



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT KISUMU**  
**INDUSTRIAL CAUSE NO. 430 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**MESHACK ODUOR ONYANGO.....CLAIMANT**

**VERSUS**

**UKWALA SUPERMARKET.....RESPONDENT**

**JUDGMENT**

Vide his Memorandum of Claim dated 16th December 2015 the Claimant alleges that he was wrongfully and unlawfully dismissed by the Respondent. He prays for the following reliefs:-

- a) Salary arrears for one month, Gratuity, House allowance for one month, damages for wrongful termination, damages for loss of employment, unpaid leave and one month's salary in lieu of notice as per paragraph 9 of the claim above.
- b) Exemplary damages
- c) Costs of the Claim.
- d) Interest on (b) and (c) above
- e) Any other relief that the court may deem just and fit to grant.

The Respondent denied unlawfully or unfairly dismissing the Claimant in the Statement of Defence filed on 19th February 2016. The Respondent averred the dismissal was in accordance with the provisions of the Employment Act.

At the hearing of the case the Claimant testified on his behalf. The Respondent called one witness DOMINIC OSICHE, Senior Supervisor. The Respondent also filed written submissions.

**CLAIMANT'S CASE**

The Claimant testified that he was employed by the Respondent first as a casual shop assistant in April 2013. He was confirmed on 1st August 2014 on permanent terms. He worked until 14th December 2015 when he was summarily dismissed. The grounds for dismissal was absence from duty without permission. He stated that he was sick and was given permission by Mr. Ankit, the Manager when he called at around 12 noon on 7th December 2015 and that he did not have money to see a doctor hence was

unable to produce a medical certificate.

## **RESPONDENT'S CASE**

Mr. DOMINIC OSICHE testified that he knew the Claimant with whom he had worked for roughly 2 years at Ukwala Supermarket. The Claimant was in Swan Branch, Kisumu while DOMINIC was in Kenshop branch

He testified that on 7th December 2015, the Claimant called Mr. Ankit, the Manager, to report that he was unable to go to work because he was sick and was allowed to take sick leave. Dominic testified that as a Manager Mr. Ankit granted one day off. However the Claimant failed to report for work the following day and reported back to work on 9th December 2015. When he reported to work he was asked to produce documents from the hospital he visited which he failed to do. A disciplinary hearing was held on 11th December 2015. The disciplinary committee found the Claimant's explanation unsatisfactory. The Claimant was given an opportunity to present doctor's documents which he failed to do.

He testified that the Claimant was informed of the accusations against him in advance through a show cause letter on 10th December 2015.

## **DETERMINATION**

I have considered the pleadings together with documents filed by the parties. I have also considered the written submissions filed on behalf of the Respondent.

The issues for determination are whether the summary dismissal was fair and if the Claimant is entitled to the remedies sought.

## **FAIR PROCEDURE**

Section 41 of the Employment Act provides for fair procedure as follows:-

### ***41. Notification and hearing before termination on grounds of misconduct***

*(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.*

In this case the Claimant was issued with a show cause letter on 10th December 2015. He was asked to go home and respond to the letter. When he brought his response to the show cause letter on 11th December 2015 at 9.00am he was made to wait until 4pm when he was called into a meeting and grilled over his absence without permission on 7th and 8th December 2015.

No notice of a disciplinary hearing was given to the Claimant. He was never informed of his right to be accompanied by either a shop floor union official of his choice or a fellow employee. The Respondent took it upon itself to invite the shop steward to the meeting without the Claimant being given an opportunity to consult with him or being asked if he had any objection to the shop steward representing him.

The minutes of the disciplinary hearing look like a grilling session. All that was done was fire questions

at the Claimant which was required to respond to. He was never given an opportunity to make any representations. The meeting appears to have taken barely 25 minutes after the Claimant had been made to wait from 9am to 4pm not knowing what he was waiting for. The Claimant was thereafter issued with a letter of summary dismissal.

I find that the procedure did not comply with Section 41.

### **VALIDITY OF REASON**

The letter of summary dismissal reads as follows:-

*14th December, 2015*

*MESHACK ONYANGO*

*SWAN BRANCH*

***REF: SUMMARY DISMISSAL***

*Following your response to our show cause letter dated 10th December, 2015 and a further meeting with the disciplinary committee on 11th December the management is of the view that your explanation was not satisfactory and you simply absconded duty in pretence of being sick, for there were no documents from any hospital to ascertain your allegations despite enough time being given to you to forward the documents to back up your explanation but nothing was forthcoming.*

*This is an act of gross misconduct as per the Employment Act 2007 and you are hereby summarily dismissed. Please bring back all the companies property and collect your dues.*

*For Ukwala Supermarket (KSM) Ltd*

It accuses the Claimant of absconding duty on the pretext that he was sick because he did not have documents from a hospital to ascertain that he was sick. Both in the reply to the show cause letter and at the "disciplinary hearing" the Claimant explained that he asked for permission from Mr. Ankit the Manager and he had no money to go to hospital so he bought medicine. In the response to the show cause letter he offered to produce the remainder of the drugs that he was still taking.

Section 44(4)(a) provides that it is a justifiable reason or lawful ground to dismiss an employee if without leave or other lawful cause the employee absents himself from the place appointed for the performance of his work. In the present case the Claimant states that he was given permission on 7th December 2015 by Mr. Ankit who told him to stay at home until he is well. He was away on 7th and 8th December 2015 and reported to work on 9th and 10th before he was issued with the notice to show cause and directed to go home and respond on the evening of 10th December. The Claimant explained that he was unwell on both days with permission. The Claimant stated he could not see a doctor because he did not have money.

Was he absent "without permission or other lawful cause"? The answer is an emphatic **NO**. He had permission from Mr. Ankit, and he was unwell. He further explained he had no money to go to see a doctor. Under Section 34 of the Employment Act it is the obligation of the employer to provide medical attention to an employee. So the Claimant was dismissed for failing to provide a medical certificate because he did not have money to pay a doctor, yet it was the employer's responsibility to provide him with the doctor, or the money or means to see a doctor.

Under Section 45(4)(b) a termination of Employment is unfair if in all the circumstances of the case, the employer did not act in accordance with justice, and equity in terminating the employment of an employee. In the present case the Claimant was summarily dismissed because he did not have money to seek medical treatment and submit medical certificate as proof of his treatment, yet it was the employer to

provide for the medical attention.

Section 34(1) provides that:-

**34. Medical attention**

*(1) Subject to subsection (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.*

On the date he was issued with the show cause letter, the Claimant testified that he was still unwell and at work and his supervisor refused to give him permission to go home. This evidence was not contested by the Respondent.

I find that the summary dismissal of the Claimant was not only manifestly unfair but also inhuman. He was denied medical treatment which was the responsibility of the employer to provide and to add insult to injury he was summarily dismissed after what can only be considered as a stage managed disciplinary hearing in a vain attempt at cosmetic compliance with the law.

**REMEDIES**

The Claimant prayed for one month's salary in lieu of notice. He is entitled to the same under Section 35 as read with Section 36 and 49 of the Employment Act. The minimum statutory salary of a shop assistant in 2015 was Shs.14,785.70 plus house allowance of 15% making a total of Shs.17,004. I award him the same as pay in lieu of notice.

The Claimant further prayed for unpaid leave of 21 days. The Respondent did not deny that he was entitled to the leave which is the statutory rate for one year. I award the Claimant the sum of Shs.11,902.50 being leave for 21 days.

The Claimant also prayed for salary for December 2015 which the Respondent has not denied that it did not pay. Indeed in its written submissions the Respondent offers to pay the same.

I award the Claimant salary for 14 days, having been terminated on 14th December 2015. I award him Shs.7,935 under this head.

The Claimant further prayed for house allowance for December and gratuity. I have already taken into account house allowance of 15% of basic salary in the calculations made herein and used a consolidated wage so the Claimant is not entitled to a separate house allowance. He is also not entitled to gratuity as provided under Section 35(5) as read with Section (6) of the Employment Act as he was a member of N.S.S.F.

The Claimant further prayed for maximum compensation of 12 months' salary. He has prayed for the same under two separate heads of claim but he is only entitled to one payment under this head. Taking into account the very grave circumstances under which the Claimant was dismissed as I have already described above, it is my opinion that although he had not worked for too long, he is entitled to maximum compensation which I award him at Shs.204,042.70.

Taking into account the fact that the Claimant originally engaged an advocate who filed suit but later decided to act in person, I award him reasonable expenses and disbursements at Shs.50,000.

The decretal sum will attract interest at court rates from date of judgment unless payment is made within 30 days.

**Dated and signed and delivered this 2nd day of February, 2017**

**MAUREEN ONYANGO**

**JUDGE**