



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

**CAUSE NO.2210 OF 2012**

**PATRICK ONYANGO SEWE.....CLAIMANT**

**VERSUS**

**HENKEL CHEMICALS (E.A) LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant, Patrick Onyango Sewe filed his Memorandum of Claim on 1<sup>st</sup> November, 2012 and a Reply to Defence filed on 21<sup>st</sup> July, 2014. The Respondent filed defence on 8<sup>th</sup> July, 2014. Parties took directions on the hearing and on 31<sup>st</sup> January, 2017 when the matter came up for hearing, the respondents, though served through the last known address and at the physical location of the advocates on record, remained absent from court. Being satisfied that the Respondent is served and Affidavit of Service by Harrison Machio filed, the court proceeded to hear the Claimant in his evidence.

2. The Claimant was employed by the Respondent as the Fibreglass Laminator in the department of Fibreglass on 1<sup>st</sup> November, 2007 until 11<sup>th</sup> April 2012 when he was dismissed. Upon employment, the Claimant performed his duties diligently and was promoted through the ranks and his last monthly salary was Kshs.23,398.90. He was however dismissed without notice or being given a hearing or reasons for the dismissal. That he was denied his rights in law and the dismissal was unfair and unlawful.

3. The Claimant is seeking;

*Unpaid leave days for 4 years at Kshs.81,592.00;*

*Notice pay Kshs.20,398.00;*

*Compensation for unfair termination of employment;*

*Severance pay for 4 years Kshs.43,515.70; and*

*Costs of the suit.*

4. In support of his case, the Claimant testified that he started work with the Respondent as a casual and due to his good performance he was taken in on permanent basis and issued with a letter of appointment. His last position was that of a Fibreglass Technician.

5. In March, 2012 the Claimant was issued with a show cause letter that he had engaged in private dealings with a customer from Nakuru and offered to work for him for a lower price and made presentations that the Respondent's goods were expensive. That the Claimant was paid Kshs.200,000.00 to

make 30 fibreglass horses or a Luna park under construction. The Claimant denied these allegations as at the time he is alleged to have been privately working for a client in Nakuru he was at work with the Respondent in Ruiru and the details of the allegations were unknown to him. He was however summarily dismissed.

6. The Claimant also testified that upon his termination he realised that the Respondent was not paying any NSSF or NHIF for him and is seeking payment for the same.

## **Defence**

7. In defence, the respondent's case is that the Claimant did not perform his duties diligently as required of him. The Claimant was involved in irregular dealings by undertaking private transactions with the respondent's clients and thereby ruining the reputation of the company and loss of clients and revenue. This was in contravention of the employment contract by the claimant. The Claimant had been given prior warnings on his conduct by letter dated 30<sup>th</sup> March, 2012, he was given a hearing but he failed to change. By letter dated 11<sup>th</sup> April, 2012 the Claimant was dismissed.

8. Before termination the Claimant was given a hearing but was not able to give satisfactory responses on his misconduct. The termination was therefore lawful and procedural.

9. The Claimant was given his leave days or paid in lieu thereof; notice was paid and acknowledged by the Claimant as reflected in his pay slip for August, 2012 pay; there is no compensation due as the termination was justified; and severance pay does not arise in this case. On 6<sup>th</sup> September, 2012 the Claimant signed the discharge certificate to confirm that he had no claim against the respondent.

10. The Respondent did not call any evidence.

## **Determination**

11. The claim herein is based on the letter of summary dismissal issued to the Claimant by the Respondent and dated 11<sup>th</sup> April, 2012. The dismissal was on the basis that the Claimant as in gross misconduct in line with section 44(3) of the Employment Act that he was undertaking private dealing by counter offering against the respondent's prospective contracts and which was in breach of the employment contract.

12. In the termination letter, the Respondent offered to pay the Claimant for;

*5 months' prorated leave;*

*5 months prorated leave travel allowance; and*

*Salary for days worked*

13. Indeed section 44(3) of the Employment Act allow an employer to summarily dismiss an employee who by his conduct is in breach of the fundamental provisions of the employment contract. However, before such dismissal, the employer is required to abide with section 41(2) of the Act by giving Notice unless the circumstances leading to the dismissal are of the nature that such notice or hearing is not possible. The employer must demonstrate to the court the circumstances that existed so as not to have the employee heard of issued with notice. Where there is no notice or hearing, the employer has failed in terms of the procedural requirements of the law and the resulting termination of employment is unfair.

14. In this case, the Claimant testified that he was accused of dealing with respondent's clients in Nakuru and that he was also alleged to have received monies for production of 30 horses for a Luna park. That this was not possible as he was at his work place at all material times. Indeed the Respondent has not produced any evidence that the Claimant absconded work or was unable to perform the duties allocated

to him due to his absence from Ruiru to any other location.

15. The Respondent has also set out that on 30<sup>th</sup> march, 2012 the Claimant was issued with a show cause letter on the allegation of private dealing with clients to which the Claimant replied on 2<sup>nd</sup> april, 2012 and denied dealings with any client or receiving the sum of Kshs.50,000.00. this explanation if followed with the letter of termination by summary dismissal.

16. The Respondent has not demonstrated that upon the notice to show cause of 30<sup>th</sup> march, 2012 the Claimant was called for a hearing as required under section 41(1) of the Employment Act or where the case was of gross misconduct, there was compliance with section 41(2) of the Act. The Respondent therefore proceeded and effect summary dismissal without giving the Claimant a chance to defend himself.

17. Section 41 requires that;

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

18. It is therefore not sufficient for an employer to pay for notice. The employee must be given a hearing on the reasons the employer intends to terminate the employment and the employee be given a fair chance to have another employee of his choice at the hearing. That is what is set out under section 45 as procedural fairness.

19. Even where the employer has evidence of gross misconduct, the employee should be given a fair chance to give his defence before termination. Where the employer is not satisfied with the explanations, termination can proceed by setting out the reasons for the same.

20. The Respondent has not provided any evidence to the court that prior to 11<sup>th</sup> april, 2012 the Claimant was notified of the reasons for termination or given a hearing. After the show cause notice was issued and the Claimant replied to the same, the Respondent ought to have given the Claimant a hearing. The resulting summary dismissal is therefore unfair in terms of section 45 of the Employment Act.

## **Remedies**

21. Notice pay is due in a case of unfair termination that was without notice. In the pay slip submitted by the Respondent for 23<sup>rd</sup> august, 2012 this was a time after the Claimant had long been dismissed and the amount of Kshs.20,398.00 is paid for notice.

22. The Claimant is also paid for days worked; leave pay, and leave travel allowance. Such monies are paid less the statutory deductions due under section 49 of the Employment Act.

23. On this submission by the respondent, the outstanding claims relate to compensation and severance pay.

24. Where the Claimant signed a discharge certificate that he had no other claim against the respondent, nothing prevents him from seeking any other lawful dues and remedies available before this court in terms of the provisions of section 49 of the Employment Act.

25. The Discharge Certificate signed by the Claimant on 6<sup>th</sup> September, 2012 is for the amount of Kshs.30,856.00 in accordance with the computations in the 23<sup>rd</sup> of August, 2012 pay slip. On the claimant's acknowledgement of such payments, the court will put that into account as having been settled.

26. On the claim for severance pay, such is due under the provisions of section 40 of the Employment Act in a case of a redundancy. The claimant's case did not stand out as one that fell under redundancy and severance pay is not due. Such is declined.

27. On the finding that the Claimant was unfairly terminated, the court awards gross pay for 6 months. Such gross pay is the amount of basic pay together with the benefits payable at Kshs.3,000.00 per month all being Kshs.23,398.00. Compensation is awarded at Kshs.140,388.00.

**Judgement is hereby entered for the Claimant for the sum of Kshs.140,388.00 as compensation for unfair termination of his employment with the respondent. The Claimant is also awarded costs.**

**Dated and delivered in open court at Nairobi this 9<sup>th</sup> day of February, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

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