



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1516 OF 2011**

*(Before Hon. Lady Justice Maureen Onyango)*

**BENSON OWINO KOMOLLO.....1<sup>ST</sup> CLAIMANT**

**FESTUS MUEMA NGUKU.....2<sup>ND</sup> CLAIMANT**

**PETER O. SUKU.....3<sup>RD</sup> CLAIMANT**

***VERSUS***

**TKM MAESTRO LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimants, Benson Komollo, Festus Muema and Peter Suku instituted this claim by a Memorandum of Claim dated 6<sup>th</sup> September 2011 filed on 12<sup>th</sup> September 2011 seeking compensation for wrongful and unlawful dismissal from employment and payment of their terminal benefits against the Respondent, TKM Maestro Limited.

They aver that they were each employed under 3 year contracts by the Respondent on or about 1<sup>st</sup> November 2008; the 1<sup>st</sup> and 3<sup>rd</sup> Claimants as Foremen and the 2<sup>nd</sup> Claimant as Senior Foreman until 12<sup>th</sup> July 2011 when the Respondent unfairly, unlawfully and illegally terminated their employment without notice and refused and/or neglected to pay their accrued final dues. That they served in their capacities devotedly with loyalty, diligence and high performance, with the 1<sup>st</sup> and 2<sup>nd</sup> Claimants both receiving a monthly salary of Kshs.49,132/= while the 3<sup>rd</sup> Claimant received Kshs.28,529/=. That their summary dismissal was malicious and contrary to the rules of natural justice, arising out of purported investigations into a theft that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants reported to the Respondent while the 1<sup>st</sup> Claimant was on leave. That they were not given a fair hearing before they were summarily dismissed by the Respondent based its allegations of theft or purported negligence or collusion which they deny. Further, that the Respondent failed to carry out proper investigations through the relevant authorities and that it breached their contracts of service which were still in force and whose terms of termination were not observed.

The Claimants further aver that as a consequence of the unlawful and/ or unreasonable termination of employment, their employment record has been cast in bad light, they have undergone immense psychological suffering and suffered loss and damages and that they claim their dues as follows:

**Benson Owino Komollo**

- (i).... Maximum 12 months' compensation for unlawful dismissal  
and lost income of..... Kshs.589,584
- (ii).... Notice Pay inclusive of House Allowance..... Kshs.49,132
- (iii)... Salary Arrears (June-12<sup>th</sup> July 2011)..... Kshs.68,784.80
- (iv)... Salary for remainder of contract (3 months, 18 days)..... Kshs.176,875.20
- (v).... Leave accrued for 2011..... Kshs.49,132
- (vi)... Service Pay (26 days for each contract year)..... Kshs.127,743.20

**Festus Muema Nguku**

- (i).... Maximum 12 months' compensation for unlawful dismissal  
and lost income of..... Kshs.589,584
- (ii)... Notice Pay inclusive of House Allowance..... Kshs.49,132
- (iii).. Salary Arrears (June-12<sup>th</sup> July 2011)..... Kshs.68,784.80
- (iv).. Salary for remainder of contract (3 months, 18 days)..... Kshs.176,875.20
- (v)... Leave accrued for 2011..... Kshs.49,132
- (vi).. Service Pay (26 days for each contract year)..... Kshs.127,743.20

**Peter O. Suku**

- (i).... Maximum 12 months' compensation for unlawful dismissal  
and lost income of..... Kshs.342,348
- (ii)... Notice Pay inclusive of House Allowance..... Kshs.28,529
- (iii).. Salary Arrears (June – 12<sup>th</sup> July 2011)..... Kshs.39,940.60
- (iv).. Salary for remainder of contract (3 months, 18 days)..... Kshs.102,704.40
- (v)... Leave accrued for 2011..... Kshs.28,529
- (vi).. Service Pay (26 days for each contract year)..... Kshs.74,175.40

Further, that they are undergoing hard economic times and have not been able to get any other jobs since the Respondent has refused to issue them with Certificates of Service. That they have since obtained their respective NSSF statements which reveal the Respondent was not regularly paying their contributions despite deducting the same from their salary. The Claimants pray for judgement against the Respondent as follows:

- a) The sum of Kshs.471,667.20, Kshs.471,667.20 and Kshs.273,878.40 as particularised in the Claim.

- b) Certificates of Service
- c) Maximum compensation for wrongful dismissal and lost income for 12 months in the sum of Kshs.1,521,516/= as particularised in the Claim
- d) Costs of this suit
- e) Interest on (a) above
- f) Any other relief this Honourable Court deems fit and just to grant.

The Respondent filed its Reply Statement and Counter Claim on 14<sup>th</sup> March 2012 stating that the Claimants are not entitled to the orders prayed for in the Claim because it never employed the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants under 3 year contracts and that their alleged contracts are clear forgeries as the same were not signed by its director. That the Claimants were negligent in their duties resulting in the loss of the respondent's property through theft by them or their accomplices on or about 20<sup>th</sup> June 2011 and which is under investigation at Industrial Area Police Station. That the preliminary investigations the respondent and the police conducted on the theft on 3<sup>rd</sup> July 2011 revealed that the Claimants were at the crime scene when it happened and that upon its Human Resource Department interviewing them, the Claimants denied and failed to give satisfactory answers. That it had the lawful right to conclude the Claimants had fundamentally breached their obligations as employees and that the grounds upon which it summarily dismissed them were justifiable and lawful as set out in Section 44(4) of the Employment Act. Further, that section 44 does not envisage an employer to establish the guilt of an employee beyond reasonable doubt before invoking summary termination as it would amount to usurping the jurisdiction of the courts and the criminal justice system.

In the counter claim, the respondent avers that the lost property was valued at Kshs.384,486/= as particularised on page 3 of the Reply Statement and that the particulars of negligence by the Claimants include:

- (a) Failing to properly secure the premises.
- (b) Failing to store the keys to the premises safely.
- (c) Providing the keys to the premises to unauthorised persons.
- (d) Allowing unauthorised persons into the Respondent's premises.
- (e) Removing without lawful authority and/or allowing unauthorised persons to remove the Respondent's property from the premises.
- (f) Colluding and/or assisting thieves to break into the Respondent's premises and to steal the Respondent's property.
- (g) Failing to give proper account of the circumstances surrounding the loss through theft of the Respondent's property

The Claimants filed a Reply to Counter Claim dated 11<sup>th</sup> October 2012 on 15<sup>th</sup> October 2012. They aver that the allegations of negligence and the particulars thereof is a red herring and an attempt by the Respondent to avoid paying them. That the particulars of the items stolen and their cost thereof is an afterthought and aimed at escaping liability and that the Respondent should have charged them in court instead of the unlawful summary dismissal. That consequently, they are not liable to the Respondent in the sum of Kshs. 384,486/= or at all and there can therefore be no counterclaim against the amount they claim and that the Counter Claim be struck out with costs and judgment entered for the Claimants as prayed.

## Evidence

CW2, **Festus Muema**, testified that he was called at around 8.30 am on 20<sup>th</sup> June 2011 by Peter Suku who informed him about the theft. At the said time he was working in the field. That he went to record what was stolen then went to Industrial Area Police Station to report and they later recorded statements on 24<sup>th</sup> June 2011. They were not arrested or charged. He stated that his contract as Senior Foreman provided for 3 months' notice of termination, he was terminated for no reason by the Respondent and that the security guard at the workshop did not record a statement at the police. In cross-examination, he stated that he had not been paid salary for one and a half months while in re-examination, he testified that all employees were released when there was no sufficient work at the workshop and that he had not been in for 2 weeks prior to the break-in that happened in the workshop.

CW3, **Peter Suku**, testified that on 03<sup>rd</sup> July 2011, all equipment was moved from the workshop at Industrial Area to Kileleshwa and the workshop closed because of low volume of work. He repeated the events of the morning of 20<sup>th</sup> June 2011 as narrated by CW1 and that the last time he was at the workshop was on 19<sup>th</sup> June 2011. After working from 8 am to 9 am he went to the office in Kileleshwa and left a guard at the workshop. That he had payslips before court together with an insurance card issued to him by the Respondent as per his contract thus proving that his contract was not a forgery. In cross-examination, he stated that he does not recall taking any leave in 2011 while in re-examination he affirmed that when he left the workshop on 19<sup>th</sup> June 2011 everything was intact.

CW1, **Benson Komollo** testified that he did not have any disciplinary incidents and that he was recalled to work and told to report to police where he wrote a statement. That what was missing after the break in were welding machines, grinders and some iron bars used as raw materials, that these would require a pick-up or a lorry to be moved from the workshop which had two gates manned by 2 different security guards; one contracted by the owner of the premises and the second contracted by the Respondent. In cross-examination, he stated that he did not hand over his keys when he went on leave and that he was called on 21<sup>st</sup> around midday to be informed of the theft and further, that he went on leave for 7 days but was called barely 3 days after and did not go on any other leave in 2011.

RW1, **Charles Mugambi**, a director of the Respondent testified that the Claimants were indeed employees in his workshop but while Benson had a contract, Festus and Peter did not have contracts and that the signatures in their alleged contracts are not his. He confirmed that the workshop is not always busy and that the Claimants continued working after the robbery before the internal investigations established that it is the three claimants who had broken into the workshop. He also stated that the date of the theft according to the termination letters was 03<sup>rd</sup> July 2011 but that this was an error as the theft was on 20<sup>th</sup> June 2011. He prayed that the court orders that the respondent be compensated for the items stolen as per their counter claim. In cross-examination, he testified that he had not presented a copy of the investigations report to the court and that upon their contracted security guards being interrogated, they implicated the three Claimants. He also acknowledged the stamp on the contracts of Festus and Peter as belonging to the Respondent.

## Claimant's Submissions

The Claimants submit that Section 41(2) of the Employment Act provides that before the employer summarily dismisses an employee, the employer shall hear and consider any representations which the employee may make. That the Respondent did not follow due process in dismissing them as they were not afforded a chance to defend themselves against the allegations of theft and further, the Respondent did not adduce evidence of any hearing or internal investigations before this court. They rely in the case of *Gilbert Mariera Makori v Equity Bank Limited* [2016] eKLR where it was stated:

“Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the

presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.

After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee."

They submit that as is required by Section 109 of the Evidence Act, the burden of proving if the signatures on their contracts had been forged rests with the Respondent, that the Respondent failed to adduce evidence in court to support its claim and that all the contracts adduced in court had the Respondent's official stamp. That they were all therefore employed by the Respondent until they were summarily dismissed and the forgery allegations are untrue and aimed at discrediting them so that they cannot claim for what is rightfully owed to them under the law. They cite the case of Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR as quoted in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, where the Court stated:

"Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."

The Claimants also submit that they are entitled to the reliefs sought taking into account the circumstances of the case, that it is only fair that they are compensated for the loss and damage occasioned by the summary dismissal which was highly irregular. That they have proved their case on a balance of probabilities and that the Respondent's actions do call this court into action to defend and promote their rights and entitlements.

#### Respondent's Submissions

The Respondent submits that the threshold to be applied determining unfair termination is provided in Section 45(1) and (2) of the Employment Act 2007 while Section 43 (1) of the Employment Act 2007 places the duty upon an employer to prove the reasons for the termination and that the failure to do so renders such termination unfair. That all the Claimants were dismissed vide separate letters which are annexed and marked Appendix 3 in the Claimants' Memorandum of Claim and that the reason for dismissal was:

*'...negligence in safeguarding the company's property leading to the theft that occurred on the night of 3<sup>rd</sup> July 2011 (which date RW1 testified was typed in error as the theft occurred on the night of 20<sup>th</sup> June 2011). In addition to this incidence, we have learnt on numerous occasions valuable items have disappeared without trace from the said premise which has led us to believe that either you have neglected your responsibilities at the workshop or colluded with those who committed the theft.'*

That all the three Claimants had keys to the Respondent's workshop and there was no break in as was confirmed by the 3<sup>rd</sup> Claimant when he reported to work on the morning of 21<sup>st</sup> June 2011 and found the door was locked and that upon opening, he found some items missing. That it therefore had a valid reason for summarily dismissing the Claimants without notice as provided in Section 44 of the Employment Act. That due process was followed as envisaged by the law and further, that the contract signed by the 1<sup>st</sup> Claimant and the only one acknowledged by the Respondent provides for the instances when the employer may terminate the employee's employment without notice at paragraph 15 as follows:

15.1 the company may terminate the employee 's employment immediately by notice in writing if he; -

15.2 commits, repeats or continues any serious breach of this agreement.

15.3 is guilty of serious misconduct or serious incompetence.

It submits that the Claimants are not entitled to salary in lieu of notice as they were summarily dismissed on account of gross breach of their duties and neither are they entitled to salary arrears as it paid all dues. That the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants are not entitled to salary for the remainder of the contract because their contracts were a forgery and that compensation for the said remaining period for which they did not work cannot be entertained as it would amount to unjust enrichment. That since the Claimants only worked for 6 full months in 2011, the prorated leave days accrued then amounts to 11 leave days for each of them being (6/12 months x 21) and that it produced in court leave forms applied for by the 1<sup>st</sup> and 3<sup>rd</sup> Claimants in 2011. That the 1<sup>st</sup> Claimant, Benson Komollo took 18 leave days in 2011 while the 3<sup>rd</sup> Claimant, Peter Suku took 14 leave days in 2011 proving that they both have no accrued leave days and are therefore not entitled to the said award. That as for the 2<sup>nd</sup> Claimant, Festus Muema, the prorated leave allowance payable is Kshs.24,566/= being (6/12 months x 49,132).

Further, that the Claimants have incorrectly calculated service pay on the basis of 26 days instead of 15 days for every year worked and that without prejudice, Section 35 (5) of the Employment Act only allows for payment of service pay where there is normal termination of employment and not in cases of summary dismissal. That the claim for maximum compensation for wrongful dismissal should also fail since the Claimants have failed to prove their termination was unjust as envisaged by Section 49 of the Employment Act.

The Respondent finally prays that the Claim be dismissed and its Counter Claim be allowed both with costs to it and that it be allowed to set off so much of her counterclaim herein as will be sufficient to satisfy the Claimants' claim.

## **Determination**

The issues for determination are whether the contracts for the 2<sup>nd</sup> and 3<sup>rd</sup> claimants are genuine, whether the termination of the claimants' employment was unfair and if the claimants are entitled to the remedies sought.

### **Validity of contracts for 2<sup>nd</sup> and 3<sup>rd</sup> claimants**

It is the respondent's case that the 2<sup>nd</sup> and 3<sup>rd</sup> claimants were never issued with contracts and that the ones filed in their bundle of documents are forgeries. RW1 however does not deny that the 2<sup>nd</sup> and 3<sup>rd</sup> claimants were employees of the respondent.

The law recognises both oral and written contracts. Sections 7 and 8 of the Employment Act provide as follows –

#### **7. Contract of service**

**No person shall be employed under a contract of service except in accordance with the provisions of this Act.**

#### **8. Oral and written contracts**

**The provisions of this Act shall apply to oral and written contracts.**

Further, Section 26 provides as follows –

## 26. Basic minimum conditions of employment

**(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.**

**(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.**

From the foregoing it is clear that where there is no written contract between the parties, the minimum terms in the Act shall apply to such contracts.

For these reasons I find that it is immaterial whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> claimants had formal written contracts as the respondent has admitted they were its employees and the terms of their contracts is not an issue in the claim.

### **Whether or not the claimants' were unfairly terminated.**

RW1 testified that the claimants were given a hearing before being issued with letters of termination. CW1 did not specifically confirm or deny being given a hearing. All he stated was that –

*“I blame the respondent for terminating my contract because I was not given notice. There was no investigations proving the allegations in the letter.”*

Section 47(5) apportions the burden of proof between the employer and the employee as follows –

**(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

It was therefore incumbent upon the claimants to prove that an unfair termination occurred as the burden of the respondent was only to justify the grounds of termination. The grounds for termination according to the letters of termination issued to all 3 claimants was that their negligence and lack of responsibility led to the theft that occurred at the respondent's workshop premises on the night of 3<sup>rd</sup> July 2011, which RW1 corrected to be 21<sup>st</sup> June 2011. CW1 admitted that all 3 claimants had copies of the keys to the workshop and there was no denial that there was no break in at the workshop at the time of the theft. Whoever stole the respondent's equipment used a key. RW1 testified that the only persons with the keys were the claimants and the workshop was opened and then locked again after the theft.

Further CW1 defended himself against theft, yet what he was accused of in the letter was negligence and lack of responsibility leading to the theft. It is not contested that there was a theft as CW1 testified that *“on or about 20<sup>th</sup> June 2011 we were robbed.”*

CW2 and CW3 did not make any reference to a hearing in their testimony.

For the foregoing reasons I find that the claimants have not proved that they were unfairly terminated. The claimants admitted having keys to the workshop and that theft occurred without a break-in.

### **Remedies**

The claimant's prayed for salary in lieu of notice including house allowance. The contracts produced by the claimants provide at Clause 7 under *“Remuneration”* that *“The salary includes an element intended*

for your use as rent.” The claimants are therefore not entitled to housing allowance in addition to the salary.

The claimants are nevertheless entitled to notice as their contracts provide under Clause 15 on termination that:

### **15 Termination**

15.1 *The Company may terminate the Employee’s employment immediately by notice in writing if he:-*

15.2 *Commits, repeats or continues any serious breach of this Agreement; or*

15.3 *Is guilty of serious misconduct or gross incompetence; or*

15.4 *adversely prejudices or does or fails to do anything\*which in the reasonable opinion of the Directors is likely to prejudice adversely the interests or reputation of the Company or any Group Company; or*

15.5 *Is convicted of any criminal offence (other than an offence which does not in the i opinion of the Directors affect his employment); or*

15.6 *Becomes bankrupt or enters into or makes any arrangement or composition with or for the benefit of his creditors generally; or*

15.7 *Becomes of unsound mind; or*

15.8 *Becomes prohibited by the operation of law from being an employee of the company*

I therefore award each of the claimants one month’s salary in lieu of notice as their contract did not provide for termination without notice even in the case of gross misconduct.

The claimant further prayed for salary up to the date of termination being 12<sup>th</sup> July 2011 which they are entitled to having been terminated on that day and I accordingly award them.

The prayer for payment to the end of the contract is not granted as the claimants did not prove unfair termination. No evidence was adduced on leave for the 2<sup>nd</sup> and 3<sup>rd</sup> claimants who did not testify or file any documents in respect of annual leave. The respondents on the other hand produced leave application forms for the 1<sup>st</sup> and 3<sup>rd</sup> claimants who had taken 18 days and 14 days respectively. Having worked up to 12<sup>th</sup> July 2011 each of them was entitled to only 10.5 days leave. They had thus taken more leave than they were entitled to.

All claimants were members of NSSF and are not entitled to service pay under Section 35(6) of the Employment Act.

### **Counter Claim**

The respondent counter claimed for the sum of Kshs.384,486 made up as follows –

<b>ITEMS</b>	<b>QUANTITY</b>	<b>VALUE</b>
1. Welding Machine ARC WIM	1	Kshs.40,000
2. Oil welding machine	1	Kshs.22,500

3. Compressor (100) red in colour	1	Kshs.70,000
4. Drilling machine	1	Kshs.21,000
5. Cut off machine	1	Kshs.38,000
6. Grinder (4 dewait 7")	4 (19,140 each)	Kshs.76,560
7. Grinder (black and decker)	1	Kshs.14,000
8. Welding machine (small)	2 (27,000 each)	Kshs.54,000
9. Power cable (3 score – 2.5 mm–70 mm)	1	Kshs.14,000
10. Spanner (No. 30/32)	3 (1,682 each)	Kshs.5,045
11. Spanner (No. 34/27)	2 (1,200 each)	Kshs.2,400
12. Spanner (No. 18/19)	6 (830 each)	Kshs.4,980
13. Twisted steel bars (Y8)	31 (500 each)	Kshs.15,500
14. Meko Jiko	1	<u>Kshs.6,500</u>

**Total Kshs.384,486**

At the hearing RW1 testified that the equipment was stolen from the workshop. Although he alleged that investigations were carried out which established that the robbery at the workshop was an inside job as there was no breakage and the doors were opened then locked again after the robbery, the investigation report was not submitted to court or shared with the claimants. Further no evidence was adduced to establish that the items listed were in the workshop and were stolen during the robbery. No inventory was produced in court. No receipts for purchase for the items or a valuation report was produced.

From the foregoing I find the counter claim not proved with the result that the same is dismissed.

### Orders

From the foregoing, I enter judgment for the claimants against the respondents as follows –

#### 1. Benson Owino Komollo – 1<sup>st</sup> Claimant

(i).... Pay in lieu of notice..... Kshs.49,132

(ii)... Salary from 1<sup>st</sup> to 12<sup>th</sup> July 2011..... Kshs.22,676.30

**Total Kshs.71,808.30**

#### 2. Festus Muema Nguku – 2<sup>nd</sup> Claimant

(i).... Pay in lieu of notice..... Kshs.49,132

(ii)... Salary for 12 days worked in July 2011..... Kshs.22,676.30

**Total Kshs.71,808.30**

**3... Peter O. Suku – 3<sup>rd</sup> Claimant**

(i)... Pay in lieu of notice..... Kshs.28,529

(ii)... Salary for 12 days worked in July 2011..... Kshs.13,167.20

(iii).. Pro rata leave January to June 2011: 10.5 days..... Kshs.11,521.30

**Total Kshs.53,217.50**

The counterclaim is dismissed.

Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**