



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NUMBER 898 OF 2014**

**JOSEPH NZIOKA.....CLAIMANT**

**VERSUS**

**SMART COATINGS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant herein was employed by the respondent in 2009 as a Paint Laboratory Chemist at a monthly salary of Kshs 18,610. He was promoted upwards and at the time of termination of his services he was a Research and Development Officer earning kshs 22,472 per month.
2. The claimant further pleaded that on 26<sup>th</sup> January, 2012 he duly reported to work and was accused of involvement in theft at his place of work. He was consequently arrested and charged with theft. On 9<sup>th</sup> June, 2012 he was however acquitted of the charges. The respondent however terminated his services without taking him through any disciplinary hearing. The claimant therefore sought compensation for unlawful termination of his services.
3. The respondent admitted the claimant was its employee as alleged but averred after an armed robbery at its premises it is the police who decided that the claimant be prosecuted on grounds that the police had found evidence linking the claimant with the robbery. The respondent denied terminating the claimant's services and averred that it was the claimant who abandoned employment from the days following his arrest.
4. In his oral evidence in court, the claimant further stated that upon his arrest, he was remanded for 78 days and released on bail on 5<sup>th</sup> April, 2012. He waited for the case to end before he could report back to work. The case ended on 29<sup>th</sup> June, 2017 and he was acquitted for lack of witness. He reported to work on 2<sup>nd</sup> July 2017 but the security refused him entry.
5. In cross-examination he stated that he was issued with annual renewable contracts. He further stated that at the time of arrest he had not been issued with a new contract. The claimant further stated that they used to take paint on credit.
6. The respondent witness Mr Charles Kihura testified that he worked for the respondent as a driver. On the material day he hooted at the gate and no one opened for him. He hooted louder after which someone unknown to him opened the gate and followed him to the parking. When he asked who the person was he was instead slapped and herded together with others into the switchboard room and locked in there. They were later opened for by a Mr Denis after the robbers had left. The police came and conducted

investigations and later came with two suspects and asked them to write down their phone numbers. They were asked to identify one phone number which turned out to be the claimant's. The claimant was taken away by the police and thereafter never came back to work.

7. The respondents second witness Mr Denis Shikindi gave an account of the robbery incident stating that the robbers ordered him to carry some paint products into a waiting lorry.

8. In cross-examination he stated that it was the security guard who opened and that on the material day, the claimant came to work alone. He further stated that he had never written to the claimant to resume work and that he was never issued with a show cause letter and further that he never wrote to his boss concerning the claimant's absence.

9. There would seem to be no dispute that a robbery took place at the respondents premises and that the claimant was suspected of being complicit and charged in court in that regard. He was however acquitted of the charges for lack of witnesses. The respondent claimed the claimant absconded duties after his arrest. However, the claimant refuted this saying he was in custody for over two months and upon his release on bail he decided to stay away until the conclusion of this case.

10. Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties. The claimant herein was undergoing prosecution for an offence where the respondent was the complainant.

11. It was not unreasonable for the claimant to stay away from work pending the outcome of the criminal charges. It would have been uncomfortable situation if the claimant was to continue working in the same place with the respondent's potential witness. The respondent would have been justified to terminate the claimant's services on suspicion of involvement in the robbery. This did not happen.

12. The court therefore finds and holds that the dismissal was unfair and hereby orders compensation as follows:

a. One month's salary in lieu of notice	22,472
b. Six month's salary as compensation for unfair termination of service	<u>134,832</u>
	<b><u>157,304</u></b>
c. Costs of the suit	

13. It is so ordered.

**Dated at Nairobi this 22<sup>nd</sup> day of September, 2017**

**ABUODHA J. N.**

**JUDGE**

**Delivered this 22<sup>nd</sup> day of September, 2017**

**NDERI NDUMA**

**JUDGE**

In the presence of:

.....for Claimant

.....for Respondent