



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 844 OF 2016**

**ABDUL YUSUF.....CLAIMANT**

**VS**

**MAWINGO CONSTRUCTION 2010 LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This dispute arises from an employment relationship between the Claimant Abdul Yusuf and his former employer, Mawingo Construction 2010 Ltd. The claim is documented by a Memorandum of Claim dated 17<sup>th</sup> October 2016 and filed in court on 28<sup>th</sup> October 2016.

2. The Respondent filed a Memorandum of Response on 28<sup>th</sup> June 2017 but did not attend the hearing in spite of due notice. The Court therefore heard the Claimant *ex parte* on 20<sup>th</sup> February 2018.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent sometime in May 2016, in the position of Plant and Workshop Supervisor. He adds that he earned a monthly salary of Kshs. 51,923.

4. The Claimant states that the Respondent terminated his employment on account of redundancy without observing the procedure established in law. He terms the termination unlawful and unfair and claims the following:

- a) Notice pay.....Kshs. 51,293
- b) Salary for July 2016.....51,293
- c) 12 months’ salary in compensation.....623,076
- d) Certificate of service
- e) Costs

**The Respondent’s Case**

5. In its Statement of Response dated 28<sup>th</sup> June 2017 and filed in court on even date, the Respondent admits having employed the Claimant on probation but disagrees with the monthly salary pleaded in the Memorandum of Claim.

6. The Respondent avers that the Claimant was summarily dismissed on the ground of gross misconduct, including theft of company property and use of abusive and disrespectful language towards his employer.

**Finding and Determination**

7. 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**

8. In his Memorandum of Claim, the Claimant pleads that his employment was terminated on account of redundancy. The Respondent on the other hand, states that the Claimant was dismissed on grounds of gross misconduct. The Claimant himself produced an undated letter signed by the Respondent's Administration Manager, suspending him pending investigations into allegations of failure to follow instructions and engaging in verbal confrontation with the Respondent's Managing Director.

9. From the foregoing, the Court did not find any basis for the Claimant's averment that his employment was terminated on account of redundancy. Rather, the Court discerns that the Claimant was actually summarily dismissed on allegations of gross misconduct.

10. In the final submissions filed on behalf of the Claimant on 9<sup>th</sup> April 2018, reference was made to the decision in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* where it was affirmed that an employer's right to summarily dismiss an employee does not derogate from the employee's right to fair hearing guaranteed under Section 41 of the Employment Act, 2007.

11. I agree that this is the correct legal position and add that for an employer to prove the grounds for summary dismissal under Section 44 of the Act, they must have afforded the employee the procedural fairness requirements established under Section 41.

12. In the instant case, there was no evidence of any such process, leading to the inescapable conclusion that the Claimant's dismissal was substantively and procedurally unfair.

### **Remedies**

13. Before pronouncing the final award, I need to deal with a side issue raised by the Respondent in its Statement of Response, to the effect that at the time of leaving employment, the Claimant was on probation. If this were the position, Section 42 of the Employment Act would remove the Claimant from the procedural fairness cover provided by Section 41 of the Act.

14. Nevertheless, and noting that Section 2 of the said Act requires a probationary contract to be in writing, the Court found no evidence to support the Respondent's averment. It is my finding therefore that at the time of leaving employment, the Claimant was not on probation.

15. There is a second issue of a preliminary nature also raised by the Respondent in its Statement of Response and it is this; that the salary of Kshs. 51,293 pleaded by the Claimant is incorrect. The Respondent even suggests that the payslip for the month of July 2016, produced by the Claimant is a forgery.

16. This is all very well but the Respondent, as the custodian of employee records, should have produced the correct version of the Claimant's pay slip. Having failed to do so, they cannot be heard to question what the Claimant has produced. Section 10(7) of the Employment Act allows the Court to adopt the Claimant's evidence in this regard, which I hereby do.

17. That said, I proceed to award the Claimant three (3) months' salary in compensation. I further award him one (1) month's salary in lieu of notice.

18. On the face of it, the Claimant's pay slip for July 2016, which he himself produced, confirms receipt of the subject salary. Without further evidence the Claimant has failed to lay a basis for the claim thereon, which therefore fails and is dismissed.

19. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....Kshs. 153,879

b) 1 month's salary in lieu of notice.....51,293

**Total.....205,172**

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

21. The Claimant is also entitled to a certificate of service and costs of the case.

22. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF MAY 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Anaya for the Claimant

No appearance for the Respondent