



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

**AT KISUMU**

**CAUSE NO. 152 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**FELIX OUMA OGADA.....CLAIMANT**

**VERSUS**

**FOAM MATTRESS LIMITED.....RESPONDENT**

**JUDGMENT**

The claimant was employed by the respondent, a limited liability company operating in Kenya whose sole business is the manufacture of foam mattresses. The claimant was engaged as a loader in March 2004.

The claimant was summarily dismissed from employment by letter dated 2<sup>nd</sup> December 2014. Accordingly to the letter of dismissal dated 2<sup>nd</sup> December 2014, the reason for dismissal is that the claimant colluded with other employees to conceal a heavy density mattress that he wanted to buy and pass it off as a deluxe mattress, which was of a lower density.

The respondent manufactures different qualities of mattress which are identified by the colour. White for low density, grey for medium density and pink for high density.

The mattress covers are also different colours; blue fabric is for medium density, heavy duty multi-coloured fabric for high density mattresses.

In the present case a high density mattress was covered with blue fabric instead of heavy multi-coloured fabric. It was about to be loaded on a sales vehicle when it was intercepted by a security guard when checking for verification.

Investigations and CCTV footage revealed that one Gilbert took the slices to one Bernard who stitched it. One Wandolo carried it from cutting machine to deluxe department and Felix, the claimants assisted in carrying the mattress to the loading section.

The claimant was issued with a show cause letter on 19<sup>th</sup> November 2014. He responded on the same day stating that he wanted to buy a deluxe mattress from the sales driver, one Dominic and paid Shs.3,100 for it, took the mattress from the store and informed Ronald to have it loaded in Dominic's vehicle. He stated that he was not aware that it was a heavy duty mattress as he chose it based on the colour of the fabric.

According to the claimant his dismissal was unlawful and in breach of the Employment Act. The respondent however states that the claimant having been a loader for 10 years was aware that no mattress was to be sold at the factory as all purchases were done at the shop. That the company has a standing procedure for movement of mattress slices, that deluxe department is only supposed to stitch medium density mattresses, that it was standard policy that a loader is supposed to get goods directly from the store but on this day Felix carried the particular mattress from the deluxe department where it was stitched, took it to PVC where he had it sealed with a polyethylene cover as a special order from the office then carried it to the

loading bay where it was intercepted.

It is the respondent's submission that the sequence of events which was consistently against company policy, gave rise to a conclusion that there was intention on the part of the claimant together with his colleagues to irregularly procure the mattress.

It is the respondent's submission that the dismissal of the claimant complied with fair procedure. He was issued with a show cause letter on

19<sup>th</sup> November 2014, which he responded to. The claimant further recorded a statement on 20<sup>th</sup> November 2014. He was subjected to a disciplinary hearing on 22<sup>nd</sup> November 2014 and 28<sup>th</sup> November 2014. At the meeting of 22<sup>nd</sup> November 2014 the management and union were represented. The disciplinary committee recommended the dismissal of Messers, Bernard, Gilbert, Wandolo and the claimant, Felix.

### **Determination**

I have considered the pleadings and evidence on record. I have further considered the submissions of the parties.

The issues for determination are whether the summary dismissal of the claimant was fair both substantively and procedurally and whether he is entitled to the prayers sought.

It is not in dispute that the claimant together with the other employees involved in the incident of passing off a high density mattress as a medium density mattress were all subjected to two disciplinary hearings on 22<sup>nd</sup> and 28<sup>th</sup> November 2014. It is further not in dispute that at both disciplinary hearings the claimant was represented by shop floor union officials.

It is further not in dispute that there was concealment and passing off of a high density mattress as a medium density mattress and that the scheme involved several employees including the claimant who were all found culpable.

I find that the summary dismissal was for valid reason and that the claimant was subjected to fair procedure.

On remedies, the claimant having been summary dismissed is not entitled to notice. The claimant was paid in lieu of annual leave as is evident from the respondent's appendix 13. He is therefore not entitled to the prayer for annual leave.

The claimant was paid a daily wage which is inclusive of housing allowance. His prayer for house allowance must thus fail.

He was a member of NSSF as demonstrated by the statement at appendix 12 of respondent's bundle of documents and his prayer for service pay cannot stand.

Having found that the summary dismissal of the claimant was both substantively and procedurally fair, he is not entitled to any compensation for unfair dismissal.

The result is that the entire claim fails. The same is accordingly dismissed. Each party shall bear its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**