



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 85 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSHUA KABAKA.....CLAIMANT**

*VERSUS*

**TANDU ALARMS SYSTEMS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claim herein is filed by Joshua Kabaka, the Claimant alleging non-payment of terminal benefits and damages for unlawful and or wrongful termination of employment by the Respondent. He seeks the following reliefs:

1. That the Court do find the reasons and procedure for termination of the Claimant's services was wrongful.
2. That the Court do find that the Respondent's action of continued withholding and failing refusal and or neglecting to pay the Claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.
3. That as a result the Court do order that the Respondent to pay the Claimant all his terminal benefits and other unpaid dues computed as hereunder:
  - a. Unpaid CCTV assistant salary arrears Kshs.756,000 (for 3 years and 6 months)
  - b. Unrefunded medical expenses Supervisor Kshs.2,110
  - c. 12 months' salary in compensation for unfair termination Kshs.216,000
  - d. One month pay in lieu of notice Kshs.18,000
  - e. General, aggravated, exemplary and/or special damages, whichever combination the Court may deem just and expedient
  - f. Costs of this suit.
  - g. Any other relief that this Court may deem fit and expedient to grant.

The Respondent filed its statement of Reply and Defence to the Claimant's Memorandum of Claim in which it admits that the Claimant was its employee and contends the Claimant's services were terminated by the respondent for just reason being underperformance and the that the termination was in accordance with Sections 43 and 45 of the Employment Act.

The Respondent avers that the Claimant is not entitled to the reliefs sought in his Statement of Claim as the reason for termination was just and due process was followed.

The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

On 26<sup>th</sup> September 2017, the Claimant testified that he was employed by the Respondent on 24<sup>th</sup> May 2005 in the position of a security guard earning a salary of Kshs.4,800.00. He was later appointed to the position of acting supervisor earning a monthly salary of 10,192/-. He

was eventually promoted to full supervisor in the year 2008 earning a monthly salary of Kshs.11,903/-. That on or about the year 2011 he was further promoted to the position of an operations controller earning a salary of Kshs.18,000./- per month, a position he held until he lost permanent sight in his right eye as result of exposure to excessive bright light at his place of deployment.

The claimant testified that on 28<sup>th</sup> May 2008 he was attended to at Kikuyu hospital and was later transferred to Kenyatta National Hospital as his eye needed to be managed as per medical report he attached to his Memorandum of Claim.

The claimant testified that during the period he was employed by the Respondent there was no job evaluation or appraisal conducted and the allegation of underperformance was not justified. He further testified that he was terminated without notice.

The claimant testified that he worked at the CCTV for a total of 3 years and 6 months during which period he was underpaid as his colleagues working at the same department were paid more. He seeks compensation as prayed in his Memorandum of Claim.

On cross examination the claimant stated that he was not issued with a letter following his promotion to CCTV controller by the Respondent, that he had no report linking his eye problem to the use of CCTV and that he did not inform the Respondent that the CCTV affected his sight. He admitted to furnishing the medical report to the Respondent after he was examined at the hospital.

The claimant admitted having been issued with the Notice to Show Cause dated 31<sup>st</sup> October, 2011. He stated that he did not respond to the same as he was sacked immediately. He testified that he worked with the Respondent up to 24<sup>th</sup> December, 2011 and was given 1 months' Notice by the Respondent upon termination.

The claimant stated that he received Kshs.97,242.69 as terminal benefits.

He testified that during the period he worked for the Respondent he was neither demoted nor his salary reduced. He stated that he did not have any document confirming that his colleagues in the same department were earning more than him in terms of salary.

On re-examination the claimant stated that his eyesight was okay prior to his posting to CCTV section. Further that the Notice to Show Cause did not expressly ask him to put in a written response to the same.

The claimant urged the Court to allow his Claim as prayed.

The Respondent did not call any witness and closed its case when the matter came up for defence hearing on 9<sup>th</sup> May, 2018.

Parties thereafter filed and exchanged written submissions.

### **Claimant's Submissions**

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

The Claimant submitted that the termination of his employment was unfair as it is against the provisions of Section 41 and 42(1) of the Employment Act, 2007.

The Claimant relied on the authority of *John Ratemo Ondieki Vs Islamic Relief World Wide (2014) eKLR* where the Court made reference to the case of *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Mangnate Ventures Limited (Industrial Cause No. 273 of 2010)* where it was held that:

“Once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and to give them the opportunity to improve over a reasonable length of time. In the opinion of the Court, 2-3 months would be reasonable.”

The Claimant further relied on the case of *Jane Wairimu Machira Vs Mugo Waweru and Associates (Industrial Cause No. 621 of 2012)*.

The Claimant submitted that the termination of his employment was unfair and unprocedural.

He submitted that he is entitled to the reliefs sought in his memorandum of Claim and urged the Court to allow the same as drawn.

### **Respondent's Submissions.**

It is submitted on behalf of the Respondent that the Claimant has failed to adduce adequate evidence to support his assertion that the Respondent unfairly terminated his services.

The Respondent further submitted that the Claimant was terminated for underperformance in accordance with Sections 43 and 45 of the Employment Act. The Respondent further submitted that the Claimant failed to meet the employer's expectations as he was unable to manage the employees whom he was supervising.

The Respondent relied on the case of *Industrial Alliance Life Insurance Company Vs Gilbert Cabiakman 2004 SCC 55* where it was stated that:

“The employee is bound to carry out his or her work with prudence and diligence and to act faithfully and honestly towards the employer. The flexibility and malleability of an individual contract of employment enable the parties to provide in the contract that the employer has the power to suspend, and to establish the conditions on which it may do so.”

Further, the Respondent submitted that Section 16.10.3(b) of the Respondent’s terms and conditions of service provides for summary dismissal of an employee for gross misconduct with loss of all benefits. The Respondent relied on the case of **CMC Aviation Limited Vs Captain Mohammed Noor (Civil Appeal No. 199 of 2013) (UR)** where it was held that “the trial Court erred in not considering the contribution the Respondent could have made to the events leading to his dismissal.”

The Respondent further submits that the Claimant in his pleadings failed to demonstrate that the Respondent had issued him with a Notice to Show Cause and that he was given an opportunity to be heard in a meeting at the Human Resource office but failed to do so.

The Respondent averred that in terminating the services of the Claimant, it acted in accordance with the provisions of Section 44(3) and 44(4) (c) of the Employment Act, 2007 and that the Respondent had a valid reason for terminating the Claimant’s employment. The Respondent urged the Court to find that the termination was valid.

The Respondent submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim, having been lawfully dismissed.

The Respondent urged the Court to dismiss the Claim with costs to the Respondent.

### **Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties the following are the issues for determination:

1. Whether the termination of the Claimant’s employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

The Claimant submitted that the termination of his services was unfair as it contravened the provisions of Section 45 of the Employment Act which provides that an employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure.

The Respondent on the other hand submitted that the Claimant’s services were terminated for underperformance and in accordance with Sections 43 and 45 of the Employment Act. Further, that the Claimant failed to meet the employer’s expectations as he was unable to manage the employees whom he was supervising.

The Respondent further submitted that it was entitled therefore to summarily dismiss the Claimant as provided for under Section 44(3) and 44(4)(c) of the Employment Act, 2007.

The Claimant was issued with a Notice to Show Cause dated 31<sup>st</sup> October 2011. He did not respond to the same as according to him, it was not an express requirement to respond thereto in writing.

The Show Cause letter reads in part:

“Also it has been reported that the performance of the guards within the airport is deteriorating which is highly suspected is due to your contribution.

This following the above, unless you prove to the management the need of being in the company within a period of ninety days from the date of this letter, your services may be terminated if there will be no improvement in your responsibility performance.”

The Claimant was thereafter issued with a Notice of Termination of Services dated 23<sup>rd</sup> November, 2011 which reads in part:

“The management have evaluated your performance and found that you do not meet company expectation and required standards.

Following this you are advised that your services in this Company will no longer be required with effect from 24<sup>th</sup> December 2011.”

In the case of **Kenya Scientific Research international Technical and Allied Workers Union (KSRTAWU) –V- Stanley Kinyanjui and Magnate Ventures Limited (Supra)** the court held that –

“Once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and to give them the opportunity to improve over a reasonable length of time. In the opinion of the Court, 2-3 months would be reasonable.”

In the case of **Jane Wairimu Machira –V- Mugo Waweru and Associates**, the court held that a credible performance appraisal process

must be evidently participatory.

In the instant case the claimant received a notice to show cause letter dated 31<sup>st</sup> October 2010 in which he was required to improve his performance within 90 days. He was not put on a performance improvement plan. He was not told exactly what was expected of him during the 90 days. There was no mention in the notice to show cause letter of how the improvement will be assessed during the improvement period. No targets were set.

23 days later, on 23<sup>rd</sup> November 2011, the claimant received a letter of termination of employment on grounds that "The management has evaluated your performance and found that you do not meet company expectations and required standards."

The claimant had worked for the respondent for over 6 years and had been promoted from a Security Guard to Supervisor, then to Inspector and finally to the position of Controller in the relatively short period. His performance must have been good enough to warrant the promotions.

The claimant was besides not being put on a performance improvement program, not given a hearing. All he received was a termination letter. He was not even allowed the 90 days given in the notice to show cause letter for him to improve, nor was there any assessment.

Section 41 provides that before an employee's employment is terminated on grounds of poor performance, he must be given a hearing in the manner set out therein. This was not done in the case of the claimant.

From the forgoing, the termination of the claimant's employment was unfair both substantively and procedurally in terms of Section 45(2) of the Employment Act. The termination was further unfair in terms of Section 45(4)(b) as in all circumstances of the case, the respondent did not act in accordance with justice and equity in terminating the employment of the claimant.

I find and declare accordingly.

### **Remedies**

The claimant prayed for

- a. Unpaid CCTV assistant salary arrears Kshs.756,000 (for 3 years and 6 months)
- b. Unrefunded medical expenses supervisor Kshs.2,110.00
- c. 12 months' salary in compensation for unfair termination Kshs.216,000
- d. One Month salary in lieu of Notice Kshs.18,000
- e. General, aggravated, exemplary and/or special damages, whichever the combination the Court may deem just and expedient.
- f. Costs of this suit
- g. Any other relief this Court deems fit and expedient to grant

The Claimant admitted during cross examination that he received Kshs.97,242.69 as terminal benefits from the Respondent and further that he was issued with one month's notice by the Respondent prior to the termination.

Attached to the Claimant's Statement of Claim is a Clearance Certificate in which the Claimant acknowledges receipt of Kshs.97,242.69 as final dues from TANDU ALARM SYSTEMS LIMITED and further that "I have no other claims against the Company."

The claimant is thus not entitled to notice. The claimant further did not prove that he was entitled to any CCTV Assistant salary. The medical expenses claimed, being in the nature of special damages, have not been proved as no evidence was adduced in respect thereof.

The circumstances under which the claimant's employment was terminated does not lend itself to an entitlement to general, aggravated, exemplary or other special damages. All these prayers fail and are dismissed.

The claimant having been terminated unfairly, is entitled to damages. Taking into account all the circumstances of his case, the manner in which he left employment, the length of service and all relevant factors, it is my opinion that 10 months' salary is reasonable compensation. I therefore award him Kshs.180,000 as compensation.

The respondent shall pay costs of the case.

Interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**