



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

**AT MOMBASA**

**CAUSE NO. 365 OF 2016**

**ANSETI MEREMO .....CLAIMANT**

**VERSUS**

**TANDU ALARM SYSTEMS LIMITED .....RESPONDENT**

**J U D G M E N T**

**I N T R O D U C T I O N**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 31/8/2015. The respondent denies the alleged unfair termination and avers that the termination was fair because it was grounded on a justifiable reasons and the claimant was accorded a disciplinary hearing before the termination.

2. The parties framed the following issues for determination.

- (a) Whether the termination of the claimant's contract was unfair.
- (b) What was his salary at the time of his termination.
- (c) Whether the claimant was ever demoted.
- (d) Whether the claimant is entitled to the reliefs sought.

**CLAIMANT'S CASE**

3. The claimant testified as CW1. He stated that he was employed by the respondent in March 2012 as a Security Guard earning ksh.9000 per month. He was promoted to a supervisor and his salary increased to ksh.16200 per month. In the same year he was transferred to Ollaro Lodge Masai Mara and promoted to controller but continued to draw the salary of a supervisor until November 2013.

4. When he lodged a complaint and demanded his salary arrears as a Controller, the HR Manager responded by giving him letter dated 1/2/2014 appointing him Controller and increasing his salary to ksh.26450 per month. The said salary was later increased to ksh.29424 on 31/8/2014.

5. On 31/8/2015, he was called to see the Operations Officer, who referred him to the HR Manager Ms. Joy Migiro who then served him with letter dated 29/8/2015 terminating his services from 31/8/2015. The reason cited for the termination was repeated late reporting to work and failing to set good example

to his junior. He denied the alleged misconduct and averred that he had not received any warning from the employer. He further averred that he was not given any hearing before the dismissal and prayed for compensation for unfair termination.

6. On cross examination, CW1 admitted that his letter of promotion to Controller is dated 1/9/2013 and it took effect the same day. He further admitted that he was verbally promoted to Operations Officer in November 2013 but he declined the position by email dated 8/1/2014 because previously he had been promoted to Controller the same way and was denied the rightful pay. Thereafter he received the promotion letter backdated 1/11/2013 but again he declined because he was not given any salary increase. Thereafter he was given letter dated 1/2/2014 demoting him to the position of Controller.

#### DEFENCE CASE

7. The respondent's MD Mr. Martin Haylock testified as RW1. He confirmed that the claimant was employed by the respondent as a Guard in March 2012 but resigned to go to Iraq. He was however reemployed on 6/9/2012 as a supervisor earning ksh.16200 per month. He further stated that CW1 was promoted to Controller on 1/9/2013 and his salary was increased to ksh.26450. On 1/11/2013, CW1 was further promoted to Operations Officer and his salary increased to ksh.28750 per month but he declined the promotion. He was therefore demoted to Controller and his salary reduced back to Ksh.26450 per month from 1/2/2014.

8. Thereafter, the claimant lost interest in his work and started to report to work late and to perform his work carelessly and negligently. He was invited to attend hearing on his misconduct twice but he failed to attend. As a result, the respondent sought advice from Nairobi County Labour office which advised her to terminate the claimant's service after serving one month notice or paying him salary in lieu of notice.

9. On 31/8/2015, the claimant was given termination letter by the HR Manager citing the grounds that he had repeatedly been reporting to work late and setting poor example to the subordinate staff. The claimant was paid all his dues and signed a settlement agreement and preferred no appeal against the termination.

10. On cross examination Rw1 admitted that the termination letter was written on 29/8/2015 to take effect on 31/8/2015 when the claimant received it. He further admitted that the claimant was not accorded disciplinary hearing before the termination. He denied that the claimant was transferred to Olloro Lodge as Controller and maintained that he was there as a supervisor.

#### ANALYSIS AND DETERMIANTION

11. There is no dispute that the claimant was employed by the respondent as a Guard, Supervisor, Controller, Operations Officer and demoted back to Controller. There is further no dispute that he was terminated on 31/8/2015 for misconduct. I therefore proceed to answer the issues for determination outlined herein above.

#### **Unfair termination**

12. Under Section 45 of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent's witness has admitted under Oath that the claimant was not accorded any hearing because it was a summary dismissal. That admission is fatal to the defence in face of the mandatory provisions of Section 41 of the Act. The said Section requires that before terminating the services of his employee on ground of misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands, and in the presence of a fellow employee or union representative of his choice, the reason why termination is contemplated, and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. That elaborate procedure was never followed herein.

13. As regards the reason for termination, the respondent has also failed to prove that the claimant was habitually reporting to work late as alleged. No attendance records were produced and no eye witness called to testify. The failure to prove the reason for the termination and the admission by RW1 that the claimant was not accorded any hearing before termination, I find and hold that his termination was unfair within the meaning of Section 45 of the Act.

### **Reliefs**

14. Under Section 49 of the Act, the claimant is entitled to one month salary in lieu of notice plus compensation in lieu of notice based on his gross salary as at the time of termination. According to the claimant's payslips for July 2015, his gross salary was ksh.29624. I however do not award him salary in lieu of notice because he has not prayed for it. I however award him ksh.236,992 being eight months salary as compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant worked for the respondent for a fairly long period, in addition to the fact that he had not been able to secure alternative employment as at the time he testified herein on 12/1/2017.

### **Salary arrears**

15. The claimant prays for ksh.10000 per month for 12 months served as a Controller in Ollaro Lodge but earned the salary of ksh.16200 he was receiving as a supervisor. The claim is dismissed because the claimant was not yet formally appointed to that position and was making the demand based on dispatch letter dated 15/11/2012 which was not a formal appointment letter.

16. However I grant the claim for salary arrears of ksh.3000 per month for November and December 2013 and January 2014 when the claimant was appointed to the position of Operations Officer but continued to receive the salary of a Controller. He will therefore get ksh.9000 for the item.

### **Loan balance with Nyati Sacco**

17. This claim lacks particulars and any basis for granting it. The claimant should direct his Sacco loan dispute to Nyati Sacco. I will not therefore condemn Nyati Sacco because she is not a party herein.

### **DISPOSITION**

18. For the reason that the claimant services were unfairly terminated, and that his salary as at the time of termination is obvious, I enter judgment for him in the sum of ksh.245,992 plus costs and interest. The said award will be subject to statutory deductions and any payment advanced to the claimant after his dismissal.

Dated, signed and delivered this 28<sup>th</sup> July 2017

O.N. Makau

Judge