



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 619 OF 2013**

**KEFA OMAE OBIRI.....CLAIMANT**

**VS**

**IMANI MARIANIST ORGANIZATION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 3<sup>rd</sup> May 2013 and amended on 8<sup>th</sup> December 2015, the Claimant has sued the Respondent for unlawful dismissal. The Respondent’s defence is contained in a Memorandum in Reply dated 27<sup>th</sup> June 2013 and filed in court on even date.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called Phyllis Wanjiru Kabogo and Brother Godfrey Seruyomo.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a driver in 1992. From 2003, the Claimant was issued with a three year renewable contract. The Claimant avers that on 28<sup>th</sup> November 2012, his employment was unlawfully terminated. He now seeks the following:

- a) Half salary for the months of May to September 2012.....Kshs. 39,455
- b) Unpaid salary from October 2012 to December 2013.....236,730
- c) Leave allowance for one year.....15,782
- d) Employee pension contribution from  
 May 2012 to December 2013.....15,780
- e) NSSF contributions from May 2012 to December 2013.....4,000
- f) One month’s salary in lieu of notice.....15,782
- g) General damages
- h) Costs plus interest

**The Respondent’s Case**

4. In its Memorandum in Reply dated 27<sup>th</sup> June 2013 and filed in court on even date, the Respondent admits having employed the Claimant. At the time of leaving employment, the Claimant was deployed as a driver and caretaker under a renewable employment contract running from 1<sup>st</sup> January 2012.
5. The Respondent however denies the claim for unlawful dismissal and states that the Claimant had a history of misconduct. In 2003, the

Claimant was issued with a warning letter for unprofessional performance and in 2007, he was suspended to pave way for investigations after some items were stolen from the Respondent's premises in Eastleigh. The Respondent avers that at the time of the incident, the Claimant had custody of the keys and was responsible for locking and opening the said premises.

6. The Respondent further avers that following the suspension, the Claimant wrote an apology for being irresponsible and asked for an opportunity to continue working. He was retained and continued working as a driver and caretaker.

7. In 2008, the Claimant was issued with a warning letter on account of misconduct. In 2009, he was suspected of stealing a mobile phone belonging to a student. He denied the allegation but agreed to pay KShs. 2,500 to the student as compensation for the lost phone.

8. In 2012, following the theft of a generator, the Claimant was suspended and on 24<sup>th</sup> November 2012, he was dismissed. It is the Respondent's case that the Claimant's dismissal was justifiable on account of gross misconduct. The Respondent further maintains that the Claimant was paid all his dues.

### **Findings and Determination**

9. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

10. The Claimant's employment was terminated by letter dated 28<sup>th</sup> November 2012, stating as follows:

*"Dear Sir,*

**RE: SUMMARY DISMISSAL**

*This is to notify you that the management of Imani Marianists has summarily terminated your services with effect from 30<sup>th</sup> April, 2012 when you were suspended from duty for gross misconduct in terms of section 44 (4) (g) of the Employment Act 2007.*

*The circumstances leading to this decision are that following the theft and loss of the organization's generator on 26<sup>th</sup> April 2012, you and **Mr. David Ole Pemba Koisany** were reasonably suspected to have stolen the said generator because you were responsible for locking the premise where the said generator was and **Mr. David Ole Pemba Koisany** was the guard on duty when the loss occurred.*

*In view of this and the previous incidents where five tyres were stolen from Imani Marianists stores and in which you were the prime suspect among many other such incidents, the organization has lost faith in you and it has become untenable to retain you in the organization work force hence this decision to terminate your services from the date of suspension.*

*Please arrange to hand over all the organization properties that may still be in your possession at the office during working hours.*

***Yours faithfully***

***Imani Marianist Organization***

*(Signed)*

***Fr. Gabriel N. Kirangah, SM.***

***Director, Imani Marianists."***

11. Prior to the dismissal, the Claimant had been sent on suspension from 30<sup>th</sup> April 2012. The suspension letter terms the Claimant as one of two prime suspects in theft of a generator valued at KShs. 46,000. According to this letter, the Claimant was suspended, pending investigations by the Police. The Claimant told the Court that he recorded a statement at Pangani Police Station and was subsequently called as a prosecution witness in a criminal case against his former colleague, David Ole Pemba Koisany, who was later acquitted.

12. No investigation report was availed to the Claimant and none was presented before the Court. It would appear therefore that the decision to dismiss the Claimant on account of gross misconduct was not preceded by any disciplinary hearing. Indeed, the dismissal letter itself indicates that the decision was made out of suspicion. I must point out that mere suspicion against an employee is not enough reason for dismissal. An employer considering such a drastic action must give the employee notice of the charges against them and allow them reasonable time to prepare and present their defence. Only then, can the employer's suspicion be vindicated.

13. Evidently, this did not happen in this case and the Court finds that the Respondent failed to establish a valid reason for the Claimant's dismissal as required under Section 43 of the Employment Act, 2007. The Respondent also failed the procedural fairness test set by Section 41 of the Act.

#### **Remedies**

14. In light of the foregoing, I award the Claimant eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service tempered with his employment record. I have also taken into account the Respondent's conduct in the dismissal transaction. I further award the Claimant one (1) month's salary in lieu of notice.

15. Regarding the claim for half salary withheld during the period of suspension, I have this to say; suspension is ordinarily a neutral action by which an employee is required to step aside to allow for unfettered investigations into allegations facing them. Suspension should not therefore attract any adverse action against the employee, such as withholding of salary, unless there is statutory basis for such adverse action. (see *Rashid Jeneby v Prime Bank Limited [2015] eKLR*). No basis was laid for withholding half of the Claimant's salary during suspicion. The claim on this account therefore succeeds and is allowed.

16. The dismissal letter dated 28<sup>th</sup> November 2012, sought to backdate the Claimant's dismissal to 30<sup>th</sup> April 2012, being the effective date of suspension. The Court did not find any legal basis for such a decision. Consequently, the Court finds and holds that the effective date of the Claimant's dismissal was 28<sup>th</sup> November 2012, when the decision to dismiss the Claimant was communicated to him. The Claimant is therefore entitled to salary up to and including 28<sup>th</sup> November 2012.

17. The Claimant told the Court that he was not paid his salary for the month of November 2012, which claim succeeds and is allowed. The Claimant further testified that he did not utilize his leave for the year 2012 and the Respondent did not produce any leave records to counter this claim which therefore also succeeds and is allowed.

18. No basis was laid for the claims for employee pension and NSSF contributions which consequently fail and are dismissed.

19. In the end, I enter judgment in favour of the Claimant in the following terms:

a) 8 months' salary in compensation.....	Kshs. 158,344
b) 1 month's salary in lieu of notice.....	19,793
c) Salary withheld during suspension (9,896x6 months).....	59,376
d) Salary for November 2012.....	19,793
e) Prorata leave pay for 2012 (19,793/30x1.75x11).....	<u>12,700</u>
<b>Total.....</b>	<b>270,006</b>

20. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

21. The Claimant will have the costs of the case.

22. Orders accordingly.

**DATED AND SIGNED AT MALINDI THIS 30<sup>TH</sup> DAY OF JANUARY 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Mochache for the Claimant

Mr. Kimathi for the Respondent