitled to service pay equivalent to 15 days pay for every year served. That this position was reiterated by the court in the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR* whose rationale was that the law is intended to ensure employees do not enter into retirement without social security. The Claimant submits that he is therefore entitled to his terminal benefits under **Section 35(5)** calculated based on the payslips he has filed in court and that these amounts must include contribution by the Respondent. That alternatively, he is entitled to service pay at the rate of salary for 15 working days for every year worked, which he computes as Kshs.269,765.80 from 1997 to 2014.

Further, that he is also entitled to compensation for the unfair and unlawful termination as under **Section 45(1)(c) of the Employment Act**. That Clause 21 of the employment contract dated 29<sup>th</sup> August 2013 provided for payment of one month's notice pay but he was never given notice and he is thus entitled to the same at Kshs.45,150 and Kshs.5,150 for both contracts. He further claims for 29 accrued leave days for 2013 and 2014 being (55,150/26 x 29) at Kshs.61,513.50 and unpaid wages for 13 days worked in February being (55,150/26 x 13) at Kshs.27,575.00.

### Respondents' Submissions

The Respondent submits that the Claimant breached the terms of his contract against the provisions of **Section 44(3)** of the **Employment Act** and that his claim should be dismissed for want of proof.

It submits that **Section 44(4)(e) of the Employment Act** provides that where *an employee knowingly fails, or refuses, to obey a lawful and proper command which was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer*, the same amounts to gross misconduct to justify summary dismissal for a lawful cause. That since the Claimant was not remorseful and it was not the first time that he was using the company vehicle for personal use without permission, it was justified to terminate his services. The Respondent further submits that the Claimant did not adduce any evidence on malice and bad faith of his employer or unfairness and that it has on the other hand demonstrated it had valid grounds to summarily dismiss him. That it fully complied with **Section 41 of the Employment Act** as demonstrated in its pleadings and testimony in court. It prays that the Court finds that the Claimant was afforded ample opportunity to defend himself but failed to exonerate himself. It relies on the case of **Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (K), Civil Appeal No. 293 of 2015** where the court in allowing the appeal found that summary dismissal is a lawful sanction and pronounced thus:

*“16....As correctly observed by the trial court under Section 47(5) of the Employment Act the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing. Consequently, as noted by this Court in **Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR**, whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.*

*17. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. See this Court’s decision in **Samsung Electronics East Africa Ltd vs. K. M [2017] eKLR**...*

*21. As to whether there was a valid reason for Samuel’s dismissal, Kiage, J.A in **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR** observed and rightly so that:-*

*“Justice Ngcobo proceeded to quote a passage from the decision of **British Leyland UK Limited vs. Swift [1981] IRLR 91** at 93 on the approach that a court should take in assessing the reasonableness of the action taken by an employer suggestive that there is quite a wide spectrum of actions that would nonetheless qualify as reasonable and there is a huge element of subjectivity, and I agree:-*

*“There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep 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.”*

The Respondent submits that because it had valid grounds to terminate the employment of the Claimant and that since he further contributed to the termination he is not entitled to be reinstated. That the prayer for reinstatement is also not tenable under **Section 12(3)(vii)** which provides that an order for reinstatement can only be granted within three years of termination since the Claimant was terminated in 2014. That the Claimant has further not met the threshold under **Section 49(4) (c)** which provides that a labour officer deciding whether to recommend the remedies in subsections (1) and (3) of section 49 shall take into account the practicability of recommending reinstatement or re-engagement.

It further refers the court to the Respondent’s Further List of Documents Appendix 2, 3 and 4 which confirm that the Claimant was duly paid all his terminal benefits and that the Claimant did not adduce any evidence to the contrary. That when the Claimant was cross-examined about the payment made, he did not deny he had a loan or that his terminal benefits were applied to offset the liabilities. That the Claimant is therefore not entitled to compensation for wrongful termination as he was lawfully dismissed through a fair process and given the opportunity to respond to the charges levelled against him. Further, that the prayers for general damages are unjustified and untenable and should be dismissed. It cites **Mombasa Civil Appeal No. 38 of 2005-Kenya Ports Authority v Silas Obengele** and **Nairobi Civil Appeal No. 108 2010 Kenya Revenue Authority v Menginya Salim Murgani** where the court was emphatic that no damages are payable for unlawful termination of a contract and that there is no compensation payable until attaining the retirement age.

### **Analysis and Determination**

The issues for determination or whether the Claimant was unfairly and unlawfully terminated from employment by the Respondent, whether the Claimant is entitled to the reliefs sought.

**Section 45(2)** of the **Employment Act** provides that 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.**

In the case of **Samsung Electronics East Africa Ltd v K M [2017] eKLR** the Court observed that whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair and that the right to fair hearing is a right that the legislature secured under Section 41 of the Employment Act. The Court in **Iyego Farmers Co-operative Sacco v Kenya Union of Commercial Food and Allied Workers [2015] eKLR** further held that whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

Under the Employment Act, summary dismissal entails substantive and procedural fairness on the part of the employer. In this case, the Respondent summarily dismissed the Claimant on the ground that he refused to obey a lawful and proper command issued to him by Mr. Mutua. The Claimant has argued that he was unlawfully summarily dismissed from employment without notice while it is the Respondent's case that it accorded the Claimant sufficient opportunity to defend himself, which he did not satisfactorily do. The Claimant's further contention is that the procedure for dismissing him was unfair as he was not furnished with the necessary documents that he sought from the Respondent prior to the disciplinary hearing.

From the evidence on record, the Respondent had valid reasons to subject the claimant to disciplinary process as there was sufficient evidence that the claimant was in breach of the regulations on use of motor vehicles. The claimant was also not truthful in his response to the inquiry during investigation and gave an account that conflicted with the records on the Stoic Car tracking records.

**Was the summary dismissal fair?**

From the evidence on the record, there was no evidence of previous misconduct of the claimant as none was mentioned. Further, the claimant was on official duty and it was confirmed that the repairs on the vehicle the claimant was driving were completed at about 6.30 pm on Saturday. It has not been stated that Saturday was a working day for the claimant.

Further, the letter of suspension which also invited the claimant for disciplinary hearing did not state the charges he was expected to respond to at the disciplinary hearing or inform him of the right to be accompanied by a fellow colleague of his choice to the disciplinary hearing as required under Section 41 of the Employment Act.

The minutes of the disciplinary hearing show that the only accusation against the claimant was that he did not tell Mr. Mutua, the Logistics Officer, that he intended to stay overnight in Nairobi. The claimant explained that he stayed in Nairobi because he was not sure of the performance of the car which he collected from the garage in Nairobi at 6.30 pm. He further explained that he was out late with the car because he was looking for money from a relative to pay for his accommodation in Nairobi. It is therefore not true that the claimant has no valid explanation for staying in Nairobi on that Saturday night or the reason for being out late with the car past regulation hours.

Further during the hearing it emerged that the respondent had no manual on disciplinary procedure as required by Section 12 of the Employment Act. This would therefore mean that the suspension of the claimant was not a term of employment.

From the foregoing, the summary dismissal of the claimant was procedurally unfair.

**Remedies**

The claimant is entitled to one month's salary in lieu of notice which I award him at **Kshs.55,150**.

The remedy for reinstatement is not available to the claimant due to the time that has lapsed of more than 3 years since his dismissal.

He is entitled to compensation having found his summary dismissal unfair. In determining how much to award him for compensation, I have taken into account his long service from 1997 to 2014, a period of 17 years. I have also considered that he had a clean record as his averments at paragraph 5 of the statement of claim to that effect was not contested by the respondent. I have further taken into account that the disciplinary process was unfair and that the punishment of summary dismissal was in the circumstance of his case very harsh.

It is for the above reasons, which I have considered together with all the other reasons under Section 49(4) of the Employment Act, that I award the claimant 12 months salary as compensation in the sum of Kshs.661,800.

The respondent will also pay the claimant's costs and interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**