



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

**CAUSE NO 1903 OF 2013**

**BERNARD ONYANGO MUKANGA.....CLAIMANT**

**VERSUS**

**INFINITY EAST AFRICA COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by a Memorandum of Claim dated 26<sup>th</sup> November 2013 and filed in court on 27<sup>th</sup> November 2013, is for unlawful termination of employment.
2. The Respondent filed a Reply on 6<sup>th</sup> November 2014 but did not attend the hearing, in spite of due notification. The Claimant testified *viva voce* and also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as an Electrician from 4<sup>th</sup> February 2011 until 22<sup>nd</sup> April 2013, when he was dismissed. His monthly salary at the time of leaving employment stood at Kshs. 18,000. He claims that there was no justifiable reason for his dismissal and that he was not given an opportunity to be heard. He adds that he was not paid his terminal dues.
4. On 8<sup>th</sup> May 2013, the Claimant reported the matter to the Union whose officials sought audience with the Respondent but they were ignored. The Claimant’s claim is as follows:

- a) 12 months’ salary in compensation.....Kshs. 216,000
- b) 1 month’s salary in lieu of notice.....18,000
- c) Leave for 26 months and 52 days..... 35,984
- d) Severance pay for 2 years.....18,000

**The Respondent’s Case**

5. In its Reply filed in court on 26<sup>th</sup> November 2014, the Respondent denies that the Claimant was its employee from 4<sup>th</sup> February 2011 until 22<sup>nd</sup> April 2013, as pleaded by the Claimant. The Respondent however admits summarily dismissing the Claimant by letter dated 22<sup>nd</sup> April 2013, due to his

involvement in the theft of electric cables on 20<sup>th</sup> April 2013.

6. The Respondent further accuses the Claimant of absenting himself from duty on 22<sup>nd</sup> April 2013, without permission or justifiable cause. While denying the Claimant's entire claim, the Respondent claims from the Claimant Kshs. 11,000, being balance of a loan advanced to him in January 2013.

### **Findings and Determination**

7. There are three (3) 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;
- c) Whether the Respondent has made out a counterclaim against the Claimant.

### **The Dismissal**

8. In its Reply to Claim, the Respondent denies the Claimant's employment history as pleaded in the Memorandum of Claim but admits summarily dismissing him on 22<sup>nd</sup> April 2013. The reason given for the dismissal is the Claimant's involvement in the theft of electric cables. Regarding the employment history, the Respondent did not produce any records as required under Sections 10 and 74 of the Employment Act, 2007. The Court therefore invokes Section 10(7) of the Act and adopts the Claimant's averments in this regard.

9. In his testimony before the Court, the Claimant denied any involvement in theft as alleged by the Respondent. He also denied absenting himself from work without permission. The Court did not find any evidence that these charges were ever put to the Claimant for his response. The result is that the said charges were not tested at the shop floor and I must therefore find that the Respondent failed to establish a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act. The Respondent also failed the fairness requirement test provided in Section 41 of the Act.

### **Remedies**

10. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account 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 and salary for days worked in April 2013.

11. The Claimant told the Court that for the entire period of his employment with the Respondent, he did not take leave. In the absence of any leave records to the contrary, the claim for leave pay succeeds and is allowed.

12. No basis was laid for the claim for severance pay which therefore fails and is dismissed.

### **The Respondent's Counterclaim**

13. By his own admission before the Court, the Claimant owes the Respondent Kshs. 8,000/= in loan balance. This amount is therefore deductible from his award.

### **Final Orders**

14. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 108,000

|   |                |
|---|----------------|
| b) 1 month's salary in lieu of notice.....              | 18,000         |
| c) Salary for 22 days in April 2013 (18,000/30x22)..... | 13,200         |
| d) Leave pay for 2 years (18,000/30x21x2).....          | 25,200         |
| Total.....  | 164,400        |
| Less amount owed to the Respondent.....                 | (8,000)        |
| <b>Amount payable to the Claimant.....</b>              | <b>156,400</b> |

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

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

17. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kandere for the Claimant

No appearance for the Respondent