



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CIVIL SUIT NO. 2144 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

NICHOLAS MBUVI NZIOKI.....CLAIMANT

=VERSUS=

KAMCO STAINLESS STEEL LIMITED.....RESPONDENT

**J U D G M E N T**

1. The Claimant prays for maximum compensation equivalent to 12 months salary in compensation for wrongful dismissal and payment of terminal benefits set out as follows:-

- |                                       |               |
|---------------------------------------|---------------|
| a. One month salary in lieu of notice | Kshs. 17,000. |
| b. Arrear salary for September 2013,  | Kshs. 11,000. |
| c. House Allowance                    | Kshs. 38,250. |
| d. Gratuity                           | Kshs. 15,300. |
| e. Leave Allowance                    | Kshs.204,000  |

and

- f. Certificate of Service

2. The Claimant is opposed vide a Memorandum of Response filed on 9<sup>th</sup> June, 2015 in which the Respondent prays the entire claim be dismissed with costs.

**Facts of the Claim**

3. The Claimant was employed by the Respondent as a welder on 2<sup>nd</sup> July, 2012 earning a daily wage of Kshs.650, paid weekly.

4. On 16<sup>th</sup> September, 2013, the Claimant was arrested by the police at the workplace on allegations made by the employer that himself and colleagues had stolen a welding machine. The claimant was remanded in custody and he told this court that his colleague paid the police Kshs.10,000 and was set free.

5. The Claimant was charged with theft and remained in custody until the case was heard and determined on 18<sup>th</sup> July, 2014 as he was unable to raise cash bail or bond.

6. The Claimant was acquitted of the charges, there being no evidence at all. The Claimant went back to reclaim his job and or terminal dues but, and was chased away by Mr. Kitche, the Director.

7. The Claimant wrote a demand letter, it was not heeded to hence this suit. The claimant prays for the enumerated reliefs.

8. Claimant testified that he had a clean record without any warning, was not given any notice to show cause nor was he called to a disciplinary hearing. He was not paid for days worked, and was not paid in lieu of notice. The Claimant did not get a certificate of service and was not granted leave for one year and 3 months nor was he paid in lieu thereof. The Claimant claims gratuity in the period served and payment of house allowance from July to September. He was treated as a casual hence was denied the above.

9. The Claimant denied having stolen the welding machine stating that it was kept in the store by the watchman. The Claimant stated that he lost his job unlawfully and unfairly. The Claimant added that he did not receive letter of termination of employment but was in custody and could not report to work during the period.

### **Response**

10. The Respondent called RW1, Bernard Mburu Ngugi an accounts clerk for the Respondent from 2009. RW1 told the court that the claimant was a casual labourer and worked as a welder from 19<sup>th</sup> March, 2013. That he was paid Kshs.17,000 paid in cash every week. He signed petty cash vouchers and was last paid on 21<sup>st</sup> September, 2013.

11. RW1 testified that on 22<sup>nd</sup> September, 2013, which was a Sunday, the Claimant was not at work. On 23<sup>rd</sup> September, 2013 a welding machine was stolen. The Claimant was suspected of theft and was arrested by police. That the Claimant never came back to work again. That RW1 saw him in court since the arrest. That the Respondent did not terminated his employment but he was replaced since he was in custody and could not attend work.

12. RW 1 stated that the Claimant did not take leave and that he was paid salary for September 2013 on 21<sup>st</sup> September, 2013. He was not given certificate of service because he disappeared. The Claimant was not registered with NSSF because he was not yet confirmed. He was on probation according to RW1. He served for 7 months. His probation was extended for absenteeism. RW 1 denied that the Claimant had served the Respondent from 19<sup>th</sup> March, 2013. RW1 prayed the suit be dismissed with costs.

### **Determination**

13. The issues for determination are:-

- (i) Whether the separation of the Claimant from the Respondent was lawful.
- (ii) Whether the Claimant is entitled to the reliefs sought.

### **Issue i**

14. It is common cause that the Claimant was arrested upon allegations by the Respondent that he had stolen a welding machine. The Claimant remained in custody for a period of about a year and could therefore not go to work. The Respondent did not institute any disciplinary process against the Claimant and did not terminate his employment.

15. The Claimant states that the Respondent falsely accused him and this was evidenced by the acquittal by the court. That upon acquittal he returned to work to be reinstated and be paid arrear salary but was chased away by the Respondent.

16. Section 44(4) of the Employment Act, 2007 provides for summary dismissal if:-

***“(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or”***

17. The employer must summarily dismiss the employee, pay any arrear salary, and terminal dues owing to the employee and provide him with a certificate of service to assert the right to summarily dismiss the employee under the provisions of section 44 of the Act.

18. In the present case, the Respondent did not summarily dismiss the Claimant, and therefore the Claimant was entitled to report back upon acquittal and claim his job back and arrear salary for days worked.

19. The court is persuaded by the decision of ELRC Court in **Wilberforce Ojiambo Oundo vs Regional Management Limited [2013] eKLR**, where the learned Judge stated –

***“It follows therefore that just like an employer is not required to await the outcome of a criminal trial before taking disciplinary action against an employee, the employee’s rights cannot be held in abeyance pending the outcome of a criminal trial”***

20. In the present case, the Respondent was the complainant in the Criminal Case against the Claimant and was aware of his whereabouts. Nothing stopped the Respondent from summarily dismissing the Claimant and pay his terminal benefits but it chose not to. The Respondent was therefore duty bound to give the Claimant due process upon his return, which it didn’t and for this reason, the court deems the dismissal to have occurred when the Claimant returned to work and was chased away by the Respondent without a hearing, having been acquitted and without payment of his lawful dues.

21. This dismissal was unlawful and unfair in the circumstances of this case, the Claimant having been acquitted and having been not

subjected to a disciplinary hearing.

22. The conduct by the Respondent violated sections 41, 43, 44 and 45 of the Act and the dismissal upon acquittal was therefore wrongful, unlawful and unfair.

**Issue ii**

23. The next issue for determination is whether the Claimant is entitled to the reliefs sought. The court will deal with the items seriatim as follows:-

**a. One Month Salary in Lieu of Notice**

24. RW1 admitted that the Claimant was paid Kshs.17,000 per month at the time of Separation. The Claimant was chased away without notice upon his return to work after acquittal. The Respondent having chosen not to discipline the Claimant until he came back was obliged to pay the Claimant one month salary in lieu of notice in the sum of Kshs.17,000, and the court so awards.

**b. Arrear Salary**

25. The court is satisfied that the Claimant was arrested on 23<sup>rd</sup> September, 2013 and was not paid salary for days worked in September. The court awards the Claimant Kshs.11,000 arrear salary.

**c. House Allowance**

26. The court is satisfied that the Respondent used to pay house allowance to the Claimant but had not paid the same for the months from July 2012 to September 2013 at 15% of the basic salary. The court awards the Claimant Kshs.38,250 in respect thereof.

**d. Gratuity**

27. The court is also satisfied that the Claimant was not registered with NSSF and was entitled to payment of service gratuity for the period served in terms of section 35(5) & (6) of the Employment Act 2007 in the sum of Kshs.15,300 and awards accordingly.

**e. Leave**

28. The court is equally satisfied that the Claimant was not granted leave for one year and three months and was not paid in lieu thereof and grants him Kshs.18,750 in respect thereof.

**f. Compensation**

29. In terms of section 49(1)(c) as read with sub-section 49(4), following the finding that the Claimant was unlawfully summarily dismissed after he had been away in custody, and actually acquitted by the court of the allegation, made against him by the Respondent, the court finds that the claimant is entitled to compensation for the loss and damage occasioned to him by the Respondent.

30. The Claimant was falsely accused of theft; was wrongfully incarcerated at the behest of the Respondent. The Claimant was not paid for days worked, was not paid his terminal dues upon dismissal and was not given a certificate of service. The court finds that the Claimant did not contribute to the summary dismissal since no disciplinary process was carried out against him nor was he summarily dismissed upon his arrest.

31. This is a proper case to award the Claimant maximum compensation for the immense loss he incurred due to false allegations made against him by the Respondent equivalent to 12 months salary in the sum of Kshs.204,000. The court would have considered an award of General and Aggravated Damages for malicious prosecution and false imprisonment had the same been sought, this being an unfortunate case, where an employee spent about one year in custody following false allegations by an employer.

32. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

- a. Kshs.17,000 in lieu of notice.
- b. Kshs.11,000 arrear salary
- c. Kshs.38,250 House Allowance
- d. Kshs.15,300 Gratuity
- e. Kshs.18,750 in lieu of Leave.
- f. Kshs.204,000 compensation.

Total award Kshs.304,300.

g. The award in (a) to (e) is payable with interest at court rates from date of filing suit till payment in full whereas the award in (f) is with interest at court rates from date of judgment till payment in full.

h. Respondent to pay costs of the suit.

**Dated and Signed in Kisumu this 14th day of March, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 6th day of April, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Mwangambo for Claimant

M/s Gitonga for Respondent

Anne Njung'e – Court Clerk