



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1750 OF 2014**

*(Before D. K. N. Marete)*

**DUNCAN MUGO MUNYI.....CLAIMANT**

**VERSUS**

**SENECA EAST AFRICA.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim filed on 8th October, 2014. The issues in dispute are therein cited as;

- *Unlawful and unfair termination/dismissal*
- *Non-payment of full terminal dues and benefits*

The respondent in a Statement of Response dated 10th June, 2015 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times relevant to this claim and particularly on or about 14th March, 2009, he was employed by the respondent as a Senior Security Supervisor. He served with loyalty and diligence until 16th December, 2013 when his services were terminated by the respondent.

The claimant's further case is that the termination was unfair and unlawful on the following grounds.

- a) The respondent did not follow the procedure laid down in the Employment Act;*
- b) The respondent terminated the claimant services without proving that the reason for the termination was valid;*
- c) The respondent did not give the claimant termination notice as provided in the Employment Act;*
- d) The respondent did not act in accordance with justice and equity;*
- e) The respondent terminated the claimant without giving him his lawful leave days contrary to the Employment Act; the claimant went for leave only in 2011 and 2012;*
- f) The respondent did not give claimant his lawful rest days;*
- g) The respondent illegally and unlawfully deducted Kshs 300/= for uniform from the claimant's salary each month;*
- h) The respondent did not pay the claimant's full salary for the month of November 2013;*
- i) The respondent did not pay the claimant's 16 days he worked for the month of December;*
- j) The respondent did not pay Gratuity/service pay to the claimant;*
- k) The respondent failed and/or neglected to give the claimant a Certificate of Service as required by the Employment Act;*

At the time of termination he earned Kshs.15,000.00 per month.

He claims as follows;

a) One month salary in lieu of notice	Kshs.15,000.00
b) Rest days for 46 months*4 days each month*Kshs500	Kshs.92,000.00
c) Leave days for 2009, 2010 & 2013 (49.5 days *Kshs.500)	Kshs.24,750.00
d) Salary arrears for the month of November 2013	Kshs.631.00
e) Unpaid salary for 16 days worked in December 2013 (16 days * Ksh.500)	Kshs.8,000.00
f) Kshs.300/= deducted each month for uniform (46 months * Kshs300)	Kshs.13,800.00
g) Unremitted PAYE for 46 months (46months*Kshs.549)	Kshs.25,800.00
h) Unremitted NSSF for 46 months (46months*Kshs.200)	Kshs.9,200.00
i) Unremitted NHIF for 46 months (46months*Kshs.320)	Kshs.14,720.00
j) Gratuity/service pay 15 days each year (Kshs 7500*3 Years)	Kshs.22,500.00
k) Twelve months wages for loss of employment (12mths * 15,000.00)	<u>Kshs.180,000.00</u>
<b>TOTAL</b>	<b><u>Kshs.406,401.00</u></b>

He prays as follows;

- a) A declaration that the Claimant's termination was unlawful and/or unfair.
- b) An order for the Respondent to pay the Claimant Kshs.406,401.00
- c) Interest on (b) above at court rates.
- d) Cost of this claim.

The respondent case is a denial of the claim.

It is the respondent's case that the claimant deserted his duties and the issue of termination did not arise, or at all. He was summoned to the head office for disciplinary action but refused to report and has been at large ever since.

It is the respondent's other case that the claimant is the author of his own predicament and is not deserving of the prayers sought. He deserted with the respondent's equipments which included uniform, company identity card, boots and never cleared as demonstrated in appendix A, B and C of the response.

The respondent also denies any issue of demand and notice to sue by the claimant.

The matter came to court variously until the 16th October, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. The claimant in his written submission dated 29th October, 2018 submits a case of unlawful termination of employment.

It is his further submission that the respondent terminated his employment without giving reasons as stipulated by section 41 (1) of the Employment Act, 2007 as follows;

*When an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

The claimant's further submission is that the respondent's allegation that the claimant deserted duty after being found drunk by his immediate supervisor and also failed to report on being summoned for disciplinary actions at the head office is not supported by any evidence such as a letter summoning the respondent for disciplinary action.

Again, the allegation by the respondent of termination on grounds of gross misconduct is not supported by a follow up of the procedure envisaged by section 44 (4) of the Employment Act, 2007 which enlists matters which amount to gross misconduct thus entitling an employer to resort to dismissal on account of gross misconduct. In the instant case, the claimant was never given an opportunity to dispute the allegation made against him before dismissal in contravention of the provisions of the law as set out above.

The claimant was also not issued with any notice of termination. The respondent has also not complied with section 10 (7) of the Employment Act, 2007 which clothes her with a duty of maintaining a written record of employment as follows;

*"if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of the employment shall be on the employer."*

The respondent in her written submissions dated 31st October, 2018 reiterates her case of no termination of employment. This is on the basis that the claimant deserted duty and was not available for disciplinary action or termination, or at all. A case of termination of employment does not therefore arise in the circumstances.

This is a matter of your case against mine. It therefore must be determined on a balance of probabilities and not so much, a preponderance of evidence. In the circumstances, the pendulum tilts in favour of the claimant's case. A balance of probability and the slight sensibility of preponderance of evidence tilts in his favour. This is because the respondent, as is submitted by the claimant does not in any way demonstrate a case of desertion from duty. This being the principality of her defence, her case is left naked and bare. I therefore find a case of termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. On a finding of termination of employment, and the respondent being unable to justify a case of termination of employment, a case of wrongful, unfair and unlawful termination of employment ensues. I therefore find a case of wrongful, unfair and unlawful termination of employment in the circumstances.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim, declare relief and order as follows;

i) A declaration be and is hereby issued that the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful.

ii) One (1) months salary in lieu of notice.....Kshs.15,000.00

iii) Six (6) months compensation for unlawful termination

of employment Kshs.15,000.00 x 6=.....Kshs.90,000.00

**Total Claim.....Kshs.105,000.00**

iii) The costs of the claim shall be borne by the respondent.

**Dated and signed this 29<sup>th</sup> day of November 2018.**

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 3<sup>rd</sup> day of December 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Njoroge holding brief for Mwangombe instructed by Mwakio, Kirwa & Advocates for the claimant.
2. Mr. Wesonga holding brief for Muli instructed by Kimathi, Wanjohi Muli & Company Advocates for the respondent.