



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBRE 524 OF 2015**

**BETWEEN**

**PAUL BWIRE ..... CLAIMANT**

**VERSUS**

**BROADWAY APARTMENTS LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Oduor Siminyu & Company Advocates for the Claimant*

*Cootow & Associates Advocates for the Respondent*

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**JUDGMENT**

1. Paul Bwire filed his Statement of Claim, on 21<sup>st</sup> July 2015. He states he was employed by the Respondent Company as an Accountant/Administrator, on 1<sup>st</sup> February 2013. He was summarily dismissed by the Respondent on 25<sup>th</sup> June 2014. He earned a consolidated salary of Kshs. 30,000 per month.

2. He was charged at the Magistrate's Court Mombasa, with the offence of stealing Kshs. 349,172 from his Employer, the Respondent herein. The Respondent never offered evidence against the Claimant in the criminal trial. On 28<sup>th</sup> April 2015, the Claimant was acquitted.

3. He feels termination was unfair and unlawful. He was not heard by the Respondent, before the decision was made. He was not given a valid reason for the decision He prays for Judgment against the Respondent for:-

- a) Declaration that termination was unfair.
- b) 1 month salary in lieu of notice at Kshs. 25,000.
- c) Salary for the month of June 2014.

d) 12 months' salary in compensation for unfair termination at Kshs. 300,000.

e) Costs and interest.

4. The Respondent filed its Response on 29<sup>th</sup> October 2015. It is agreed the Claimant was employed by the Respondent in the stated position. He earned a consolidated salary of Kshs. 30,000 per month, consisting basic salary at Kshs. 25,000 and house allowance at Kshs. 5,000.

5. He embezzled Respondent's funds. The Respondent reported him to the Police, who on carrying out their independent investigation, charged the Claimant with the offence of stealing. It was the duty of the Director of Public Prosecutions to bond Witnesses. The fact that this was not done, leading to release of the Claimant, does not mean he did not embezzle Respondent's funds. Termination was based on valid ground and was carried out fairly.

6. The Claimant testified, and closed his case, on 28<sup>th</sup> June 2016. The Respondent failed to present its Witness on 21<sup>st</sup> September 2016, when Respondent's case was scheduled for hearing. Proceedings closed on this date. The dispute was last mentioned on 8<sup>th</sup> November 2016, when Parties confirmed the filing of their Closing Submissions, and delivery of Judgment scheduled on or before 16<sup>th</sup> June 2017.

### **Claimant's position**

7. The Claimant told the Court he was employed as an Accountant/Administrator of the Respondent. The Respondent dealt in residential housing business.

8. He was arrested as indicated above, for the offence of stealing by servant. He was bonded after 6 days in custody. He returned to work on being bonded. The Respondent told him his services were no longer needed at the Respondent. Bernard Ojiambo, the business owner told him so. The Claimant was not heard. Ojiambo did not attend Court at hearing of the criminal case. No other Witness attended. The Claimant was acquitted. The Claimant did not misappropriate any funds. There was no audit showing misappropriation of funds. Police did not carry out any investigations. If there was no complaint from the Respondent, the Claimant would never have been charged.

9. The Claimant was not paid salary for June 2014. Termination was malicious. The criminal trial was a smokescreen. There was no warning letter. The Claimant had never been alleged to be involved in misappropriation before. Cross-examined, he testified he worked from February 2013 to June 2014. He was not given any termination letter. He did not know why the Respondent instigated his prosecution.

### **Submissions**

10. The Claimant submits termination lacked valid reason, and was carried out unfairly. The Respondent did not observe Section 45 of the Employment Act 2007. The Respondent did not call any Witness to justify its decision. The Claimant urges the Court to adopt the Court's decision in ***Shem Opiyo Ogango v. Shiva Carriers Limited [Cause Number 1207 of 2010 at Nairobi]*** and ***Abraham Gumba v. Kenya Medical Supplies Authority [Cause Number 1073 of 2012 at Nairobi]***, and find Respondent acted unfairly, and grant the prayers sought.

11. The Respondent submits that the Claimant was involved in stealing of Respondent's funds. He was under duty to show he was dismissed unfairly. He who alleges must prove. The Respondent relies on ***Stephen Wasike & Another v. Security Express Limited [2016] e-KLR*** where it was held that, a Party seeking justice must place before the Court all material evidence and facts, which considered in light of the law, would enable the Court to arrive at the decision as to whether the relief sought is available. The Claimant was clearly involved in misappropriation of Respondent's funds, and the Respondent, entitled to summarily dismiss the Claimant under Section 44 [4] [g] of the Employment Act 2007.

### **Issues:-**

12. These as understood by the Court are:-

- a) Whether termination was based on valid ground.
- b) Whether procedure was fair.
- c) Whether the Claimant merits the prayers sought.

**The Court Finds:-**

13. The Claimant was employed by the Respondent housing business, as an Accountant/ Administrator, effective 1<sup>st</sup> February 2013. His salary, as shown in the letter of appointment, and in the Response filed by the Respondent, was a monthly consolidated amount of Kshs. 30,000.

14. He was arrested on 26<sup>th</sup> June 2014, on the suspicion of stealing from the Respondent, a sum of Kshs. 349,172. He was charged before the Magistrate's Court Mombasa with the offence of stealing by servant on 26<sup>th</sup> June 2014. He states he was bonded 6 days later. He reported on duty on being bonded. He was told by the Respondent his services were no longer required.

15. There was no letter of termination issued by the Respondent upon the Claimant. There are no written grounds justifying Respondent's decision. However Parties appear to agree the reason for termination was the alleged stealing of Respondent's funds by the Claimant.

16. The Claimant gave adequate evidence showing his contract was unfairly terminated as required under Section 47 of the Employment Act 2007. The law requires the Employee to show unfair termination has taken place, while the Employer is required to justify the reasons for its decision. It is important to understand the evidential burden under Section 47 above, and avoid submissions based on the general principle under the Evidence Act Cap 80 the Laws of Kenya, that he who alleges must prove.

17. There is no record of investigations carried out by the Respondent at the workplace, on the allegation of stealing by servant. There is no investigation report or audit report of any form, brought before the Court, showing that the Respondent had reasonable suspicion that the Claimant was involved in stealing of Respondent's funds. There are no accounting documents in any form. Section 44[4] [g] of the Employment Act cited by the Respondent in its Submissions, requires that the suspicion by the Employer must be based on sufficient material and reasonable grounds. The Respondent merely states the Claimant was suspected of stealing. There is no foundation upon which suspicion rests. Termination was not based on valid ground.

18. The Respondent was not barred by the criminal trial from undertaking disciplinary proceedings at the workplace, and from dismissing the Claimant. The two processes are separate and independent. The contract, under which the Claimant worked, did not have any clause, joining the two processes and making the decision at the workplace, dependent on the outcome of the criminal trial.

19. The Respondent, as discussed above however, did not initiate any internal process, but just told the Claimant to keep away from work, once he was charged with a criminal offence in Court. The criminal trial ended with the acquittal of the Claimant. The Respondent would have no reason to doubt Claimant's innocence after this, particularly as there was no internal process of any shade, initiated at the workplace. It is not proper to hold that acquittal did not mean the Claimant was innocent. He was not tried at the workplace for an employment offence. The public process resulted in a not- guilty verdict. What would be the basis for holding that acquittal did not mean the Claimant was innocent? If there was an internal process, with an outcome suggesting the Claimant was guilty of an employment rather than a criminal offence, there would be some justification in Respondent's position. In the absence of any internal process, the Respondent should accept that, the Claimant was not found culpable for stealing of funds at any forum. Termination was not based on valid ground, and was therefore unfair.

20. There were no charges drawn against the Claimant. He was not required to show cause why

disciplinary action should not be taken against him. There was no disciplinary hearing. Sections 41 and 45 of the Employment Act 2007 were completely ignored. The Respondent simply told the Claimant, when the Claimant reported for duty after 6 days in prison, that his services were no longer required. Procedure was way below the standards of fairness contained in the Employment Act 2007. Termination was unfair for want of fair procedure.

**21. The Claimant is granted the equivalent of 12 months' gross salary in compensation for unfair termination at Kshs. 360,000.**

**22. He worked for the month of June 2014. He is granted salary for June 2014 at Kshs. 30,000.**

23. Notice pay under Section 36 of the Employment Act 2007, is based on remuneration which the other Party would have earned. Section 2 of the Act defines remuneration as the total earnings. Notice pay is based on the gross, rather than the basic salary. **The Claimant is granted 1 month salary of Kshs. 30,000 as notice pay.**

24. No order on the costs.

**25. Interest granted to the Claimant at 14% per annum from the date of Judgment.**

IN SUM, IT IS ORDERED:-

**a) Termination was unfair on both substantive and procedural grounds.**

**b) The Respondent shall pay to the Claimant the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 360,000; salary for June 2014 at Kshs. 30,000; and 1 month salary in lieu of notice at Kshs. 30,000- total Kshs. 420,000.**

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

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

Dated and delivered at Mombasa this 16<sup>th</sup> day of June 2017

James Rika

Judge