



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 832 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETER LUSENO SIKAFU.....CLAIMANT**

**VERSUS**

**B. S. MOHINDRA LIMITED.....RESPONDENT**

**JUDGMENT**

Vide his statement of claim dated 6<sup>th</sup> May 2015 and filed in Court on 19<sup>th</sup> May, 2015, the claimant avers that his employment was unfairly and wrongfully terminated by the respondent, a registered limited liability company.

His case is that he was employed by the respondent on 1<sup>st</sup> May, 1994 as a casual worker earning a monthly salary of Kshs.3,944. He avers stated that his services were later confirmed on 12<sup>th</sup> May 1998 as a washroom cleaner earning a gross salary of Kshs.15,344 per month.

The Claimant contended that during the subsistence of his employment with the Respondent he was verbally assigned messengerial duties to deliver letters and to bank cheques for the Respondent. He further contended that he performed his duties diligently and to the Respondent’s satisfaction until 30<sup>th</sup> August 2013 when he received a letter terminating his services citing neglect of work or carelessly and improperly performing his duties as the reason for his termination.

The Claimant averred that he did appeal against the decision of the Respondent to terminate his services. However, the appeal was declined. He further averred that the dispute was subsequently reported to the Ministry of Labour on 28<sup>th</sup> April, 2014 as required under Section 62 of the Labour Relations Act and the Ministry appointed a conciliator, Mr. R. Kilonzo.

The Claimant averred that conciliation meetings were convened on 24<sup>th</sup> June 2014 and 19<sup>th</sup> August 2014 but no agreement was reached between the parties. A report by the conciliator recommended that the Claimant’s termination be reduced to a normal termination and that the Claimant be paid his terminal dues as per the current Collective Bargaining Agreement.

The Claimant contended that his termination was unfair as the Respondent did not adhere to fair procedure as provided under the Employment Act, 2007.

In his Memorandum of Claim the Claimant seeks the following reliefs:

- (i) Reinstate his services unconditionally without loss of benefits at the same grade, and salary, which he earned before his termination.
- (ii) Pay the Claimant twelve (12) months gross wages for wrongful termination to cushion him for the suffering he has gone through.

**Alternative Prayer**

In the event that reinstatement is not considered by the Court, then the Claimant prays that this Court orders the Respondent to pay him his terminal benefits as follows:

(i) Three (3) months’ pay in lieu of notice 15,344 x 3.....Kshs.46,000



The Claimant submitted that his termination was not in accordance with fair procedure as provided under Section 41 and 45 (2) (c) of the Employment Act, 2007.

The Claimant further submitted that his dismissal by the Respondent for unblocking the sewer line and dumping the waste at the garden and covering it with soil was harsh punishment as a warning would have sufficed under Clause 12 of the Collective Bargaining Agreement.

The Claimant contended that he is entitled to the reliefs sought in his Memorandum of Claim and urged the Court to allow the same as prayed.

### **Respondent's Submissions**

The Respondent on the other hand submitted that it had a valid reason to terminate the Claimant's employment and that due process was followed. The Respondent relied on the findings of the Conciliator to the effect that indeed the Claimant had committed misconduct. It further relied on the Claimant's own written admission.

The Respondent submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim urging the Court to dismiss the same with costs to the Respondent.

### **Analysis and Determination**

There is no dispute that the Claimant was employed by the Respondent in the year 1994 as a casual and his employment confirmed in the year 1998. It is further not in dispute that the Claimant worked for the Respondent continuously until 30<sup>th</sup> August, 2013 when the Claimant's employment was terminated by the Respondent. The issues for determination are:

1. Whether the Claimants' termination was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought.

### **Unfair termination**

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

### **Reason for Termination**

The reason cited for the termination of the Claimant's employment herein was gross misconduct. The particulars are that on 30<sup>th</sup> August 2013 the Claimant was assigned the duty of unblocking a sewer line and damped the waste into the open garden instead of throwing it into the septic tank exposing other employees to health hazard and was a threat to the Respondent's tenants who may decide to pull out of the Respondent's premises. The Respondent termed the Claimant's conduct as negligent and/or improper performance of his duties.

In view of the foregoing, I find that the Respondent had a valid reason for terminating the Claimants' services as was similarly held by the conciliator in his report dated 10<sup>th</sup> March, 2015.

### **Was procedure followed?**

Section 41 of the Employment Act requires that prior to the termination of an employee's services for misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of another employee or shop floor union official the reasons for which his/her termination is being contemplated and be allowed a fair hearing.

In the instant case due process was not adhered to as provided under Section 41 of the Employment Act, 2007. Although the Respondent contends having accorded the Claimant a hearing no evidence was tendered to support this assertion in terms of minutes of a disciplinary hearing as required by law or a letter summoning the claimant for a disciplinary hearing.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

*“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

In Francis Mbugua Boro -Vs- **Smartchip Dynamics Ltd (2017) eKLR** it was held:

*“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 and missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”*

I therefore find that the termination of the claimant's employment did not meet the procedural threshold under Section 41 of the Employment Act and was therefore procedurally unfair.

**Whether the Claimant is entitled to the reliefs sought**

Having found that the termination was unfair the Claimant is entitled to the following reliefs:

i. Three months' pay in lieu of notice as provided in Clause 10 of the CBA, 15,344 x 3.....  
Kshs.46,032

ii. 28 days' pay for each completed year of service being gratuity as provided in Clause 20 of the CBA 28/26 x 15,344 x 19.....  
Kshs.313,962

In respect of the prayer for compensation, I have taken into account the claimant's long service and fairly clean record during the long service of almost 20 years. I have further considered his contribution to the circumstances that led to the termination of his employment as well as the manner in which the termination process was handled which as I have already found above, was in violation of the procedure set under the law. In the circumstances it is my opinion that compensation equivalent to 6 months' salary is reasonable.

I accordingly award in the same in the sum of (15,344 x 6)..... Kshs.92,064

In summary I enter judgment of the claimant against the respondent as follows –

1. Notice	Kshs.46,032.00
2. Gratuity	Kshs.313,962.00
3. Compensation	<u>Kshs.92,064.00</u>
<b>Total</b>	<b>Kshs.452,058.00</b>

The amount is subject to statutory deductions. The claimant is awarded costs and interest from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**