



**REPUBLIC OF KENYA**

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

**CAUSE NO 375 OF 2015**

**JOSEPH MWANGONDI MWAORE.....CLAIMANT**

**VS**

**T.S.S. GRAIN MILLERS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 5<sup>th</sup> June 2015 and filed in court on even date, the Claimant sued the Respondent for wrongful and unfair dismissal and refusal to pay terminal dues.
2. The Respondent was duly served but did not file any response. The matter therefore proceeded by way of formal proof.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as an Electrician from 1<sup>st</sup> December 2012 until 7<sup>th</sup> January 2014. At the time of leaving the Respondent's employment, the Claimant earned a monthly salary of Kshs. 16,527.
4. The Claimant further states that he was summarily dismissed by letter dated 7<sup>th</sup> January 2014, on allegations of theft and neglect of duty as defined in Section 44(4)(c) and (g) of the Employment Act.
5. The Claimant claims that he was not given any explanation nor was he given an opportunity to be heard. He further claims that he did not take his annual leave for the last year.
6. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice.....Kshs. 16,527
- b) Annual leave for the last year of employment.....15,256
- c) 12 months' salary in compensation.....198,324
- d) Punitive damages
- e) Certificate of service
- f) Costs

**Findings and Determination**

7. There are two (2) issues for determination in this case:
  - a) Whether the termination of the Claimant's employment was lawful and fair;
  - b) Whether the Claimant is entitled to the remedies sought.

## The Termination

8. The Claimant's employment was terminated by letter dated 7<sup>th</sup> January 2014 stating thus:

*"Dear Sir,*

**Ref: Termination of Employment**

*You were employed as an **Electrician** and assigned to work in the Mills Maintenance Department.*

*We regret to note that there has been a lot of loss/damage of maintenance equipment in the said department that is equal to sabotaging your employer or rendering the whole working system futile wherefore (sic) you were in the position to know and protect the same from happening. In the investigation carried out the whole weight lays (sic) on you, jointly with a few others in the department.*

*Therefore, the management would like to enlighten you and at the same time put you in full knowledge regarding Section 44 sub-sec. 4 c & g of the Employment Act.*

*c) an employee wilfully neglects to perform any work which it was within his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.*

*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.*

*In circumstances therefore (sic), please note that the management will not tolerate this kind of misconduct whatsoever. Thus has issued this termination letter following the weight of the above quoted clauses.*

*Yours faithfully,*

**TSS GRAIN MILLERS LIMITED**

*(signed)*

**EDISON M. IRINA**

**PERSONNEL MANAGER"**

9. This letter accuses the Claimant of misconduct, by occasioning loss and damage of maintenance equipment in his Department. This is, if proved, would have been a valid ground for terminating the Claimant's employment.

10. The only way the Respondent would have proved the accusations against the Claimant was to serve the charges on the Claimant and allow him adequate opportunity to respond as required under Section 41 of the Employment Act. From the evidence on record, this did not happen.

11. The Claimant testified that in early January 2014, he was called to a meeting by the Respondent's Director, one Mr. Aweso who told the Claimant that there was a lot of theft which had gone unreported. Aweso then called out names of employees in the Maintenance Department, including the Claimant, whose employment had been terminated. On 7<sup>th</sup> January 2014, the Claimant was issued with a termination letter by the Respondent's Human Resources Manager, Joseph Kithikwa.

12. The termination letter alludes to some investigations carried out by the Respondent, whose outcome lay blame on the Claimant and some of his colleagues in the Department. No investigation report was availed to the Court and there was no evidence of the Claimant having been involved in any investigations.

13. Overall, I find and hold that the Respondent failed to prove a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. Further, the Respondent failed to observe the mandatory procedural fairness instructions given by Section 41 of the Act. The ultimate conclusion is that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

## Remedies

14. I therefore award the Claimant four (4) month's salary in compensation. In making this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

15. I further award the Claimant one (1) month's salary in lieu of notice.

16. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

17. The Court did not find any basis for the claim for punitive damages which is consequently disallowed.

18. In the final analysis, I enter judgment in favour of the Claimant as follows:

- a) 4 months' salary in compensation.....Kshs. 66,108
- b) 1 month's salary in lieu of notice.....16,527
- c) Leave pay for 1 year (16,527/30\*21).....11,569

**Total.....94,204**

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant is also entitled to a certificate of service and costs of the case.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF MAY 2020**

**LINNET NDOLO**

**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, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mbuya for the Claimant

No appearance for the Respondent