



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 1033 OF 2012**  
**JOHN E. KIHUMBA MUYA.....CLAIMANT**  
**VERSUS**  
**NAIROBI INSTITUTE OF BUSINESS STUDIES LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 18.6.2012 alleging unfair dismissal by the respondent and sought the following reliefs:

a. One month salary in lieu of notice	Kshs 69,300
b. 12 months' salary as compensation for wrongful dismissal	Kshs 83,600
c. 10 days leave for 2011	Kshs 30,000
d. Leave for 2012	Kshs 5,775
e. Salary for January 2012 inclusive of 10% increment	Kshs 69,300
f. Salary for 6 days in February, 2012	Kshs 14,338
g. Gratuity of one month salary per year of service	Kshs 693,000
<b>Total</b>	<b><u>Kshs 1,713,308</u></b>

2. The respondent admitted dismissing the claimant on 16.3.2012 for gross misconduct and denied that the dismissal was unfair or wrongful. She averred that the dismissal was justified due to the claimant's misconduct as stated in the termination letter which was erroneously dated 6.2.2012 instead of 16.3.2012. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 20.2.2018 when the claimant testified as CW1 but the respondent never called any witnesses to support her defence. After the hearing only the claimant filed written submissions which I have carefully considered herein alongside the evidence tendered.

**Claimants Case**

4. The Claimant testified that he was employed by the respondent as an Accountant, then Administration Manager, Premises Manager, Course Co-ordinator and a lecturer. He started with a salary of Kshs 25,000 per month but as at December, 2011 he was earning Kshs 63,000 gross per month. He was never issued with a written contract like other employees but he worked without any disciplinary issues.

5. The Claimant further testified that in December 2011, the respondent closed down for long vacation but he was asked by the respondent's finance manager Mr Mburu Wanyoike to remain and supervise repair works that were on going. While in his office, Cw1 noticed that the store adjacent to his office had been broken into and called the storekeeper over the phone who confirmed that he had left the store securely locked. He then reported the matter to the finance manager Mr Wanyoike over the phone and further made a report to Kamukunji Police Station. Thereafter he was told to report back to the police station on 17.1.2012 but then he was made to keep reporting there until 26.1.2012 when he was charged in Makadara Court with the offence of stealing Kshs 2400 from Mr Wanyoike. The charges were however substituted with that of stealing by servant, forgery and uttering false documents but after the trial he was acquitted on all the said charges.

6. The claimant further testified that on 6.2.2012 he received a telephone call from the respondent's office asking him to pick a letter which turned out to be a termination letter. The letter cited absconding as the reason for the termination and required him to clear and cooperate in that matter. That later in April 2012, he received another letter dated 16.1.2012 which summarily dismissed him from the employment. He contended that the termination was unfair because he was not accorded any prior hearing in the presence of a fellow employee of his choice and that he was not issued with a certificate of service. He therefore prayed for the reliefs pleaded in his claim plus damages for malicious prosecution.

7. On cross-examination the claimant stated that he joined the respondent on 22.10.2002. He contended that he only noticed the breakage on the store from his office but denied knowledge of the person who broke into the same. He further contended that after noticing the breakage he reported the same to the storekeeper, finance manager and the police. That from 17<sup>th</sup> - 26<sup>th</sup> January, 2012 he was directed by the finance manager to be reporting to the police station and the police kept on telling him to wait.

8. The Claimant further stated that on 6.2.2012 he received a call from the respondent's secretary telling him to go for his letter which stated that after being charged with Criminal case No 495 of 2012, he had absconded duty and that he had lost interest in the company's employment. That after collecting the letter he was not allowed in the institute again to do clearance as directed until April, 2012 when he received the dismissal letter which showed that it was posted on 19.3.2012. The letter citing forgery as the reason for his dismissal.

### **Analysis and Determination**

9. After careful consideration of the un rebutted evidence by the claimant, it is clear that he was terminated by the letter dated 6.2.2012 for absconding from work from the time he was charged in court. Although he was required to clear and cooperate, he was not allowed back to the institute from that day. He therefore believed that the subsequent dismissal letter posted to him on 19.3.2012 was of no consequence. I agree with him. The issues for determination herein are:

- a. Whether the termination of the claimant's employment contract was unfair.
- b. Whether the claimant is entitled to the reliefs sought.

### **Unfair Termination**

10. Under section 45 of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. The claimant contended that he was served with a termination letter dated 6.2.2012 and later he was served with a dismissal letter dated 16.1.2012, posted on 19.3.2012 and received on 29.4.2012. The respondent pleaded in her defence that the termination was effected through the dismissal letter erroneously dated 16.1.2012 instead of 16.3.2012.

### **Reason for the termination**

11. The reason for the dismissal according to the letter dated 6.2.2012 was absconding from work by the claimant after being charged with a criminal offence. The claimant denied the alleged absconding by his demand letter dated 9.2.2012, only 2 days after the termination. The respondent has not adduced any evidence to prove that the claimant absconded from work without permission or just cause contrary to section 44 (4)(a) of the Employment Act. The burden of proving the reason for dismissing an employee is upon the employer by dint of section 43 and 45 of the Employment Act. That burden has not been discharged herein and I therefore return that the dismissal of the claimant was not justified.

### **Procedure followed**

12. Under section 41 of the Employment Act, the employer is required in mandatory terms to accord his employee a fair hearing before terminating his services on account of misconduct, poor performance or physical incapacity. The hearing entails explaining the reason for the intended termination to the employee in a language he understands and in the presence of another employee or shop floor union official of his choice and thereafter accord the employee and his chosen companion a chance to air their representations for consideration before the termination is decided. In this case the said hearing was never accorded to the claimant before the termination. The reason for the said default was not explained in evidence.

13. In view of the failure by the respondent to prove a valid and fair reason for dismissing the claimant as required by section 43 and 45 of the Employment Act, plus the failure to accord him the kind of hearing prescribed by section 41 of the Act, I return that the dismissal of the claimant was unfair and wrongful.

### **Reliefs**

14. Under section 49 of the Employment Act, I award the claimant one month salary in lieu of notice plus 10 months' salary as compensation for the unfair dismissal. In awarding the said compensation, I have considered the claimant's long service and the fact that he was not paid any gratuities after the dismissal. I have further considered that he never contributed to his dismissal through the misconduct cited as the reason for the termination.

15. The claimant is further awarded 10 leave days for 2011 because it has not been disapproved by leave records. The claim for leave for 2012 is however dismissed for lack of particulars. The salary for January to 6.2.2012 is granted. The awards herein are based on the salary of Kshs 63,000 contained in the pay slip for December 2011. The alleged increment of 10% is dismissed for lack of evidence. Finally the claim for gratuity is dismissed for lack of legal and contractual basis.

### **Conclusion and Disposition**

16. I have found that the claimant was dismissed vide the dismissal letter dated 6.2.2012. I have further found that the dismissal was unfair because it was not grounded on a valid and fair reason and fair procedure was not followed. Consequently I enter judgment for the claimant in the following terms:

<b>a. One month notice</b>	<b>Kshs 63,000.00</b>
<b>b. Compensation</b>	<b>630,000.00</b>
<b>c. Leave for 10 days in 2011</b>	<b>24,250.75</b>
<b>d. Salary for January 2012</b>	<b>63000.00</b>
<b>e. Salary for 6 days in February 2012</b>	<b><u>14338.00</u></b>
<b>Total</b>	<b>Kshs <u>794588.75</u></b>

17. Claimant is also awarded certificate of service, costs and interest from the date hereof. The said award shall be paid subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 9<sup>th</sup> day of November, 2018**

**ONESMUS N. MAKAU**

**JUDGE**