



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

**CAUSE NO 2262 OF 2014**

**EVANS RURINJA GITHUO.....**  
**.....CLAIMANT**

**VERSUS**

**SUNMATT**  
**LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant, Evans Rurinja Githuo filed this claim on 18<sup>th</sup> December 2014 seeking compensation for unlawful termination of employment. The Respondent filed a Memorandum of Reply on 2<sup>nd</sup> April 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Acting Human Resource Manager, Anthony Omondi. Both parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a Shop Assistant from 1<sup>st</sup> March 2005 up to 23<sup>rd</sup> January 2012 when he was dismissed.

4. On 26<sup>th</sup> December 2011, the Claimant was arrested on allegations of stealing assorted clothing materials belonging to the Respondent. He was released from police custody on 27<sup>th</sup> December 2011 with no charge but was suspended by the Respondent on 28<sup>th</sup> December 2011 pending investigations.

5. On 23<sup>rd</sup> January 2012, the Claimant was dismissed on the ground of absconding duty. He states that he was not notified of the outcome of the investigations into the allegations of theft nor was he informed of the date he was to resume duty. He further states that he was not given an opportunity to be heard prior to the dismissal.

6. The Claimant now claims the following:

- a) A declaration that his dismissal was unlawful and unfair
- b) One month’s salary in lieu of notice.....Kshs. 26,824

- c) 12 month' salary in compensation for unfair termination.....321,888
- d) Service pay for 6 years of service.....80,472
- e) 12 months' salary as damages for unlawful arrest.....321,888
- f) Costs plus interest

### **The Respondent's Case**

7. In its Memorandum of Reply dated 27<sup>th</sup> March 2015 and filed in Court on 2<sup>nd</sup> April 2015, the Respondent states that the Claimant was employed as a Shop Assistant on 1<sup>st</sup> October 2005.

8. The Respondent further states that the Claimant was suspected of having been involved in the theft of assorted clothing materials which were being ferried in the Respondent's motor vehicle No. KAW 828V in which the Claimant was the turn boy.

9. Following the outcome of internal investigations conducted by the Respondent the Claimant was suspended on 28<sup>th</sup> December 2011. Pursuant to the suspension letter dated 28<sup>th</sup> December 2011, the Claimant was asked to show cause why disciplinary action should not be taken against him. The Claimant responded vide an undated letter which was received by the Respondent on 3<sup>rd</sup> January 2012.

10. The Respondent avers that the Claimant's suspension was to run for two (2) weeks with effect from 28<sup>th</sup> December 2011 meaning that the Claimant was to report for duty on 11<sup>th</sup> January 2012. The Claimant failed to resume duty upon the lapse of two weeks and was therefore summarily dismissed

11. It is the Respondent's case that the Claimant's dismissal was necessitated by his failure to resume duty after the suspension period and not by the allegations of theft. The Respondent maintains that the Claimant's dismissal was within the law and that the Claimant was paid all his terminal dues.

### **Findings and Determination**

12. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

13. The Claimant's dismissal letter dated 23<sup>rd</sup> January 2012 states as follows:

*"Dear Sir*

#### **REF: DISMISSAL FROM EMPLOYMENT ON GROSS MISCONDUCT**

*Kindly refer to our letter dated 28<sup>th</sup> December 2011 and your reply to the same dated 3<sup>rd</sup> January 2012 on charges of gross misconduct, involving theft of company property in form of assorted cloth materials measuring 137 meters worth ksh 61,650 on 26<sup>th</sup> December 2011.*

*In this regard to facilitate investigations, you were suspended from duty effective 28<sup>th</sup> December 2011 for a period of two weeks, you*

*were therefore expected to report back to duty on 12<sup>th</sup> January 2012 but you have since not*

reported, hence you have absconded duty.

*In the circumstances therefore and pursuant to the Employment Act 2007 you are hereby summarily dismissed from the services of Sunmatt Limited with immediate effect.*

*Please return any company property that may be in your possession to the undersigned. We wish you success in your future undertaking.*

*Yours faithfully,*

**FOR: SUNMATT LTD**

*(Signed)*

**V. RANDIGA**

**ADMINISTRATOR**”

14. According to this letter the Claimant was dismissed for absconding duty. Prior to the dismissal the Claimant had been suspended by letter dated 28<sup>th</sup> December 2011 which also required him to show cause why disciplinary action should not be taken against him. The suspension letter stated inter alia:

*“Meanwhile you shall remain suspended from duty effective today 28<sup>th</sup> December 2011 for a period of two weeks pending the decision of the company.”*

15. A plain reading of the suspension letter is that upon expiry of the two weeks, the Respondent was to make a decision. There was no evidence that any such decision was taken. Instead, the Respondent waited for the suspension period to lapse in order to justify absconding of duty as reason for the dismissal. The Court found the Respondent’s conduct on this score not only unreasonable but also irresponsible.

16. An employer who commences a disciplinary process against an employee is obligated to run it to conclusion. There was no magic in the two weeks suspension period and the Respondent cannot use its lapse as a ground for dismissal.

17. The suspension was effected in the context of serious allegations of theft against the Claimant who was entitled to feedback on the outcome of investigations into these allegations. The Respondent’s Acting Human Resource Manager, Anthony Omondi confirmed in cross examination that there was no communication to the Claimant on the outcome of the investigations. Omondi further testified that the Claimant was not notified of the intention to dismiss him on account of absconding duty.

18. In the final submissions filed on behalf of the Claimant, reference was made to the decision in **Godfrey Anjere v Unique Suppliers Limited [2015] eKLR** where **Abuodha J** rendered himself as follows:

***19. “In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse.”***

20. This is the correct legal position regarding dismissal on the ground of absconding duty as I understand it. The Respondent’s witness told the Court that no effort was made to trace the Claimant’s whereabouts. This coupled with the Respondent’s failure to pursue the original charge of stealing leads the Court to conclude that the Respondent had no valid reason for dismissing the Claimant.

21. Additionally, the Claimant was not availed the mandatory procedural fairness requirements set out under Section 41 of the Employment Act.

**Remedies**

21. Overall the Court finds that the Claimant’s dismissal was substantively and procedurally unfair and awards him ten (10) months’ salary in compensation. In making this award I have taken into account the Claimant’s length of service as well as the Respondent’s conduct prior to the dismissal. I also award the Claimant one (1) month’s salary in lieu of notice.

22. From the evidence on record the Claimant was a contributing member of the National Social Security Fund (NSSF) and is therefore not entitled to service pay. The claim for damages for unlawful unrest was not proved and is dismissed.

23. Finally I enter judgment in favour of the Claimant as follows:

- a) 10 months’ salary in compensation.....Kshs. 268,240
- b) 1 month’s salary in lieu of notice.....26,824
- Total.....295,064**

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant will have the costs of this case.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Njou for the Claimant

Ms. Cherono for the Respondent