



**REPUBLIC OF KENYA**

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

**CAUSE NO 171 OF 2014**

**FREDRICK AMBOGA.....CLAIMANT**

**VERSUS**

**FONES DIRECT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Fredrick Amboga against his former employer, Fones Direct. The claim as contained in a Memorandum of Claim dated 11<sup>th</sup> February 2014 and filed in Court on 12<sup>th</sup> February 2014 seeks relief for wrongful dismissal.

2. The Respondent filed a Memorandum of Defence on 24<sup>th</sup> March 2014 and the matter proceeded to full hearing with the Claimant testifying on his own behalf. The Respondent called the Claimant's former colleague, Leah Njeri, its Employee Relations Officer, Nelson Wafula Bruce and the Claimant's former Supervisor, Judy Mambo.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as a Shop Assistant at a monthly salary of Kshs. 11,580 from September 2011. He worked as such until 5<sup>th</sup> April 2013 when he was summarily dismissed. It is the Claimant's case that his dismissal was unlawful and unfair.

4. Efforts to resolve the dispute at the Labour Office were unsuccessful hence this suit in which the Claimant claims the following:

- a) A declaration that his dismissal was wrongful
- b) Three months' salary in lieu of notice.....Kshs. 34,740
- c) Salary for the month of April 2013.....11,580
- d) Pay in lieu of accrued leave.....11,580
- e) Leave travelling allowance for the year 2012
- f) Service gratuity for 2 years

- g) 12 months' compensation for loss of employment...138,960
- h) Unpaid commission.....154,492
- i) Unpaid overtime.....69,813
- j) Underpayment house allowance.....43,399
- k) General damages and loss of future earnings
- l) Reinstatement
- m) Certificate of service
- n) Costs plus interest

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

5. In its Memorandum of Defence dated 20<sup>th</sup> March 2014 and filed in Court on 24<sup>th</sup> March 2014 the Respondent admits having employed the Claimant as a Shop Assistant effective 15<sup>th</sup> December 2011 at a monthly basic salary of Kshs. 11,580 plus a house allowance of Kshs. 1740.

6. The Respondent states that on various dates between March and April 2013 the Claimant reported late and left his place of employment early without permission. He also failed to keep the shop tidy. On 4<sup>th</sup> April 2013, the Claimant left his place of employment telling his colleague, Leah Njeri that he was going shopping. The Claimant did not come back prompting Leah to report to their Supervisor, Judy Mambo.

7. The Supervisor in turn made a report to the Respondent's Human Resource Manager who verbally summoned the Claimant to appear for a disciplinary meeting on 5<sup>th</sup> April 2013. The Claimant failed to give a satisfactory explanation as to why he was violating company time schedules and was therefore summarily dismissed on the same day.

8. The Respondent sets out the Claimant's disciplinary history as follows:

- a) On 13<sup>th</sup> January 2013, the Claimant was orally warned by the Auditor for failure to put on his name tag;
- b) On 25<sup>th</sup> January 2013, he was warned to be careful when handling customers at the Branch;
- c) On 11<sup>th</sup> February 2013, he was issued with a warning letter for refusing to abide by company policies;
- d) On 26<sup>th</sup> March 2013, the Claimant together with his colleague held a meeting with their immediate supervisor, Judy Mambo during which they committed themselves to observe cleanliness and punctuality at the Branch.

9. The Respondent's case is that the Claimant committed acts of gross misconduct thus rendering himself liable to summary dismissal. The Respondent maintains that in effecting the dismissal due procedure was observed. Further, the Claimant was paid all his dues.

### **Findings and Determination**

10. 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**

11. The Claimant was dismissed by letter dated 5<sup>th</sup> April 2013 stating as follows:

*“Dear Sir,*

**Reference: SUMMARY DISMISSAL**

*The management has noted with great concern of (sic) your irresponsible behavior and dishonesty in handling your job. We sat several times this year to discuss your failures of (sic)*

*following company procedures. You have been severally warned and trained on taking procedures seriously but have always shown negligence.*

*You have not only breached the policies by absconding work severally but you were also found disappearing from your work station at working hours without communicating to the management.*

*You have been severally warned to refrain from such misconduct but you chose not to.*

*The act of irresponsibility and dishonesty on your part is totally unacceptable and on the basis of the above the Management regrets to inform you that you have been summarily dismissed from your services with immediate effect for gross misconduct.*

*This action is taken in accordance to (sic) the employment Act section 44 which states Acts of dishonesty, insobriety, theft, possession of weapons, sleeping on the job, falsifying records, fighting in the company premises, failing to, or performing her work carelessly and improperly (sic).*

*Yours sincerely*

*For: Fones Direct LTD*

*(Signed)*

*FAIZHA KANA*

***Human Resource Manager”***

12. This letter sets out a catalogue of accusations against the Claimant. However, from the evidence adduced before the Court, it would appear that the decision to dismiss the Claimant was triggered by the allegation that he had left his place of work early on 4<sup>th</sup> April 2013. According to the Respondent, the Claimant had received several previous warnings, an averment the Claimant contests.

13. The Court did not find any evidence that the specific charges contained in the letter of dismissal or any other previous accusations were ever put to the Claimant for his response. It seems to me therefore that the Respondent failed to establish a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act, 2007.

14. Regarding the dismissal procedure, the Claimant’s supervisor told the Court that the Claimant was summoned to a disciplinary hearing on 4<sup>th</sup> April 2013. This was the same day that the report against the Claimant was made to the Respondent’s management. Evidently, the Claimant was not afforded any opportunity to prepare his defence against the accusations made against him. The Respondent thus breached the procedural fairness requirements established by Section 41 of the Employment Act.

**Remedies**

15. In light of the foregoing findings the Court has arrived at the conclusion that the Claimant’s dismissal was substantively and procedurally unfair and therefore awards him six (6) months’ salary in compensation. In making this award I have considered the Claimant’s length of service as well as the Respondent’s conduct prior to the dismissal. I further award the Claimant one (1) month’s salary in lieu of notice.

16. In his testimony before the Court the Claimant admitted having been paid his salary for April 2013 together with accrued leave pay. These claims are therefore without basis and are dismissed. The claims for leave travelling allowance, unpaid commission and house allowance underpayment were not supported by any evidence and therefore fail.

17. Although the Claimant did not lead any specific evidence in support of the claim for overtime compensation, I allow the claim to tune of Kshs. 5,501 as admitted by the Respondent. From the evidence on record the Claimant was a contributing member of National Social Security Fund (NSSF) and is therefore not entitled to service gratuity.

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

- a) 6 months’ salary in compensation.....Kshs. 79,920
- b) 1 month’s salary in lieu of notice.....13,320
- c) Overtime compensation..... 5,501
- Total.....98,741**

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

20. The Claimant will have the costs of the case.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Masese for the Claimant

Miss Ogutu for the Respondent