



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 142 OF 2015**

**FRANCIS MBUGUA BORO**

**CLAIMANT**

**v**

**SMARTCHIP DYNAMICS LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Court is called upon to determine, whether the summary dismissal of Francis Mbugua Boro (Claimant) by Smartchip Dynamics Ltd (Respondent) through a letter dated 3 February 2014 was unfair, whether the Claimant owed the Respondent Kshs 39,430/- unaccounted for after a sale and appropriate remedies/orders (although parties agreed to some 5 Issues, substantially the issues are 2).

2. The Claimant testified on his behalf while the Respondent called one of its Directors (another witness lined up died before testifying).

3. The Claimant's submissions which should have been filed before 30 January 2017 were not on file by this morning while the Respondent filed its submissions on 20 February 2017. The Court has considered the evidence and submissions.

**The law on terminations**

4. The statutory framework on unfair terminations is primarily found in section 35 of the Employment Act, 2007 which envisages written notice of termination (show cause); section 41 of the Act which require notification of allegations and a hearing if termination of employment is on account of *misconduct, poor performance and or physical incapacity* (procedural fairness); section 43 of the Act which places a burden on employer to prove the reasons for termination and section 45 of the Act which require the employer to prove that the reasons were fair and valid (substantive fairness).

5. Other relevant provisions are sections 36, 44 and 47 of the Act, among others.

**Applying the law to the facts presented**

6. The instant case was one of summary dismissal and therefore it cannot be disputed that the procedural fairness safeguards as envisaged by section 41 of the Act are implicated.

7. However, the question begs whether the letter written by the Respondent to the Claimant on 27 October 2014 seeking a response on certain identified *Areas of Concern* and the Claimant's reply dated 31 October 2014 would amount to a show cause notice and response as contemplated by section 41 of the Employment Act, 2007.

8. The Court has perused the aforesaid letter and notes that although it expressed concern about the Claimant's performance and conduct, there was no inkling at all in it as to whether disciplinary action which could lead to termination of employment or dismissal was being considered.

9. In the Court's view, it is as essential ingredient of procedural fairness as envisaged under section 41 of the Employment Act, 2007 that an employer should inform the employee clearly that disciplinary action and/or termination of employment is being considered while putting to the employee the allegations to confront.

10. Further, it was mandatory for the Respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of section 41(2) of the Employment Act, 2007.

11. The Respondent's director who testified was content with merely stating that a hearing was conducted on 3 November 2014 without disclosing the persons who were present or producing notes of the hearing. Even the dismissal letter did not make any reference to a hearing on 3 November 2014.

12. Missing that essential ingredient and a hearing, the Court reaches the conclusion that the summary dismissal of the Claimant was procedurally unfair (Respondent appear to admit the dismissal was unfair in its written submissions).

### **Substantive fairness**

13. Because of the conclusion reached on the question of procedural fairness, it is not necessary for the Court to consider whether the Respondent has proved, and proved as valid and fair the reasons for the dismissal of the Claimant.

### **Counterclaim**

14. The Respondent counterclaimed against the Claimant for failure to account for a computer machine, monitor, key board and a mouse which he sold but did not keep formal records. The items were valued at Kshs 39,430/-.

15. The witness produced records to prove that the Claimant sold the items but did not account for the revenue/sales.

16. The Claimant did not in any significant manner ward off the testimony of the director as to the failure to account for the sales except to state he sold the items on credit, and the Court therefore finds him liable for the Kshs 39,430/-.

### **Appropriate remedies**

#### **Pay in lieu of notice**

17. The Claimant was offered 1 month pay in lieu of notice and he admitted in cross examination to have been paid the same and therefore nothing turns on this head of relief.

#### **Gratuity**

18. The Claimant did not lay any evidential, contractual or legal foundation for gratuity and the same is declined.

19. If by gratuity, the Claimant meant service pay in terms of section 35(5) and (6) of the Employment Act, 2007, he would not be entitled to the same as the copy of pay slip produced show he was a contributing member of the National Social Security Fund.

#### **Compensation**

