



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

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 347 OF 2011**

**JANET NDUKU NGWILI ..... CLAIMANT**

**VERSUS**

**IMPALA GLASS INDUSTRIES ..... RESPONDENT**

Mr. Nyabena for claimant

M/S Bonyo for Respondent

**JUDGMENT**

1. The claimant was employed by the respondent as a clerk on 1<sup>st</sup> November 1999 at a basic monthly salary of Kshs.6,000.
2. The salary was increased to a basic salary of Kshs.16,000 and 6,000 house allowance making a gross salary of Kshs.22,000 as per the payslip of December 2010 produced in court. The claimant avers that she also received a regular monthly allowance of Kshs.9,000 which is not reflected in the payslip produced.
3. The claimant served the respondent continuously until 17<sup>th</sup> January 2011 when the respondent summarily dismissed the claimant by a letter of even date for;  
  
allegedly being a partner to M/S Jito Glass works a competitor of the respondent; and  
  
engaging in private work as respondent's competitor while being a partner to M/S Jito Glass Works.
4. The claimant denies these allegations and states that the dismissal was not for a valid reason and was therefore unlawful.
5. The claim seeks compensation for the unlawful dismissal, payment in lieu of notice, service gratuity at the rate of fifteen (15) days salary for each completed year of service for eleven (11) years, payment in lieu of leave days not taken and grant of certificate of service.

6. The claimant received a notice to show cause dated 11<sup>th</sup> January 2011. She was to reply within seventy two (72) hours in person in the director's office at 2.30 p.m. on 14<sup>th</sup> January 2011.
7. The claimant attended the meeting on 14<sup>th</sup> January 2011, in which she was asked to answer the charges levelled against her. The minutes of the meeting were produced in court. Claimant denied being a partner of Jito Glass works but was confronted with a search certificate from the Registrar of companies. The claimant persisted in the denial.
8. The claimant also denied that M/S Jito Glass Works was given priority over other customers by herself as a result of her interest in the firm.
9. The claimant was also accused of calling and meeting one Mr. Opiyo regularly and stolen goods from the company were found in possession of Mr. Opiyo.
10. The claimant denied these allegations and asked she be moved from her department to another to avoid the alleged conflict of interest.
11. The committee found the claimant guilty as charged and was summarily dismissed. The claimant testified under oath in support of the averments in the statement of claim and prays that the court awards her as prayed.

## **Response**

12. The respondent filed a memorandum of response to the claim on 3<sup>rd</sup> June 2011. The respondent admits employment particulars of the claimant and that the claimant was summarily dismissed for gross misconduct set out in the notice to show cause and the letter of summary dismissal.
13. The respondent avers that on 11<sup>th</sup> December 2010, the human Resource Manager received information that respondent's goods were being smuggled in a motor vehicle Reg. No. KVV 258 to an apartment site in Upper Hill Nairobi owned by Jito Glass Works, a competitor of the respondent. A chase care team confirmed the occurrence. The Human Resource Manager subsequently visited the site and was informed that the site was owned by the claimant and her two colleagues.
14. That a search at the Registrar of Business Names revealed that Jito Glass Works was indeed owned by the claimant and George Otieno Odhiambo and Solomon Ngwili.
15. The respondent produced a search certificate of the firm which confirmed this information. A report by the Human Resource manager on the theft incident was also produced before court with details from fellow employees implicating the claimant in irregular activities in the site department perpetrated by the claimant and others.
16. The claimant was given as show cause letter dated 11<sup>th</sup> January 2011. The claimant attended a disciplinary hearing on 14<sup>th</sup> January 2011 and the explanation she gave amounted to bare denial. The claimant was found guilty and was summarily dismissed for conflict of interest being a partner in Jito Glass Work a competitor of the respondent and carrying out activities in the course of her employment to assist Jito Glass Work do business to the loss and detriment of the respondent.
17. The respondent called RW1 Shabir Hussein the Human Resource Manager of the respondent who testified under oath in support of the allegations made against the claimant. RW1 confirmed that there was credible evidence that the claimant was a partner of Jito Glass Works with others and that Jito Glass Works traded with the respondent regularly and was also a competitor of the respondent. That jito Glass Works received preferential treatment from the claimant over other customers of the respondent and that the claimant assisted Jito Glass Works to irregularly get goods from the respondent as explained earlier in this judgment.

18. RW1 testified that the claimant was guilty as charged, was granted a fair hearing but failed to make any reasonable explanation to the charges and was therefore dismissed for a valid reason and in terms of a fair procedure.

19. RW1 was steadfast under cross examination by Mr. Nyabena for the claimant. His testimony was consistent and credible.

20. The evidence was corroborated by RW1 Mr. Philip Ochieng who worked as a draftman for the respondent in 2011 but had since left Impala Glass Industries. RW2 testified that orders from Jito Glass Works were processed at unusual speeds under instruction of the claimant. To fast track Jito Glass Works orders they overlooked orders from other customers.

21. RW2 told the court that he attended the disciplinary hearing for the claimant and he saw the abstract indicating that the claimant was a partner of Jito Glass Works. RW2 was consistent under intense cross examination by Mr. Nyabena for the claimant and insisted that fast tracking the orders of Jito Glass Works led to delay of orders of deserving customers. That the claimant gave instructions for the Jito Glass Works orders to be fast tracked.

22. RW2 was not aware if Jito Glass Work took glass from the respondent without paying but was aware of investigations which led to recovery of goods at upperhill apartment.

### **Determination**

23. The issue for determination is whether the summary dismissal of the claimant was for a valid reason and whether the dismissal was carried out in terms of a fair procedure.

24. From the totality of evidence before court, the claimant has failed to discharge her onus to show on a balance of probability that her summary dismissal by the respondent was not for a valid reason and was not carried out in terms of a fair procedure.

25. To the contrary, the pleadings, list of documents before court and the oral testimony by RW1 and RW2 has justified the reason for the summary dismissal of the claimant. The respondent has discharged the onus placed on it in terms of Section 43 as read with section 47 (5) of the Employment Act, 2007 showing that the claimant undermined the business of the respondent by being a partner in a firm that received preferential treatment through the claimant's intervention in the course of her work at the respondent's employ.

26. Accordingly, the claim for unlawful dismissal lacks merit and is dismissed with costs. However, the claimant is entitled to grant of certificate of service within fourteen (14) days of this judgment.

### **Gratuity**

27. The claimant has also failed to establish that she is entitled to payment in respect of service gratuity as claimed or at all. This is because the payslip produced by the claimant clearly shows that she was registered with National social security Fund (NSSF) and the statutory deductions were remitted accordingly.

### **Leave**

28. With regard to the claim for payment of Kshs.26,230 in lieu of leave days not taken. This claim was not adequately rebutted by the respondent. The claimant has demonstrated on preponderance of evidence that she is entitled to this relief.

29. In the final analysis the court enters judgment in favour of the claimant for;

- a) Kshs.26,230 being payment in lieu of leave days not taken;

b) grant of certificate of service within 30 days of this judgment;

c) Half the costs of the suit;

d) Interest at court rates of the decretal sum from date of filing suit till payment in full.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of January 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**