



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NO 357 OF 2015**

**LAKELI MBALUKA MUTILE .....CLAIMANT**

**VERSUS**

**UNEECO PAPER PRODUCTS LTD ..... RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The claimant was employed by the respondent as a Senior Accountant on 14.10.2013 for a gross salary of Kshs.42,000 per month. On 20.4.2015, he was dismissed summarily on ground that she had divulged confidential information. The dismissal was done without according her a chance to defend herself of the said offence which she avers was false. She therefore prays for Kshs.662,290 being compensation plus all her benefits on termination.

2. The respondent admits the employment relationship with the claimant but denies that the termination of her contract of service was unfair. She avers that the claimant was summarily dismissed on account of gross misconduct and in strict compliance with his contract of employment and the employment laws. She therefore denied the claim of salary in lieu of notice and compensation for unfair termination but admitted the claim for 26 leave days outstanding and salary for 20 days worked in April 2015.

3. The issues for determination herein are:

**a. Whether the summary dismissal of the claimant was unfair unjust and wrongful.**

**b. Whether the claimant is entitled to the reliefs sought in his suit or any part thereof.**

4. In answer to the said questions, the claimant testified as CW1 while the respondent called his HR Manager MR. Milton Ligambo as RW1. After the hearing, both parties filed written submissions.

**Analysis and Determination**

**Unfair Termination**

5. Under section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that it was founded on valid or fair reason and that it was done after following a fair procedure. Valid reason is one that is true while a fair reason is one which relates to the employee's conduct and the operational requirements of the employer. Fair procedure on the other hand refers to explaining the reason for the 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 according the

employee and his chosen companion a chance to air their defence for consideration before the dismissal is decided as required under section 41 of the Act. In addition to the foregoing pre-termination fairness, the employer is bound to accord post-termination fairness by paying the employee all his lawful employment dues under section 18, and 35 of the Employment Act and issue him with a Certificate of Service under section 51 of the Act.

### **Reason for Termination**

6. In this case the claimant (CW1) testified that, on 20.4.2015 the Director of the respondent summoned her to his office and gave her a summary dismissal letter. The letter was served on her before the Director explained the reason for the dismissal and before according her a chance to defend herself in the presence of another employee. She also denied the truth in the alleged offence of divulging secret information to other employees.

7. The respondent admitted that the claimant was not given any hearing before the summary dismissal because the offence by the claimant was gross, and the employment contract and the law entitled her to discuss the claimant summarily. Rw1 further admitted that he was not present when the claimant was dismissed but he confirmed that the office from where the claimant worked from was an open space with many workers.

8. Under section 43, 45 and 47(5) the burden of proving and justifying the reason for termination lies on the employer. In this case the Director who dismissed the claimant never testified herein to discharge the said burden of proof. Also no evidence was adduced by any employee or other person present at work on 20.4.2015 to confirm that indeed the claimant divulged the information on salary discrepancies and caused some employees to raise complains. The evidence by the Rw1 has therefore not proved on a balance of probability that the claimant committed the said offence. Consequently I find and hold that the reason cited for the summary dismissal was not valid and fair within the meaning of section 45(2) (a) and (b) of the Act.

### **Procedure followed**

9. As regards procedural fairness, the defence has alleged that the offence committed was gross and under the contract and the law, it warranted instant dismissal without hearing. However section 41 of the Employment Act provides that before an employer terminates the services of his employee on ground of misconduct, poor performance or physical incapacity under section 44 of the Act, he shall first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter invite the employee and his chosen companion to air their representations for determination before the decision to discuss is made. Consequently, I find that the dismissal of the claimant by the respondent did not pass the test of procedural fairness. The said procedural unfairness was enhanced by the failure to pay the claimant her dues and issue her with a certificate of service.

10. In view of the finding above that the respondent has failed to prove that the summary dismissal of the contract was grounded on a valid and fair reason, and that it was done after following a fair procedure as required by section 45(2) of the Employment Act, I hold that the summary dismissal was unfair, unjust and wrongful.

### **Reliefs**

### **Declaration**

11. In view of the foregoing holding, I make declaration that the termination of the claimant's employment contract was unfair, unjust and wrongful as prayed.

### **Notice and Compensation**

12. Under section 49(1) and (4) of the Act the claimant is entitled to salary in lieu of notice plus compensation for the unfair termination. Clause 2 of her contract of employment entitled her to 2 months' notice before termination on payment of 2 months' salary in lieu of notice. I consequently award Kshs.84,000 being 2 months salary in lieu of notice. I further award to her Kshs.252,000 being six months gross pay as compensation for the unfair termination. In making the award I have considered the short period served but also the fact that being a Senior Accountant, the claimant could not secure alternative employment even as at the date of the hearing of this suit on 4.5.2016, over a year since her dismissal.

**Unpaid salary and Leave outstanding**

13. The respondent admitted the claimant for 26 leave days and salary for the 20 days worked in April 2015. Therefore award to her Kshs.41,990 for the 26 leave days and Kshs.32,300 as salary for the 20 days worked in April 2015 as prayed.

**Disposition**

14. For the reasons that the summary dismissal of the claimant was procedurally and substantially unfair, I enter judgment for the claimant declaring his dismissal unfair, unjust and wrongful; and awarding him **Kshs.410,290** plus costs and interest.

**Dated, signed delivered at Mombasa this 27<sup>th</sup> January 2017.**

**O. N. MAKAU**

**JUDGE**