



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1528 OF 2014**

(Before Hon. Lady Justice Maureen Onyango)

**TITUS MUTISO MBINDYO.....CLAIMANT**

VERSUS

**MOTOR BOUTIQUE LIMITED.....RESPONDENT**

**JUDGMENT**

By Memorandum of Claim dated and filed on 2<sup>nd</sup> September 2014, the claimant avers that he was unlawfully and unfairly dismissed from employment by the respondent who further failed to pay his terminal dues. He seeks the following orders from the court –

- a. A declaration that the Claimant's dismissal from his employment by the Respondent was unlawful and unfair.
- b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs.324,766 as claimed below–
  - i. One month's salary in lieu of notice.....Kshs.24,982
  - ii. The Claimant further submits that as a result of the illegal and unfair summary dismissal complained of above, he suffered abrupt loss of income and trauma and inability to meet his continuing obligations as a result of which he suffered damages for which he seeks compensation at 12 months' salary, being Kshs.24,982 x 12 months.....Ksh.299,784
- d. Interest on (c) above from the date of filing suit till payment in full.
- e. Cost of this suit plus interest thereon.

The respondent filed a statement of defence dated and filed on 10<sup>th</sup> November 2014. In the defence it denies the averments in the memorandum of claim and prays that the same be dismissed with costs.

On 12<sup>th</sup> July 2018 the case was fixed for hearing in court by consent of parties on 11<sup>th</sup> October 2018. However, on the hearing date the claimant attended court but the respondent did not. The claimant's case was thus heard in the absence of the respondent.

By an application dated 3<sup>rd</sup> December and filed on 17<sup>th</sup> December 2018, the respondent sought a raft of orders, including the withholding of judgment and any subsequent orders and proceedings, the setting aside of the claimant's testimony and entire proceedings of 12<sup>th</sup> July 2018 and the recall of the claimant for cross examination by the respondent. The application was fixed for hearing on 16<sup>th</sup> January 2019. Again the respondent failed to attend court on 16<sup>th</sup> January 2018 and the application was dismissed for non-attendance of the respondent/applicant for non-prosecution of the application.

In his testimony on 11<sup>th</sup> October 2018 the claimant stated that he was employed by the respondent on 7<sup>th</sup> July 2008 and worked until 2013. His last salary was Kshs.24,982 as per pay slip attached to the claimant's bundle of documents at page 5. He testified that on 5<sup>th</sup> July 2013 the owner of the company, a Director, a Mr. Tito, complained that some property was lost. That the Director did not specify what the lost property was. The said Director proceeded to dismiss the claimant together with his colleagues. The claimant testified that they were not

issued with letters of termination.

The claimant testified that the property lost was never disclosed to them, that no investigations were carried out, and that they were never reported to the police. He further testified that they were never called for a disciplinary hearing or given notice before termination.

He prayed that the court finds the termination unlawful and grants him notice, compensation for unfair termination and costs.

In the submissions filed on behalf of the claimant it is urged that the respondent failed to comply with both Section 41 and 43 of the Employment Act. That the averment of the respondent that the claimant was subjected to a disciplinary hearing by the respondent on 5<sup>th</sup> July 2013 is not supported by a letter inviting him for the hearing or minutes of the proceedings of the disciplinary hearing.

The claimant relied on the decision of Ndolo J. in the case of *William Opetu –VS- Mukesh Patel* where faced with a similar situation the court held that the respondent failed to controvert the claimant's evidence or offer alternative reasons for termination of claimant's employment. He prayed for notice as provided in Section 35 and for compensation of 12 months' salary as provided at Section 49 of the Act.

### **Determination**

I have considered the pleadings by both the claimant and the respondent, the evidence adduced by the claimant in court and the written submissions of the claimant.

The issues for determination are whether the claimant's employment was unfairly terminated by the respondent and if he is entitled to the remedies sought.

The respondent did not file any documents with its defence and did not indicate to the court at any time that it intended to file any. In the statement of Defence at paragraphs 5, 6 and 7 the respondent pleads as follows –

“That the decision to terminate the employment of the Claimant was necessitated by the Claimant inability to exonerate and vindicate himself from a syndicate that was involved in the disappearance of company goods in which he was responsible of.

That pursuant to the provisions of the Employment Act, 2007, the Claimant brought himself to the realm of Section 44 (1) and (3). However, the Respondent reduced the disciplinary action to normal termination and paid all terminal dues as per the law.

That the claimant together with his colleagues hatched an elaborate scheme to defraud the respondent of assorted goods that came to the claimant's possession by virtue of his employment”

At paragraph 9, the respondent pleads as follows –

“That the Respondent complied with provisions of Section 41 of the Employment Act of 2007 by taking into account explanation on the missing items by a meeting held on 5<sup>th</sup> July 2013 for which the claimant could not sufficiently clear himself from responsibility of the lost property.”

As submitted by the claimant, there is no proof of a hearing in the nature of either an invitation for the disciplinary hearing or minutes of the meeting. The respondent has not controverted the averments of the claimant. The court has not reason to disbelieve the claimant's testimony. The respondent did not even deny that it did not disclose the identity of the goods that were allegedly lost or deny that the claimant and his colleagues were not issued with letters of termination.

For the foregoing, reasons the court finds and declares the termination of the claimant's employment by the respondent unfair.

### **Remedies**

The claimant prayed for notice and compensation. The respondent at paragraph 10 of the defence pleads that the claimant's summary dismissal was reduced to a normal termination and part of the dues remitted to the employees SACCO for which the claimant was a member to recover a loan owed to the Co-operative by the claimant as a loan recovery. No evidence was adduced of any loan owed by the claimant to the undisclosed SACCO or how much was owed by the claimant to the said SACCO. Further, no evidence was adduced of the remittance to the SACCO or even how much the respondent remitted. In the circumstance, the court finds that there is no proof of remittance of the claimant's terminal dues to the SACCO.

Having been unfairly terminated the claimant is entitled to both notice and compensation. I award him one month's salary in lieu of notice in the sum of Kshs.24,983.

I further award him compensation equivalent to 10 months' salary in the sum of Kshs249,820. In awarding 10 months' salary as compensation I have taken into account the length of service of the claimant, the manner in which his employment was terminated, the casual manner in which the said termination was effected, the fact that he was not paid any terminal dues, the fact that no further terminal dues were due to him and the total sum due which is only **Kshs.274,802/=**.

The respondent shall also pay the claimant's costs to this suit and the decretal sum shall attract interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**