



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

**AT NAIROBI**

**CAUSE NO. 119 OF 2014**

(Before Hon. Lady Justice Maureen Onyango)

**SAMWEL KIPNGETICH ROTICH.....CLAIMANT**

VERSUS

**FOUR WHEEL DRIVE MAINTENANCE.....RESPONDENT**

**JUDGMENT**

The Claimant filed his Memorandum of Claim on 3<sup>rd</sup> February 2014 contending the wrongful termination of employment and subsequent refusal by the Respondent to pay his dues. He seeks the following reliefs:

1. The sum of Kshs.270,464
2. Compensation of 12 months' salary for unlawful dismissal of employment
3. Costs of the suit.
4. Interest on 1 and 2 above
5. Any other relief the court may deem just by law.

The Respondent filed its Memorandum of Reply on 5<sup>th</sup> March 2014 in which it denies having terminated the employment of the Claimant unlawfully and avers that the Claimant was summarily dismissed for the loss of several items. It filed a Counter Claim seeking Kshs.190,500 being the value of goods lost while the Claimant was on duty.

In his Response to the Counter-Claim the Claimant avers that he was not liable for the loss.

**Claimant's Case**

The Claimant testified that he was employed in 2002 as a guard and was initially paid Kshs.3,500. He testified that on 20<sup>th</sup> June 2013 he asked for a pay rise and it is then that he was informed that some items got lost. He testified that he was given 2 warning letters and was thereafter dismissed on 26<sup>th</sup> June 2013.

He testified that he was neither given an opportunity to be heard nor was he paid notice. He testified that at the time of his dismissal he was paid Kshs.4,000 and was underpaid. He further testified that the Respondent did not make any NSSF and NHIF deductions and he was not paid overtime.

In cross-examination the Claimant testified that he did not know how items got lost and that after termination he reported to the Police.

**Respondent's Case**

RW1, **Clarence Glen Edward Mathews**, the proprietor of the Four Wheel Drive Maintenance, the Respondent, testified that he employed the Claimant in 2009 as his night watchman. He testified that there were two robbery incidents when two spare wheels, a trolley jerk and wheel barrow went missing on 11<sup>th</sup> May 2013. He further testified that on 20<sup>th</sup> June 2013 robbers vandalised his customers' cars and took

away spare wheel, battery and battery charger, and five overalls.

He testified that he could not trace the Claimant upon the occurrence of the first incident but he issued him with a warning letter which was the final warning letter. He testified that he terminated the Claimant's employment upon discovering the loss of items on 20<sup>th</sup> June 2013 and that he paid him his dues in mid-month except for the 5 days he had worked. He testified that the Claimant's salary was Kshs.6,300 per month which would be increased annually. He testified that he never issued the Claimant with the letter of appointment, which the Claimant produced in Court and that in respect of the termination letter he had instructed his secretary to write the termination same.

In cross-examination he testified that he neither produced any inventory of the stolen property nor did he report the incidences to the Police. He admitted that he did not pay NSSF as the Claimant refused to pay.

### **Claimant's Submissions**

The Claimant submitted that he had illustrated that he was employed by the Respondent vide the letter of employment dated 15<sup>th</sup> June 2001. In response to the Respondent's position on the Claimant's date of employment it relied on the case of *Edwar Isedia Mukasia v Eldo Supermarket Limited [2015] eKLR* where the Court held:

“Section 10 (7) of the Employment Act, 2007 binds employers to proof of terms of employment in the event of non-production of written contract of employment in all legal proceedings...”

The Claimant submitted that in cases of termination by notice or payment in lieu of notice the employer is not expressly required by statute to give reasons if the correct procedure is followed. He submitted that contrary to this the Respondent did not terminate the employment of the claimant by issuing notice.

The Claimant submitted that the decision to terminate employment must be based on good faith and should be free of bias without victimising the employee. The Claimant relied on the cases of *Geoffrey Muguna Mburugu v The Attorney General Case No. 3472 of 1994* and *Col. Benjamin Mwema v The Attorney General Case no 2230 of 2001*.

The Claimant submitted that he is entitled to underpayments and the all prayers sought.

### **Respondent's Submissions**

The Respondent submitted that the Claimant was summarily dismissed for the loss of items at Respondent's work place. It submitted that the Claimant did not offer a proper explanation regarding the loss and that he had neglected to perform his duties. The Respondent relied on Section 44 of the Employment Act to justify the Claimant's dismissal for gross misconduct.

### **Issues for determination**

1. Whether the Claimant was unfairly terminated
2. Whether the Claimant is entitled to the reliefs sought

#### **1. Whether the Claimant was unfairly terminated**

The Claimant's termination was as a result of the loss of items at the Respondent's premises. The Claimant testified that he was not aware that there was a loss of items. It is RW1's case that the Claimant was issued with a warning letter dated 13<sup>th</sup> May 2013 regarding the theft of items for a Rhino Charge Car. The Claimant testified that he was not accorded an opportunity to be heard while RW1 testified that he never reported the loss to the police but he had incurred loss in replacing the stolen items. Despite the fact that items were stolen RW1 never invited the Claimant for a disciplinary hearing on the loss of items prior to his summary dismissal.

Section 41 of the Employment Act provides:

**1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

Section 41 requires that where an employee is accused of gross misconduct he must be subjected to a disciplinary hearing as provided therein. The respondent having failed to give the claimant a hearing, the termination was procedurally unfair in terms of Section 41 as read with 45(2) of the Employment Act.

#### **2. Whether the Claimant is entitled to the reliefs sought.**

The Respondent denied having issued the Claimant with the Employment Letter dated 15<sup>th</sup> June 2001 but admitted he employed the Claimant in 2009. In respect of the Claimant's salary the Claimant testified that he was initially paid Kshs.3,500 and that at the time of his dismissal he was paid Kshs.4,000. RW1 testified that he paid the Claimant Kshs.6,500. The Respondent was expected to prove that he paid the Claimant a monthly salary of Kshs.6,500 and employed the Respondent in 2009 as expected under Section 10(7) of the Employment Act but he did not.

The claimant's letter of appointment whose authenticity the respondent denies states that he was employed on 1<sup>st</sup> July 2001. However in his pleadings at paragraph 4 of memorandum of claim he states it was 15<sup>th</sup> June 2001. In his testimony he stated that he started working in 2002. During cross examination the claimant stated that he was originally employed as a casual and worked as a reliever. From the forgoing I find that the claimant was not truthful about his date of employment and will therefore accept the date given by the respondent being 1<sup>st</sup> October 2009.

The Claimant having been unfairly terminated is entitled to one month salary in lieu of notice in the sum of Kshs.10,912 which I award him..

The Claimant is also entitled to service pay since RW1 testified that he never made the Claimant's NSSF contributions. I award him service pay for 3 years at Kshs.16,368/=.

In respect of having worked on public holidays, the Claimant did not provide any evidence. He did not mention the same in his testimony.

The Claimant prayed for underpayment for the months of 2010 to 2013 for each entire year as follows

2010:  $(7,523 - 4,000) \times 12 \text{ months} = 42,276$

2011:  $(8,463 - 4,000) \times 12 \text{ months} = 53,556$

2012:  $(9,571 - 4,000) \times 12 \text{ months} = 66, 852$

2013:  $(10,911.70 - 4,000) \times 12 \text{ months} = 82,940$

The claimant's employment having been terminated on 26<sup>th</sup> June 2013, and taking into account that the General Order is effective from 1<sup>st</sup> May of each year of increase, the claimant is awarded the following –

May 2010 to April 2011	–	Kshs.42,276.00
May 2011 to April 2012	–	Kshs.53,556.00
May 2012 to April 2013	–	Kshs.66,852.00
May 2013 to June 2013	–	Kshs.13,823.40
<b>Total underpayments</b>		<b>Kshs.176,507.40</b>

The claimant prayed for compensation. I do not think he deserves the same having admitted that the respondent's property was lost under his watch twice. That was indeed the reason for his dismissal.

### **Counterclaim**

On the counterclaim although RW1 testified that he lost property, there was no proof of the property lost or the value thereof. I find the counterclaim not proved and dismiss it.

### **Conclusion**

In conclusion, I enter judgment for the claimant against the respondent in the total sum of **Kshs.203,787.40**.

The respondent shall also pay costs of the claim to the claimant and issue him with a certificate of service.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**