



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1477 OF 2013**

(Before Hon. Lady Justice Hellen S. Wasilwa on 12<sup>th</sup> June, 2019)

**THOMAS MONGARE OYARO .....CLAIMANT**

**-VERSUS-**

**SAMORE ENGINEERING LIMITED .....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Thomas Mongare Oyare filed an Amended Statement of Claim dated 15/08/2016 seeking compensation for unfair termination and payment of terminal benefits against the Respondent, Samore Engineering Limited.

2. He avers that he was employed as a Security Officer by the Respondent on a monthly salary of Kshs. 11,596/= from June 2008 and that he served the Respondent diligently until May 2013 when his services were unfairly terminated for allegedly stealing client’s property being tires and metal beams. That his terminal dues are as follows:

- a. One month’s pay in lieu of notice.....Kshs. 11,596.00**
  - b. Service pay (11,596/30 x 15 x 5 years).....Kshs. 28,990.00**
  - c. Leave (11,596/30 x 21 x 3 years).....Kshs. 24,351.00**
  - d. Public holidays (11,596/30 x 55 x 2).....Kshs. 42,519.00**
  - e. House allowance (15% x 11,596 x 60 months)..Kshs. 104,364.00**
  - f. Overtime (4x6x4x12x5 years x Ksh.48 x 1.5)...Kshs. 414,720.00**
  - g. 12 months’ gross salary compensation for  
unfair termination(12 x 13,335.4).....Kshs. 160,024.80**
  - h. Certificate of service**
- TOTAL.....Kshs. 1,045,125.80**

3. He avers that his employment was oral and was never reduced into writing contrary to the mandatory provisions of **Section 9 of the Employment Act** and that the Respondent did not also give him house allowance or accommodation as required by **Section 31 of the Employment Act**.

4. That he worked during public holidays but was not compensated through overtime payment at double rates and that he also used to work 4 hours overtime each week from Monday to Saturday without being paid. That the Respondent did not give him any notice at all prior to the termination of his services nor was he issued with any show cause letter as required by the principles of natural justice.

5. That he was also not summoned to any disciplinary hearing by the Respondent so as to defend himself against the allegations contained in

the termination letter dated 19/06/2013 and that despite demanding for his dues, the Respondent refused to pay the same. That upon his termination, he reported the matter to the District Labour Officer Industrial Area who wrote a letter dated 10/07/2013 to the Respondent for a conciliation meeting on 16/07/2013, which was however snubbed by the Respondent.

6. The Claimant prays that this Court awards as follows:-

- i. A declaration that the said termination was unlawful, illegal and unfair.**
- ii. The sum of Kshs. 1,045,125.80 as particularised in paragraph 5 of the Claim.**
- iii. The sum of Kshs. 160,024.80 being compensation for unlawful termination.**
- iv. The costs of this suit with interest thereon at Court rates.**
- v. Any other relief as the Court would deem just and expedient.**

7. In his Witness Statement dated 15/08/2016, the Claimant states that he also reported the matter to the Kituo Cha Sheria whereupon the Respondent was issued with a demand notice, which was not responded to. That the Respondent's actions have caused him untold suffering and that the allegations levelled against him are false since he did not steal the company or client's property and neither was he taken to any Court to be charged with stealing.

8. The Respondent filed its Statement of Defence dated 15/05/2014 stating that upon discovering the Claimant was engaged in illegal activities, it conducted independent/external investigations which found that he had stolen its client's fuel (diesel) and dismissed him after he failed to defend himself when he was given the chance to. That the said summary dismissal was therefore justifiable and grounded on gross misconduct in accordance with proper procedure and law and it prays for the dismissal of the Claimant's claim with costs.

9. The Respondent also filed a Witness Statement dated 10/12/2018 by its Director, Edwin Njoroge Njuguna who states that on the night of 28/05/2013, there was a reported theft of 60 litres of diesel from the company's depot belonging to a client and on which date the Claimant was on duty. That in the course of his employment, the Claimant had borrowed money from the company which to date he is yet to refund.

### **Evidence**

10. The Claimant testified in Court that he used to work from 6am to 6pm all seven days in a week and given a payslip as seen in **App 2** and that he wishes to rely on his written statement as his evidence. That he never signed the document alleged by the Respondent and that neither was he given any warning before his dismissal. He stated that he applied for a loan of Kshs. 15,000/= on 13/06/2011 which he has paid completely.

11. On cross-examination, he stated that he only worked during the day, was paid monthly and that he did not know if some things were stolen from the Respondent's premises. That when he asked for a loan of Kshs. 40,000/= he was not given the said amount and that he used to work with Abdi Dida who was also a day guard. That he used to sign in and out of work daily and that he was paid Kshs. 20,000/= by mpesa when he was dismissed.

12. In re-examination, he stated that while the documents and books he signed are with the company, the book showing he worked on public holidays was at home.

13. RW1, Edwin Njoroge testified in Court that he wished to rely on his witness statement as his evidence together with the filed list of documents. That they reported the theft to the Chief's Office - AP centre and when the AP came to investigate, they were not happy with them and that they then invited Devtech, a private investigator who made a report. That Devtech directly linked the Claimant to the theft and that when they called him to explain, he did not show up. That the Claimant showed up after 3 to 4 weeks and they gave him a dismissal letter for absconding duty and for the issue of theft.

14. He also testified that in 2012, CID officers came to their premises looking for the Claimant claiming stolen items were kept in the Respondent's premises and that the Claimant was taken to answer to a case in Mombasa whose status he does not know.

15. He stated that the Claimant used to work from 8am and that in the evening, Dida would come at 5pm to take over until the night guard came at 6pm and that Dida was also a guard on duty during public holidays.

16. On cross-examination, he stated that the attendance register was in their office and that they used to work 6 days weekly while Dida worked on Sunday and used to sign too. That Mr. Ndungu was the one coming early to guard and was a Workshop Manager and that they called the Claimant severally for a disciplinary hearing but he did not come. That the Claimant was not on leave when he was dismissed and that they noticed the theft on Saturday at 3pm.

17. He also stated that he did not have any evidence in Court that the Claimant was given Kshs. 40,000 loan and that they have not filed any counterclaim in respect of the Claimant. That they never paid Claimant anything at dismissal, he did not know how much they owed him as terminal dues and the Claimant was not given house allowance as it was included in the salary.

18. In re-examination, he confirmed that they indeed paid the Claimant the Kshs. 20,000/= after negotiating with the other Directors.

### Claimant's Submissions

19. The Claimant submits that the Respondent did not have any valid reason to terminate his services, as it has not produced any evidence before this Court to prove he stole any property from the company and neither has it issued him with any investigation report. That since his services were unfairly and unlawfully terminated, this Court should award him the prayers and reliefs sought in his Amended Claim.

20. He also submits that the Respondent did not follow the mandatory procedure of disciplining an employee as set out under **Section 41 of the Employment Act** and neither has it produced any record of any disciplinary proceedings. That **Section 42 of the Employment Act** provides for the right to a fair hearing regardless of accusations faced by an employee and that the letter dated 19/06/2013 clearly shows that his employment was terminated and was not a summary dismissal as alleged in the Statement of Defence.

21. It is submitted by the Claimant that **Section 49 as read with Section 50 of the Act** provide that once it is demonstrated that dismissal was wrongful or unfair, then the Court can award him compensation to a maximum of 12 months' gross salary and which he has indeed proved. He also prays that this Court grants him the Certificate of Service in accordance with **Section 51 of the Employment Act** and that the Respondent be condemned to pay the costs of this suit together with interest at Court rates.

### Respondent's Submissions

22. The Respondent submits that **Section 45(2) of the Employment Act** provides for instances when termination of employment by an employer is unfair and that the same is affirmed in Walter Ogal Anuro –v- Teachers Service Commission [2013] eKLR where the court emphasized that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

23. That it indeed communicated to the Claimant the reason for termination and procedurally handled his misconduct as required by **Section 41 of the Employment Act**. That it also gave him the finding of the inquiry in the nature of a report and that it is he who did not acknowledge receipt of both the termination letter and the report. It finally submits that procedural justification is not vitiated where the opportunity to be heard is made available but wasted by the Claimant and that it therefore had a valid reason to act.

24. I have examined the evidence and submissions of the Parties. The issues for determination by Court are as follows:-

**1. Whether the dismissal of the Claimant was justified and fair.**

**2. Whether the Claimant is entitled to the remedies sought.**

25. On the 1<sup>st</sup> issue, the Claimant aver that he was dismissed vide a letter dated 19.6.2013 which indicated that he had committed a misconduct in the form of stealing company and client property namely tires and metal beams.

26. The Claimant in his evidence indicated that he never stole as alleged and neither was he charged with any offence of theft. He avers that he was not ever issued with a show cause letter.

27. From the averments of the Claimant, since the Respondent allege theft, they have the onus of proving this.

28. The Respondent in their Memorandum of Response and their evidence aver that the Claimant stole and the matter was reported to police. They also aver that they called the Claimant to explain himself and he did not show up.

29. The Respondent did not produce any letter inviting Claimant to show cause as alleged. There is also no evidence that they called him to any disciplinary meeting to explain himself.

30. Section 43 of Employment Act 2007 states as follows:-

**1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".**

31. Indeed the Respondent should prove the reasons of dismissal and it is not enough just to allege theft. The Respondent in my view failed to prove they had valid reasons to terminate the Claimant.

32. There is also no evidence that the Respondent accorded the Claimant any fair hearing as envisaged under Section 41 of Employment Act 2007 which provides as follows:-

**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”.

33. In absence of any valid reasons for dismissal of the Claimant and in the absence of evidence that the Claimant was accorded a fair hearing, I find the dismissal of the Claimant unfair and unjustified and I declare it so as provided for under Section 45 (2) of Employment Act 2007 which states as follows:-

2. “A termination of employment by an employer is unfair if the employer fails to prove:

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure”.

34. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 11,596/=

2. Service pay for 5 years =  $\frac{1}{2} \times 11,596 \times 5 = 28,990/=$

3. Leave pay for 1 year = 11,596/=

4. House allowance at 15% of basic pay =  $\frac{15}{100} \times 11,596 \times 60 \text{ months} = 104,364/=$

5. 8 months’ salary as compensation for unlawful termination =  $9 \times 11,596 = 104,364/=$

**TOTAL = 260,908/=**

6. Issuance of Certificate of Service.

7. Claim for overtime is not proved.

8. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 12<sup>th</sup> day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

Omulama holding brief Nyabena for Claimant – Present

Respondent – Absent