



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 720 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**NICODEMUS ATSVILWA MIKOE.....CLAIMANT**

**VERSUS**

**GOODMARK SECURITY AGENCY.....RESPONDENT**

**JUDGMENT**

The Claim herein is filed by Nicodemus Atsilwa Mikoe alleging wrongful dismissal and refusal to pay terminal dues contrary to the provisions of the Employment Act. He seeks the following reliefs:

- (i) A declaration that the dismissal of the Claimant was wrongful and unfair.
- (ii) The Claimant to be paid terminal dues totalling to Kshs.337,658/-.
- (iii) The Respondent be ordered to pay an equivalent of 12 months' gross salary as compensation for unlawful termination.
- (iv) The Respondent to pay costs.
- (v) The Respondent to pay interest.

The Respondent, despite being served with summons and the Claimant's Statement of Claim, failed to enter appearance or file its Response.

On 17<sup>th</sup> April 2018 when the cause was called out for hearing there was no appearance for the Respondent while Mr. Wetangula was present for the Claimant. The cause therefore proceeded for hearing as an undefended cause. The Claimant gave sworn testimony.

**Claimant's Evidence**

The Claimant (CW1) in his testimony stated that he was employed by the Respondent in the year 2008 as an ungraded plumber and a security guard earning a monthly salary of Kshs.6,000/-. He further testified that he was not issued with a contract of employment.

It was his evidence that he performed his duties honestly and diligently till sometime on 9<sup>th</sup> November 2012 when the Respondent terminated his services.

He further testified that on or about 28<sup>th</sup> October, 2010 while he was engaged in his normal duties along Kilimani Road, Kilimani Area of Nairobi County he was arrested and arraigned in Court on allegation of theft of a Motor Vehicle.

The Criminal Case CR 4788 of 32010 at Kibera Law Courts was concluded after 2 years and he was acquitted. Upon conclusion of the Criminal case he reported back to work but was sent away without any pay.

**The Claimant**

He avers that he reported the matter to the Ministry of Labour. However, upon the request of the Respondent Company he withdrew the complaint in the hope that the dispute would be settled amicably between the parties. That no agreement was reached prompting him to file

the instant cause. He urged the Court to allow his Claim as prayed.

The Respondent did not call any witness to rebut the Claimant's evidence.

### **Claimant's Submissions**

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

It is submitted by the Claimant that the termination of his employment was illegal as he was dismissed on the basis of being arrested over an alleged crime which case was dismissed and the Claimant acquitted of any wrong doing.

It is further submitted that the Claimant was not given any notice of termination and/or given a chance to explain what happened, that this was in total violation of Section 41, 42, 44 and 45 of the Employment Act, 2007. The Claimant relied on the case of **Peris Nyambura Kimani Versus Dalbit Petroleum Limited (2015) eKLR** where it was held that terminating the employee's employment by the Respondent without notice or explanation was in contravention of Article 41 and 27 of the Constitution of Kenya, 2010 provision on unfair labour practices and discrimination. The Claimant further relied on the case of **A M M Versus Spin Knit Limited (2013) eKLR**.

The Claimant submitted that he is entitled to the reliefs sought in his statement of claim. He urged the Court to allow the Claim as drawn.

### **Determination**

Having considered the pleadings, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

1. Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful
2. Whether the Claimant is entitled to the reliefs sought

### **The Law**

The law relating to fair termination is contained in Section 41, 43 and 45 (2) of the Employment Act.

From the facts of this cause it is evident that the Claimant was not issued with any show cause letter or subjected to a disciplinary hearing prior to the termination of his employment. The Respondent further failed to submit any evidence to rebut the Claimant's account of events that led to the termination of his employment.

The criminal case against the Claimant did not stop the Respondent from conducting its own investigations in the matter and subjecting the claimant to a disciplinary hearing to ascertain the culpability of the Claimant before proceeding to terminate his services.

The claimant was thus condemned unheard, in violation of Sections 41 and 43 of the Employment Act. The termination of his employment was thus unfair under Section 45(1) and (2) the Employment Act which provide –

- 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**

In **Walter Ogal Anuro -V- Teachers Service Commission (2013) eKLR** the Court held that:

*"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."*

*I find that termination of the claimant's employment by the respondent unfair.*

### **Remedies**

In terms of compensation for unlawful termination the claimant having worked for about four years and taking into account the length of service and all the circumstances of his case including the level of his salary and his terms of employment, it is my opinion that 6 months' salary is reasonable compensation.

The Claimant further prayed for the following reliefs:-

- i. Days worked in October 2010 Kshs.6,000/=
- ii. One Month salary in lieu of notice Kshs.9,572/=
- iii. a) Annual leave 4 years at 9,572 years 26 days Kshs.38,288/=
- b) Prorata leave for 9 months x 3 days x 9,572

26 working days Kshs.9,940/=

- iv. Underpayment of wages
  - a) Basic Salary Kshs.9,572-6000 x 24 months Kshs.85,728/=
  - b) House allowance Kshs.1,436 x 24 months Kshs.34,464/=
  - c) Overtime for extra 87 hours 5552 x 24 months Kshs.133,248/=
- v. Public holidays 20 days x 9,57 x 2 hours x 12 hours

225 hours Kshs.20,418/=

- vi. Any other relief as per Section 63 (1& 2)

Labour Institutions Act, 2007

- vii. Certificate of Service

**Grand Total Kshs.337,658/=**

No evidence was adduced in support of the claims. The claimant in his evidence did not attempt to explain the basis for the claims or even mention the items claimed. These claims have thus not been proved with the result that the same are dismissed.

#### **Orders**

**In conclusion I award the claimant only 6 months' salary as compensation in the sum of Kshs.57,450/=.**

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

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**