



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

**AT NAIROBI**

**CAUSE NO.1554 OF 2012**

**PETER APOLLO OCHIENG.....CLAIMANT**

**VERSUS**

**INSTARECT LTD.....RESPONDENT**

**JUDGEMENT**

Issue in dispute – unlawful and wrongful dismissal from employment of the claimant

1. The Claimant was employed by the Respondent vide letter dated 14<sup>th</sup> January, 2011 as the Sales & Marketing Manager. The Claimant was to be on probation for 7 months and was paid Kshs.55, 130.00 as his monthly salary. By letter dated 25<sup>th</sup> August, 2011 the Claimant was confirmed in his employment and salary increased to Kshs.60, 130.00.

2. The Claimant served diligently but for no cause choreographed steps and actions began to orchestrate the make false accusations against the Claimant calculated to frustrate him into resigning and which led to the issuance of letter dated 17<sup>th</sup> January, 2012 summarily dismissing the Claimant from employment when he refused to resign.

3. The reasons for summary dismissal were vague, evasive and false. The dismissal was arbitrary and in breach of clear provisions of the law.

4. The Claimant has reason to believe that he was dismissed because of pursuing and seeking for an explanation on the issue of non-award of bonuses to his sales team and subsequently discriminatory award of such bonuses and his agitation for better working conditions for his sales team.

5. The claim is for commissions amounting to Kshs.26, 946, 00 payable under the contract of employment and based on sales made by the claimant. The other claims are that there court should make a finding that the Claimant was wrongfully dismissed. That he should be paid;

- a) One month notice pay at Kshs.60,130.00;
- b) Commissions at Kshs.26,946.00;
- c) Annual leave for one year Kshs.60,130.00;
- d) Service pays Kshs.30, 065.00;

e) Damages for wrongful dismissal;

f) Certificate of service; and

g) Costs of the suit.

6. The Claimant testified in support of his case. That upon employment he worked diligently and was appreciated for his work. He was on probation which was extended and a letter of extension was issued.

7. On 17<sup>th</sup> January, 2012 the Claimant was issued with a letter of summary dismissal after working for the Respondent for over a year. The Claimant was accused of moonlighting but his performance had been very good. The Claimant had been issued with a warning letter but he contested the matters raised therein. The administrator, Lorna gave the Claimant the options of being sacked or a resignation.

8. The Claimant also testified that he was terminated for challenging the extension of his probation period. He also challenged the non-payment of the bonuses due. He had asked for his bonuses which were grudgingly paid late in September but in December he was not paid. Christmas bonus was payable for best performance and his juniors were paid better than him. When the Claimant raised these matters with the Respondent he was told to resign or be sacked.

9. The Claimant also saw a newspaper notice which indicated that he was no longer the employee of the respondent. He was listed with two other employees of the Respondent who had committed a criminal offence. This was intended to injure the person of the claimant. He lost job opportunities.

10. The Claimant also testified that he was accused of holding back a measuring wheel and office keys after termination.

11. The Respondent business was construction of sheds, electric fencing and gate automation. All sales staff had a wheel. The Claimant did not unlawfully withhold what he had. It costs about Kshs.16, 000.00. All management staff had office keys. There were no specific orders on clearance.

12. The Claimant challenged the defence that his probation was extended due to poor performance. He did not report to work while drunk and he never solicited for money or paid through Mpesa and then failed to remit to the respondent. The letter by John Ainsworth was not issued but appeared in the defence filed by the respondent.

### **Defence and Counter-Claim**

13. in defence the Respondent admits that by letter dated 14<sup>th</sup> January, 2011 they employed the Claimant and was on probation for 3 months. The contract of employment gave terms and conditions which the Claimant had to follow. The Claimant was not to engage in any other employment or work without the Respondent written approval; he was not to accept any remuneration, gifts or other benefits from other persons with whom the Respondent had business relations and where he was forced to accept the same was to be reported to the department manager; devote all his time to the service of the respondent; and that the Respondent would summarily dismiss the Claimant for lawful cause.

14. The Claimant began work but probation was extended to 14<sup>th</sup> August, 2011 as the Respondent had not been satisfied with the claimant's performance. The Claimant had engaged in conduct which was contrary to his employment by reporting to work late and drunk. On 7<sup>th</sup> June, 2011 the Respondent was forced to write to the Claimant issuing him with a second warning letter for the conduct.

15. by letter dated 25<sup>th</sup> August, 2011 the Claimant was confirmed in his employment and was given a Christmas bonus of kshs.8, 478.33. On 13<sup>th</sup> January, 2012 one client wrote an email complaining about the competency of work done by the Claimant and that the Claimant had been making demands for direct payment from the client instead of paying at the Respondent office. The Respondent conducted an

investigation and in order to find the truth it accessed the marketing department emails wherein communication from the Claimant to another of the respondent's clients disclosed that indeed the Claimant had been requesting clients to deposit money directly to a phone number which did not belong to the respondent.

16. This forced the Respondent to immediately terminate the Claimant immediately vide letter dated 17<sup>th</sup> January, 2012. The reason for termination was given therein. Such termination was lawful.

17. The Claimant was not faithful in his employment with them and any bonuses paid were as a result of company policy. The letter dismissing the Claimant was unmistakable, unequivocal and clear stating the reasons for termination and when he was to collect his due. There were no discriminatory practices by the respondent.

18. The Claimant failed to clear with the Respondent as advised in the letter of termination and he failed to return the keys and also unlawfully withheld the measuring wheel until April 2012 and causing the Respondent damage of Kshs.884,736.00 in replacing the same which the Respondent claims as special damages;

*1 viro lock Kshs.3, 600.00;*

*2 viro padlocks Kshs.7, 200.00;*

*3 viro padlocks Kshs.3, 000.00;*

*Loss associated with measuring wheel Kshs.870, 936.00*

*Total Kshs.884, 736.00.*

19. The claimant's dues for January, 2012 that are payable are kshs.23, 699.00 and a cheque in his name was issued but remained uncollected. The Claimant is not entitled to the claims made and should be dismissed with costs.

### **Counter-claim**

20. In counter-claim, the Respondent is seeking for the payment of Kshs.884, 736.00 being costs for property withheld by the claimant. The Claimant failed to return the keys and measuring wheel and necessitating the Respondent to incur expenses in replacing office doors and carry out its activities occasioning a loss. The claims relate to;

*1 viro lock Kshs.3, 600.00;*

*2 viro padlocks Kshs.7, 200.00;*

*3 viro padlocks Kshs.3, 000.00;*

*Loss associated with measuring wheel Kshs.870, 936.00*

*Total Kshs.884, 736.00.*

21. The counter-claim is also that the court should issue a declaration that the claimant's dismissal was lawful and claim be dismissed with costs and the Respondent be awarded the sum of kshs.884, 736.00 with interests and costs.

22. In evidence the Respondent called **Lorna Mathenge** the respondents Administrator who testified that she is the officer in charge of personnel and run the office of human recourse new staff and their welfare.

23. The Claimant was employed by the Respondent and issued with an employment contract as Sales & Marketing Manager. He was bound by terms and conditions applicable for the job. The Claimant was only supposed to do work allocated by the Respondent and for the Respondent only. No outside work or payment for other work was allowed. The Claimant was not supposed to harm Respondent business in any manner.

24. The Claimant was paid a salary and commission when he met his work targets. Upon confirmation of employment the Claimant had a salary increase. Where the Claimant failed to abide the work conditions, his employment was subject to summary dismissal.

25. The Respondent is a service company and where a client is not well attended to or an employee fails to do a job well that would harm the business reputation. The Claimant breached trust with clients by asking for money for work and payments not submitted with the respondent. This happened while the Claimant was on probation and it was thus extended. The Claimant also came to work late and drunk. He had a brawl with another employee. The Claimant left office keys and his last salary. The Claimant reported to work while drunk on 25<sup>th</sup> May, 2011 when he engaged in a noisy brawl which among other such incidents. He was issued with a warning letter.

26. Upon the extension of probation, on 25<sup>th</sup> August, 2011 the Claimant was confirmed. His salary was increased. Staff got a bonus and Christmas bonus which the Claimant was paid. There was no discrimination in the award of bonuses. What Zachariah Latiff was paid at Kshs.16, 920.00 was not an act of discrimination against the claimant. Latiff was selling a new product and he held two dockets and not in sales as the Claimant was.

27. The Claimant was dismissed under circumstances that he contravened regulations and terms of his employment which was contrary to policy in place at the respondent. A client came to the office and sent an email to the witness on an enquiry following a complaint by Mr Ainsworth that he felt the work done at his house was poor and the Claimant had not attended him properly and had asked to work for him privately. The client stated how the Claimant sourced for work privately; persuading the client to pay cash; and attended to work without a quotation from the respondent. The general work done by the Claimant was slow and was not cooperative, thus the client's complaint. The final product was poor for the costs incurred at Kshs.95, 572.00.

28. It was not the policy of the Respondent for clients to pay in cash or directly to the sales team. All payment had to be at the office and a receipt issued. The Respondent had an Mpesa transactions line which the Claimant failed to use.

29. The Respondent had one client with complaints against the claimant. The Respondent later learnt of clients who paid directly to the claimant. Jannie Karina got a quotation from the Claimant without reference and was asked to pay the Claimant through his telephone number. This client wrote a long email with complaints against the claimant. The Claimant had demanded for 75% and to be paid through his telephone line.

30. The witness also testified that when she got the complaints she had to confirm and thus did an investigation of emails. From the emails system she learnt of the emails and payments to the Claimant by clients. She called the Claimant and met at the office but the Claimant refused to respond to questions made to him. A decision was taken to dismiss the Claimant immediately on 17<sup>th</sup> January, 2012.

31. The Claimant was found to be moonlighting – doing work for others on Respondent time for private gain. This was contrary to policy contract terms. It was in breach of section 44 of the Employment Act and the Respondent exercised its right to terminate. The Claimant was paid his terminal dues less debt owing. The Claimant collected his termination letter from the office. Before termination the witness had discussed with the Claimant the cases of Mr Ainsworth and Ms Jennie and he refused to say anything in defence.

32. From 17<sup>th</sup> January, 2012 the Claimant did not return to work with the respondent. He also refused to

undertake clearance. He left with measuring wheel and office keys. Such keys were to access the Respondent offices. The Respondent had to buy new office keys and replace locks. There are receipts for the purchased padlocks. By keeping the property of the respondent, there were losses incurred all amounting to the counter-claim of Kshs.884, 736.00.

33. The measuring wheel is important in Respondent work. In a given month 4 clients are attended to using the wheel. Each sale has Kshs.870, 936.00 and for 4 months combined. In doing fencing the Respondent made Kshs.13, 373,559.85 and Walling Kshs.11, 522,570.00. In total, by the Claimant keeping the measuring wheel and the property of the Respondent cumulatively there was loss. The measuring wheel could only be sourced from South Africa and the Respondent had to import it. The amounts counter-claimed are thus due.

34. The second witness for the Respondent was **Gordon Peter Hays** the managing Director. He testified that the Respondent business is to provide perimeter security and textile shades and has the overall management of the Respondent Company.

35. He employed the Claimant as a Sales & Marketing Manager who was paid a bonus as reward for exceeding targets of Kshs.14 million for the department. It was at 1%. Sales in December, 2011 were below Kshs.14 million and thus no bonus. The Claimant had made demands for bonus based on his sales targets. He also looked at 3 weeks trading instead of 4 weeks. All previous bonuses which met the target were paid. There was no favouritism of other employees for the Claimant to allege discrimination against him. Latiff was the Operations Manager for security and was senior to the Claimant and the bonus pay difference paid to him was based on percentage of the staff salary. He earned Kshs.140, 000.00 per month while the Claimant earned Kshs.60, 000.00. The bonus percentage was based on the monthly pay.

36. The witness also testified that he never asked Lorna to demand that the Claimant should resign. He was not involved in the claimant's termination.

## **Submissions**

37. Both parties filed written submissions. The Claimant submits that his dismissal was not procedural and amounted to unfair termination of his employment. On 17<sup>th</sup> January, 2012 the Respondent administrator sent the Claimant a text message summoning him to a meeting and he complied. The allegations were that there were clients complaints about his conduct and that he should resign or be sacked. The complaints by the clients were not brought to the attention of the claimant. The Claimant then left for field work and when he returned he was issued with a letter terminating his employment.

38. The Respondent witness Ms Mathenge testified that on 13<sup>th</sup> January, 2012 they received information from clients and accessed claimant's emails and upon reading they decided to terminate the claimant. The decision to terminate the Claimant on 13<sup>th</sup> January, 2012 was only communicated to the Claimant 4 days later. This is contrary to section 41 of the Employment Act. The procedural requirements are outline din the cases of **Nicholas Otinyu Muruka versus Equity Bank Ltd, Cause No.25 of 2013** and **Loise Otieno versus Kenya Commercial Bank Ltd, Cause No.1050 of 2011**.

39. The Claimant also submits that there were no valid grounds for his dismissal as required under section 43 and 45 of the Employment Act. The burden placed on the employer is that there must be proof of the reasons for termination. The Claimant was dismissed from issues touching on the irregular extension of his probation period and his agitation for payment of earned commissions and the selective award of bonuses. The Respondent witness Mr Hays confirmed that the Claimant had made sales in December, 2011 but was not paid on the basis that he had not reached his targets. This resulted in his termination. Other employees such as Mr Latiff were paid bonus and the failure to pay the Claimant was discriminatory.

40. The allegations made against the Claimant that he sent an email to Mr Ainsworth were matters that the Claimant had no chance to address before his termination. He saw the client complaints in court filed with the defence.

41. The Claimant submits that the Respondent acted with malice when they published his name and photo in the newspapers together with that of his two colleagues, one of whom had been arrested by the police and the other was being sought after by the police. The impression created was that the Claimant had committed a criminal offence and this has made it impossible for him to get new employment.

42. The dismissal of the Claimant amounted to unfair termination and should be awarded as claimed.

43. The Respondent submits that the Claimant by his conduct fundamentally was in breach of his contract of employment with the respondent. The Claimant had a written contract of employment which spelt out the conditions and terms of his employment which he breached. The Claimant was moonlighting; he made demands to clients for direct payments to him and did work for personal gain. The Claimant failed to have client's quotation directed at the office but to himself; and by asking clients to pay him in cash such was in total breach of his employment contract. Two different clients lodged complaints against the claimant.

44. Under section 44(3) of the Employment act, where an employee is in breach of the fundamental provisions of his employment, such is subject to summary dismissal. The Claimant had also breached his own employment contract. Such warranted dismissal.

45. Section 44(4) allow an employer to dismiss an employee who wilfully neglects to perform his duties as required and who commits acts reasonably believed to be criminal. By the Claimant seeking to be paid by clients in cash for own benefit and failing to do his work as required, he was in breach of his employment contract and hence the dismissal from employment. The deposits from the claimants phone number and failure to disclose this to the Respondent as the employer was theft as held in **Alex Iuvaha Afanda versus Ramco hardware Limited [2013] eKLR.**

46. The Respondent also submits that there were valid reasons for termination the Claimant based on what the Respondent genuinely believed to be acts of commission that warranted termination. By the Claimant diverting Respondent business to hi personal benefit, information which came to the knowledge of the Respondent from clients complaints and access to his mails, such confirm the existence of valid reasons used by the Respondent to terminate his employment.

47. At the time of dismissal, the Claimant had not achieved the set targets to warrant a bonus pay. Such was communicated to him in writing and the claims for bonus pay are not due.

48. The allegations that the publication by the Respondent of the claimant's name that he had left the business was malicious are not true. It was not done with malice. It was lawful to let the public know the Claimant had left the Respondent employment. The termination of his employment was lawful and justified. The claims made should be dismissed as held in **J.W.N versus Teachers Service Commission [2014] eKLR.**

49. On the counter-claim, the Respondent submits that it incurred costs of purchase of new locks and by the Claimant keeping the keys and measuring wheel, there was loss of business which was quantified and amounted to the counter-claimed sum of Kshs.870, 936.00 which the Claimant should pay with interests and costs. A dishonest employee should not be made to benefits from the same as held in **Sophia Wambui Muthoni versus Muramati Sacco Society Limited [2014] eKLR.**

## **Determination**

50. The employment of the Claimant by the Respondent is not contested. The fact of the Claimant being issued with a written contract of employment is also agreed save that he was to be on probation for 3 months but such was extended to run from 14<sup>th</sup> January, 2011 to 15<sup>th</sup> August, 2011.

51. Though no issue with regard to the probation period term is raised as a specific claim, section 42 of the Employment Act requires that before the probation period can be extended, the employee must be issued with a written communication as to the reasons for such extension and agree to the same. This is to

ensure the employee is evaluated at the end of the probation period and where there are errors, poor performance, or any question on the conduct of the employee, such can formulate the rationale for the extension of the probation period. To leave it open and ambiguous is subject to abuse and violation.

52. The Claimant agrees that on 17<sup>th</sup> January, 2012 he was called by Ms Mathenge the Administrator to the boardroom for a meeting. He was faced with various allegations. The Respondent admits to the same. That on 13<sup>th</sup> January, 2012 the administrator learnt of clients who had complaints against the claimant. She accessed his emails and learnt of communications between the Claimant and the clients where he was sourcing for private work and payments to himself.

53. The Claimant does not deny he authored emails to Ms Karina and therein made demands for payments directly to himself and on his phone number. However, following the meeting of 17<sup>th</sup> January, 2012, the Claimant was issued with a termination letter.

54. Access to work place emails and communication is a prerogative of the employer. Where an employee uses workplace tools, time, resources to send communication, such time, tools and resources are the property of the employer. In a scenario where an employer has a workplace website and allows employees to communicate through the same, any communications therein is ordinarily accessible to the employer through the internet link. An employee who uses the employer time for own business thus stands in violation of section 44(4) of the Employment Act.

54. In **Angela Wokabi versus Tribe Hotel, Cause No.1712 of 2014** the court held that;

*... Use of employer work email to look for new employment is wrong. Such work email is the property of the employer. An employee cannot claim privacy over matters shared, included or shared out of such an address at the expense, time or within the tools allocated for work by the employer. in the **Case of Bar Bulescu versus Romania, Application No.61496 of 2008**, the European Court of Human Rights held that whilst human rights law gave employees a reasonable expectation of privacy at work, this right was subject to an employer's legitimate objective of managing its resources effectively. Therefore, an employer could, if the circumstances justified it, be entitled to monitor employees' emails provided this was limited in scope and a proportionate means of achieving its legitimate objective.*

55. As such, where the Claimant used his workplace time to communicate and source for outside or private employment, such is a subject for summary dismissal. This resulted in the meeting of 17<sup>th</sup> January, 2012. However, even in a serious case of an employee who grossly miscounts self a workplace, section 41(2) of the Employment Act requires such an employee be given a hearing even on short notice. The law requires that;

*(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*

56. In this case both parties agree to the meeting held on 17<sup>th</sup> January, 2012 but such meeting was between Ms Mathenge and the claimant. Section 41 requires that the Claimant be accompanied by another employee to confirm that indeed the Claimant was given time to defend himself and in circumstances where the employer is not able to hear the employee's defence; the exceptional circumstances of the case must be demonstrated by the employer. In **Benson Muhia Kamau versus Safepark Ltd, Cause No.644 of 2012** the court held that;

*The employee must be given a hearing for the employer to hear what representations the employee may have with regard to any alleged misconduct unless such hearing is practically or reasonably not possible based on the circumstances of each case. Such exceptional circumstances where they exist must be demonstrated by the employer.*

57. In this case, where the Respondent had prior knowledge of the claimant's misconduct and called him for hearing but failed to abide the mandatory provisions of the law, such amounted to procedural unfairness. There is no evidence that the Respondent was faced with such an exceptional case that there was no time to allow for due process.

58. Even where the Respondent was seized of damning information and sufficient to warrant summary dismissal, procedural fairness in addressing such gross misconduct is mandatory. The meeting held with the Claimant on 17<sup>th</sup> January, 2012 was an option that the Respondent opted for and should have conformed to due process as this is all what natural justice entails. In any event the Claimant was called in the morning, allowed to go to the field and upon return in the evening was issued with a dismissal letter. A hearing before termination in accordance with the law is paramount.

59. I find the claimant's dismissal lacked in fair procedure and thus unlawful.

### **Remedies**

60. On the finding that the claimant's dismissal was procedurally unfair, the Claimant is entitled to compensation. One (1) month pay is hereby found an appropriate award and amounting to Kshs.60, 130.00.

61. Notice pay of one month is due in terms of the contract amounting to kshs.60, 130.00.

62. The question of commissions due to the Claimant is on the basis that he earned such commissions and was not paid during employment. The Respondent has submitted material that the sales commissions were addressed within the rules and regulations of the respondent. The annexures with regard to commission's payments, I find such to be sufficient evidence that the Respondent addressed the same and no dues owe in his regard.

63. On the claim for leave pay due, section 28 of the Employment gives every employee the right to take leave. Such leave can be taken for time off or payment in lieu thereof. The Respondent attached a leave schedule where No.14 is the Claimant who was paid and he acknowledged the sum of Kshs.3, 700.00. However the schedule payments relate to *leave schedule 2008*. The Claimant was employed on 14<sup>th</sup> January, 2011 to 17<sup>th</sup> January, 2012. He had worked for a full years. He was entitled to full annual leave due. As the evidence on record relates to a period outside the contract duration of the claimant, I take it the claim is justified. The Claimant is awarded Kshs.60, 130.00 for leave pay due as the Claimant never went on his annual leave.

64. Service pay is claimed. The Claimant attached his pay slips for October and November, 2011. There were remittances to NHIF and NSSF. In terms of section 35 of the Employment Act, the claim for service pay is not justified. Such is declined.

65. A certificate of service is due to every employee upon termination. Good practice dictates that the employee should clear with the employer for the terminal dues to be paid. The Claimant shall be issued with his certificate.

### **Counter-claim**

66. Of importance with regard to the counter-claim is the claimant's evidence. He asserted that all employees had a key and had a measuring wheel. That upon termination there were no procedures for handing over and thus he never did so. Such confirms that the claimant, even with knowledge that he was dismissed continued to hold the property of the employer, respondent.

67. It is not sufficient defence that every other employee had a key to the Respondent premises and that every employee who had a measuring wheel was allowed to keep it. Upon the termination of the claimant's employment with the Respondent such property should have been returned unconditionally. By holding such property and on the evidence that the Respondent incurred losses, the Claimant is liable.

68. I find no evidence to controvert the counter-claim. The same is allowed as prayed.

**Accordingly judgement is hereby entered for the Claimant in the following terms**

- a) Compensation at Kshs.60,130.00;
- b) Notice pay Kshs.60,130.00;
- c) Leave pay Kshs.60,130.00;
- d) Certificate of service

**The counter-claim is hereby allowed for the Respondent in the following terms;**

- a) Payment of Kshs.884,736.00 being an amount for:

*1 viro lock Kshs.3, 600.00;*

*2 viro padlocks Kshs.7, 200.00;*

*3 viro padlocks Kshs.3, 000.00;*

*Loss associated with measuring wheel Kshs.870, 936.00*

*Total Kshs.884, 736.00.*

- b) The Claimant shall pay due costs.

**The dues owing to the Claimant being lower than what is owing to the Respondent in counter-claim and the costs, the Respondent shall be paid by the claimants what is due less the awards made.**

Delivered in open court at Nairobi this 29<sup>th</sup> day of June, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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