



**REPUBLIC OF KENYA**

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

**CAUSE NO 2253 OF 2012**

**KENNEDY WAFULA..... CLAIMANT**

**VERSUS**

**WELLS FARGO LIMITED..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 6<sup>th</sup> November 2012 and filed in court on 7<sup>th</sup> November 2012, the Claimant sued the Respondent for unlawful summary dismissal. The Respondent filed a Response on 8<sup>th</sup> March 2013, to which the Claimant responded on 18<sup>th</sup> November 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf but the Respondent did not call any witness, in spite of adequate opportunity to do so.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a Security Guard at a monthly basic salary of Kshs. 4,836 plus a house allowance of Kshs. 1,000, effective 1<sup>st</sup> November 2004. His salary was progressively increased up to Kshs 9,012 plus a house allowance of Kshs. 1,352 as at the time he left the Respondent’s employment.

4. The Claimant worked in various assignments until 18<sup>th</sup> April 2012, when he was summarily dismissed, on allegations of accessing a restricted area on 11<sup>th</sup> April 2012. He states that he was not given an opportunity to be heard. His claim is as follows:

- a) 2 months’ salary in lieu of notice..... Kshs. 20,726.00
- b) Days worked in March/April 2012..... 9,327.00
- c) Refund of uniform deductions..... 4,000.00
- d) Overtime worked and not paid..... 2,773.00
- e) Overtime carried forward from March 2012..... 1,941.00
- f) Prorata leave for 6 months..... 4,145.60

- g) Gratuity for 7 years..... 37,850.40
- h) Compensation for unlawful dismissal..... 124,368.00
- i) Costs

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

5. In its Response dated 6<sup>th</sup> March 2012 and filed in court on 8<sup>th</sup> March 2012, the Respondent denies the Claimant's claim for unlawful dismissal. The Respondent states that the reasons for the dismissal were enumerated in the dismissal letter.

6. It is the Respondent's case that the Claimant displayed incompetence, dereliction of duty and abdication of responsibility, leading to his dismissal. Further, the dismissal was carried out in a procedural and lawful manner.

7. The Respondent avers that the Claimant was a member of the National Social Security Fund (NSSF) and is therefore not entitled to service gratuity. The Claimant's dues were tabulated at Kshs. 27,545 and a cheque issued in his favour but he declined to pick it.

### **Findings and Determination**

8. 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**

9. The Claimant was dismissed by letter dated 18<sup>th</sup> April 2012 stating as follows:

***"Dear Mr. Wafula,***

#### **RE: SUMMARY DISMISSAL**

*Your services are summarily dismissed (sic) with effect from 13<sup>th</sup> April 2012 following the incident on 11<sup>th</sup> April 2012 at Phonelink Capital Centre Mombasa road whereby you accessed a restricted area at the back of the cash counters contrary to assignment instructions and company rules and regulations. You are aware that you are on a third and final warning letter.*

*Your final dues payable through the Accountant after completion of clearance procedures are as follows:-*

- 1. Kshs. 4,000/- being refund of uniform deposit*
- 2. Salary for days worked up to 12/04/2012*
- 3. Overtime for days worked up to 12/04/2012*
- 4. Overtime carried forward from 23/03/2012-31/03/2012*
- 5. Payment in respect of eleven (11) days prorata leave*

*All dues shall be paid net of statutory deductions, loans, advances, loss, shortages in issues and*

other deductions that may be lawfully effected.

The above enumeration of your dues is as per records held. However, please read and make any claims you may have as no claims shall be entertained after payment is made and received.

Yours faithfully,

**WELLS FARGO LIMITED**

(Signed)

**F.K. MAINA**

**PERSONNEL DIRECTOR”**

10. This letter accuses the Claimant of accessing a restricted area at his place of assignment, an allegation the Claimant denies. From the evidence on record, the Claimant was not given an opportunity to respond to the allegations prior to the dismissal. The accusations leading to the his dismissal were therefore untested at the shop floor and the Court finds that the Respondent not only failed to establish a valid reason for the dismissal, as required under Section 43 of the Employment Act, 2007, but also violated the procedural fairness requirements set out under Section 41 of the Act.

**Remedies**

11. Pursuant to the foregoing findings, I award the Claimant ten (10) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service and the Respondent’s conduct prior to the dismissal. I further award the Claimant one (1) month’s salary in lieu of notice as well as salary up to 18<sup>th</sup> April 2012, being the effective date of the dismissal.

12. The claims for uniform refund, overtime compensation and leave pay are admitted and are payable.

13. No basis was laid for the claim for gratuity, which therefore fails and is dismissed.

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

- a) 10 months’ salary in compensation..... Kshs. 103,640
- b) 1 month’s salary in lieu of notice..... 10,364
- c) Salary for days worked in April 2012 (10,364/30x18)..... 6,218
- d) Uniform refund..... 4,000
- e) Overtime compensation..... 4,714
- f) Prorata leave (10,364/30x11)..... 3,800

**Total..... 132,736**

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. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI**

**THIS 3<sup>RD</sup> DAY OF NOVEMBER 2017**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Gachomo for the Claimant

Mr. Kimani for the Respondent