



5. Any Other relief the Court may deem fit.

The Respondent filed response to the claim on 29<sup>th</sup> July 2015 in which it admits entering into an employment relationship with the claimant. The Respondent avers that the Claimant's services were summarily terminated after he was caught with stolen shoes belonging to a colleague.

The Respondent contends that following the discovery of the theft, the Claimant absconded duty and is as such not entitled to the reliefs sought in the Memorandum of Claim. The Respondent urged the Court to dismiss the Claim with costs to the Respondent.

The matter proceeded for hearing on 14<sup>th</sup> May 2018 and 18<sup>th</sup> September, 2018 with both the Claimant and the Respondent's witness testifying. Both parties filed written submissions after the close of the hearing.

The claimant testified that on 27<sup>th</sup> March, 2014 he was called to the Human Resource Office and was asked to stand at the corner in the presence of the shop steward and the Human Resource Officer and was asked to undress. It was the Claimant's testimony that he found this treatment embarrassing as the HR was a lady and further that the shoes that were purportedly lost were not found on him despite the fact that he was called a thief.

The claimant further testified that his employment was verbally terminated on 15<sup>th</sup> August, 2014. He further testified that he was not issued with any dismissal letter and that he was not paid his terminal dues at the time of separation. He urged the Court to allow the Claim as drawn.

On cross examination the claimant insisted that he was on duty in March, 2014 despite the fact that he had no evidence to confirm that he was at work on the said date.

The claimant insisted that he did not steal any shoes belonging to his colleague and further that he has never been arrested for the alleged theft.

He contended that he was not aware of any disciplinary meeting convened by the Respondent on 11<sup>th</sup> June 2014, and that it is not true that he absconded duties as alleged by the Respondent. He insisted that he worked for the period between April and August 2014.

The Respondent on the other hand called one witness who reiterated the averments made in the Memorandum of Response to the Claim filed herein. RW1 contended that the Claimant failed to attend the exit meeting despite being invited for the same. RW1 further averred that the Claimant absconded duties after he was found in possession of lost shoes belonging to one of his colleagues.

On re-examination RW1 confirmed that the Claimant failed to report back for duty. He stated that all employees of the Respondent including himself sign a master roll upon entry and exit which was not signed by the Claimant during the said period in question.

RW1 further stated that the minutes presented in Court indicate that the Claimant had not been dismissed and that the exit meeting did not take place as the Claimant failed to attend.

### **Submissions**

In the submissions filed on behalf of the claimant, he states that he was a victim of a setup as he was not responsible for the theft as alleged by the Respondent. He further submitted that the Court ought to ignore the statements filed by the Respondent in this matter as they are an afterthought prepared after it became apparent that the Claimant had filed the instant Claim.

The Claimant further submits that his constitutional rights were gravely violated by the Respondent in the manner in which he was handled by the Respondent and in particular Articles 25, 28 and 41 of the Constitution.

The Claimant contended that the termination of his employment was unfair, unlawful and contrary to the provisions of Sections 41 and 44 of the Employment Act, 2007. He urged the Court to allow his Claim as drawn and relied on the case of *ELRC No. 293 of 2015 Pamela Nelima Lutta Vs Mumias Sugar Company Limited*.

The Respondent on the other hand submitted that it had reason to terminate the Claimant's services and that despite being invited for an exit meeting the claimant failed to attend the same.

It was further submitted that the Claimant absconded duty following the incident of theft and is therefore not entitled to the reliefs sought in his Memorandum of Claim.

### **Analysis and Determination**

There is no dispute that the Claimant was employed by the Respondent from 1<sup>st</sup> July, 2007 until 15<sup>th</sup> August, 2014 when he was verbally terminated from his employment. The issues for determination therefore are:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the reliefs sought should be granted

**What then is the law on unfair termination?**

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The section provides that –

**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.**

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer’s burden is to justify the reasons for such termination.

In the instant case there was valid reason to terminate the employment of the claimant but the respondent did not comply with fair procedure. There is no evidence that any attempt was made to call the claimant for a disciplinary hearing after the 26<sup>th</sup> March 2014 when it is alleged he was found with shoes belonging to a colleague who had reported the shoes lost. RW1 testified that the claimant was to report for an exit interview meaning that a decision had already been made to terminate the claimant’s employment without taking him through any disciplinary process.

The respondent filed minutes of a meeting held with the union on 11<sup>th</sup> June 2014. There is no evidence that the claimant was invited to the meeting. As is reflected in the minutes, the claimant had already instructed counsel by then. The last paragraph of the minutes states –

*“But for Crispinus Wesonga Shiraka who took his matter to Betty Rashid and Company Advocates, has to withdraw from there if he so wishes to have his matter discussed by the union.” (sic)*

I thus declare the termination of the claimant’s employment unfair.

On the remedies the claimant is entitled to one month’s salary in lieu of notice which I award him at Kshs.14,370/=.

He is also entitled to the salary for March 2014, which RW1 admitted he was not paid as he did not report back to work after 26<sup>th</sup> March 2014. I award him Kshs.14,370.

The claimant has not proved that he reported to work after 26<sup>th</sup> March 2014. The prayer for payment of salary for the months of April, May, June, July and August 2014 therefore fail and is dismissed.

The prayer for annual leave was likewise not proved and is dismissed. The claimant is not entitled to service pay as he admitted and his payslips also reflect, that he was a member of NSSF.

He has not proved inhuman treatment and the prayer for damages fails and is dismissed.

Having been unfairly terminated, the claimant is entitled to compensation. However, in view of the circumstances under which he was terminated. I award him only one month’s salary as compensation in the sum of Kshs.14,370.

In summary, therefore I award the claimant the following –

- (i) Pay in lieu of notice..... Kshs.14,370
- (ii) Salary for March 2014..... Kshs.14,370
- (iii)..... Compensation.....  
Kshs.14,370

**Total Kshs.43,110**

The respondent shall pay claimant’s costs.

Interest shall accrue at court rates.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**