



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 425 OF 2014**

**BETWEEN**

**FRED AGOLLA ..... CLAIMANT**

**VERSUS**

**PERFECT SCAN LIMITED .....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Nyange Sharia Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant*

*Menezes, Oloo & Chatur Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim, on the 8<sup>th</sup> September 2014. He states he was employed by the Respondent Company as a Security Supervisor from 1<sup>st</sup> October 2007 to 5<sup>th</sup> April 2014. He earned a salary of Kshs. 8.000 per month. House allowance was not included. He was denied bicycle allowance from February 2011, off days, leave allowance, salary for days worked, public holidays' pay, service pay, salary in lieu of notice, and uniform deductions. The Claimant was summarily dismissed. It was alleged he was disrespectful to Respondent's Directors. He feels termination was unfair. He prays for Judgment against the Respondent for:-

- a) A declaration that termination was unfair.
- b) A declaration that he was entitled to 1 month leave after every 12 months.
- c) A declaration that he was entitled to house allowance, bicycle allowance and uniform deductions.
- d) An order that the Respondent pays to the Claimant: salary for the month of March 2012; 5 days salary for April 2012; 1 month salary in lieu of notice; uniform deductions; 4 years' annual leave pay; leave travelling allowance; 6 pro-rata annual leave days for 2012; house allowance at 15% of basic pay for 4 years; 216 off duty days; 36 pending public holidays at double rate; and 12 months' salary in compensation for unfair termination- all adding up at Kshs. 240,930.
- e) Certificate of Service to issue.

f) Costs.

g) Any other suitable relief.

2. The Respondent filed its Statement of Response on the 9<sup>th</sup> October 2014. Its position is that it employed the Claimant on 1<sup>st</sup> October 2007, in the stated position. He was summarily dismissed on 16<sup>th</sup> April 2012 for gross misconduct. The Respondent denies that it owes the Claimant any terminal dues. Termination was fair and lawful, and carried out under Section 44 of the Employment Act 2007. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. The Claimant gave evidence and rested his case, on the 28<sup>th</sup> July 2016. The Respondent did not call any Witness, adopting its Pleadings and Documents as the totality of its case on the 24<sup>th</sup> November 2016, when proceedings closed. The matter was last mentioned on 7<sup>th</sup> February 2017 when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

4. Agolla told the Court he was employed on 1<sup>st</sup> October 2007. He supervised Security Guards. He was summarily dismissed on 5<sup>th</sup> May 2012. His work motorcycle had a tyre burst while the Claimant was in the course of his supervisory duty. Ordinarily, when this happened, he would call Respondent's Director, and would be offered assistance through Respondent's nearest patrol car. On this occasion, he called the Director for assistance. The Director told the Claimant to push the motorcycle. When the Claimant questioned why he was not assisted, he was informed by the Director there was no more work for him.

5. He was paid nothing. He was asked to return the work uniform and other tools of trade. He was not given a letter of termination, until his Advocates issued a demand letter. He did not sign appendix 2 of the Respondent's documents which is a discharge voucher. He worked 7 days a week. He did not take annual leave. Termination was unfair. He was not heard. He was not issued any notice of termination. It is not true that he was invited to a disciplinary hearing and turned down the invitation.

6. Cross-examined, he testified that his motorcycle broke down twice. He called the Director who said he should push the motorcycle to the office. He was not told that patrol cars were unavailable. The Claimant complained to the Respondent. He decided to stay home the following day because the Respondent had failed to assist him. He was not called to a meeting the following day. He did not sign any letter acknowledging receipt of terminal dues and discharging the Respondent from future claims. He admitted the signature in his verifying affidavit, is the same as appears in the acknowledgment/ discharge note. He worked for 5 years. He never rested. Redirected, Claimant's position was that he is not a handwriting expert. There was no Witness to his receipt of terminal dues.

7. The Respondent as stated above adopts its Pleadings and Documents. A summary of the Statement of Response has been given at paragraph 2 of this Judgment.

**The Court Finds:-**

8. The Claimant was employed by the Respondent as Security Guard Supervisor, on 1<sup>st</sup> October 2007. He states in his Demand Letter, Statement of Claim, and Submissions, that he was summarily dismissed on 5<sup>th</sup> April 2014. In his testimony in Court, he gave the date of dismissal as 5<sup>th</sup> May 2012. In the Claimant's prayers under paragraph 4, the Claimant seeks to be paid 5 days' salary for work done in the month of April 2012. He was not clear on the date he left employment. The Respondent gives the date of dismissal as 16<sup>th</sup> April 2012. The Court adopts 16<sup>th</sup> April 2012 as the date of dismissal.

9. The dispute arose after the Claimant undertook one of his routine supervisory rounds, on a motorcycle provided by the Respondent. He had a tyre burst. He asked for assistance from the Director as he was wont to. On this occasion the Director was not ready to direct one of the Respondent's patrol cars to aid the Claimant. The Claimant was made to walk and push the motorcycle along. By the time he arrived at the offices, he was angry because he was made to push the motorcycle. He questioned his Director. In a

fit of anger, he did not report for duty the following day. The Respondent asked him to return his tools of trade, and make himself scarce. The employment relationship came to an end.

10. The Court is persuaded the Claimant signed the acknowledgment/ discharge note dated 23<sup>rd</sup> April 2012. He disputes he did not sign, but the signature on the note, and that in his verifying affidavit bears resemblance. He told the Court he is not a handwriting expert; he does not have to be an expert to recognize his own signatures. He was paid and accepted a total amount of Kshs. 15,070 in terminal dues. He should have made his claim for additional terminal dues contained in the Claim before the Court, at the time he accepted the initial sum of Kshs. 15,070. There is no justification in the prayers for additional terminal dues.

11. The only issue the Court should consider is whether termination was based on valid ground, and carried out fairly; and whether compensation is merited.

12. As discussed above, the Claimant became angry after his Employer declined to assist him, when his motorcycle had a tyre burst. He questioned the Director, and opted to stay home the following day.

13. He in doing so, engaged in two acts of gross misconduct under Section 44 [4] of the Employment Act: he disobeyed the instructions of his Employer, to be at the designated place of work, discharging duties assigned to him; and he was absent from work without the leave of his Employer, or any other lawful reason. The Respondent would have valid ground to summarily dismiss the Claimant for gross misconduct. The letter of summary dismissal states the Claimant was disrespectful to the Directors, which would fall within this general picture of insubordination and being absent from work without leave or lawful reason. Termination was based on valid ground. The Claimant should have managed his anger: observed and respected his terms and conditions of service; work ethics; command chain; and workplace protocol.

14. Although the Respondent states that the Claimant walked out of a disciplinary hearing, there is no evidence that he was asked to show cause, why he should not face such disciplinary action. There were no charges drawn against the Claimant. There is no record of his invitation to a disciplinary hearing. The Respondent did not show full compliance with Section 41 and 45 of the Employment Act, on procedural protections.

15. The Court finds termination was based on valid ground, but flawed on procedure. ***The Respondent shall pay to the Claimant the equivalent of 6 months' salary at Kshs. 48,000 in compensation for unfair termination.***

16. Prayers of declaratory nature sought, save for the prayer declaring termination was unfair, add no value to this Judgment and are rejected.

17. ***Certificate of Service to issue.***

18. No order on the costs.

19. ***Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) Termination was on valid ground, but flawed on procedure.***

***b) The Respondent shall pay to the Claimant the equivalent of 6 months' salary at Kshs. 48,000 in compensation for unfair termination.***

***c) Certificate of Service to issue.***

***d) No order on the costs.***

***e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

Dated and delivered at Mombasa this 30<sup>th</sup> day of June, 2017

**James Rika**

**Judge**