



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

**AT MOMBASA**

**CAUSE NO. 450 OF 2015**

**OMWOYO MAKIYA HEBSON.....CLAIMANT**

**VS**

**OJODE UDOTO & ONJOR ADV.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as a Court clerk from October 2010 earning kshs.19,000/= per month. On 24.10.2013, he was sent on compulsory leave by a letter dated the same date. He construed the said compulsory leave to mean termination of his employment without any reason. On 19.5.2014, he served the respondent with a demand letter for his terminal dues but the same yielded nothing. He now brings this suit claiming terminal dues plus compensation for unfair termination. He avers that his summary dismissal was for no good cause and he was not accorded a fair hearing as required under section 41 of the Employment Act (EA). He further avers that the respondent never remitted any NSSF contributions on his behalf.

2. The respondent denies that it employed the claimant in October 2010 for kshs.19,000/= per month and avers that it was in existence by then. It further denies that it dismissed the claimant summarily by the letter dated 24.10.2013 and avers that the claimant was only sent for compulsory leave upto 26.10.2013 after he was implicated with theft of office laptop. The claimant, however, never returned to the office on 26.10.2013 as required. The respondent further avers that the claimant is not entitled to the reliefs sought because he is the one who abandoned work without notice.

3. The suit was disposed of by way of written submissions and the pleadings.

**Analysis and determination**

4. After careful consideration of the pleadings, witness statements, and the submissions filed by both parties, the court finds that the claimant was employed by the respondent. The issues for determination are:

- a. Whether the claimant deserted employment or he was unfairly terminated.
- b. Whether the reliefs sought ought to issue.

**Desertion vs unfair termination**

5. The burden of posing unfair termination lies with the employee under section 47 (5) of the Employment Act. In this case, the claimant relies on the letter dated 24.10.2013 to state that he was constructively dismissed. The respondent relies on the same letter to state that she only send the claimant on a compulsory leave upto 26.10.2013 but he never returned to the office. The letter stated as follows:

***“Due to facts within your knowledge we are forced to send you to Compulsory leave. PLEASE NOTE that it is upon you to return the said Laptop and offer an apology or in the alternative quit forthwith. You have until 26.10.2013 to make a decision on whether you intend to keep your job or the laptop. In the event you take the latter option, we all the same thank you for your services and dedication and wish you well in life’s endeavors.”***

6. In the opinion of this court, the letter under review was not for a summarily dismissal. The captioned subject matter of the letter was **COMPULSORY LEAVE**. The letter gave the claimant a period of upto 26.10.2013 to decide whether to retain the Laptop or lose his job. The claimant states in his witness statement that he returned to the office on 26.10.2013 and met Mr. Udoto in his office. Mr. Udoto has not denied such meeting with the claimant on 26.10.2013 in his witness statement filed in court on 4.2.2015. The court therefore makes a finding that the claimant was not dismissed by the letter dated 24.10.2013.

7. In this courts view, the claimant was dismissed on 26.10.2013 when he was called by Mr. Udoto into his office and was told to vanish from the office because he (Mr. Udoto) never wanted to see a thief in his office. Mr. Udoto has admitted in his statement that the claimant was dismissed for theft of Laptop from his office. in his witness statement filed in Court on 4.2.2015 and which contradicts the averments in the defence and also the statement by Claudeta Malonza on 1.12.2014, Mr. Udoto stated:

***“The claimant had disciplinary (sic) issues for a long time but I kept imploring on him to safe guard his job. The final act that led to his summary dismissal was the theft of my laptop which had vital documents. I wish to state that only person with the office key.”***

8. The question that begs answer is whether the said summary dismissal was unfair. Under section 45 of the Employment Act, termination of employment is unfair unless the employer proves that it is founded on valid and fair reason and that is was done after following a fair procedure. The respondent’s witnesses have accused the claimant of being a habitual offender. That in October 2013, a laptop was stolen from Mr. Udoto’s office without an evidence of break in and the claimant was the only suspect because he alone had the key to the office. That the claimant was send on compulsory leave to decide whether to return the stolen laptop or lose the job. That when he returned on 26.10.2013 as required, Mr. Udoto send him away because he never wanted to see a thief in his office.

9. This court is satisfied that the respondent was entitled to make a subjective opinion that the claimant was the thief who stole his laptop from the office because it was the claimant only who had the key to the office. That fact was not contested by the claimant in his witness statement. The court however is of the view that despite the existence of a good reason for dismissal, the procedure followed to summarily dismiss the claimant was not fair.

10. Under section 41 of the Employment Act, before the employer dismisses his employee for misconduct, he is required in mandatory terms to explain the employee the reason for the intended dismissal and invite the employee to defend himself. The said proceeding must be conducted in a language of the employee’s understanding and the employee must be given the right of being accompanied by a fellow employee or a shop floor union representative of his choice. The foregoing procedure is the one referred to as fair procedure in section 45 2 (c) of the Employment Act and it was not followed before the summary dismissal of the claimant. Consequently the said dismissal was rendered unfair and it is so found.

### **Reliefs**

11. Under section 49 (3) an unfairly dismissed employee is entitled to either reinstatement or re-engagement subject to the provisions of section 47 (4) of the Employment Act. The court has considered

the wish of the claimant that he should be compensated by damages rather than being reinstated to his employment. The court has also considered the relationship between the claimant and the respondent and the matters leading to the dismissal and made a finding of fact that the relationship has broken down beyond repair. Consequently, the court will not order reinstatement or re-engagement of the claimant. Instead, the claimant will be awarded damages under section 49 (1) of the Employment Act. He was on monthly salary and as such he is awarded one month salary in lieu of notice being kshs.19,000/=.

12. The claimant pleaded the above salary but the respondent denied the same without pleading the correct salary according to it. The same was also not stated in the statements filed by the two defence witnesses. The same was only stated from the bar in the written submissions filed by the defence counsel when he urged the Court to find that the claimant's salary was kshs. 10,000/=. Under section 10 (7) of the Employment Act, the employer has the burden producing a written contract of employment in legal proceedings to disprove any term of contract verbally alleged by the employee. In this case the employer did not produce any written contract or any other documentary evidence to disprove the allegation by the claimant that he was employed for a monthly salary of kshs.19,000/=. Hence this court finds that the claimant was earning a salary of kshs.19,000/= per month.

13. The claimant is also awarded service pay for the 3 years served from October 2010 at the rate of 15 days pay per year which works to kshs.28,500/=. The claimant's contention that NSSF contribution was not remitted on his behalf was not disproved. Consequently the relief is well founded. The claim for gratuity is however dismissed for lack of evidence.

14. The claim for leave is also granted as prayed. The claimant was entitled to 21 days leave per year but he never took any leave. The respondent produced no leave records to disprove the claim for the 63 leave days earned. The claimant will therefore get  $kshs.19,000 \times 63/30 = kshs.39,900/=$  in respect of leave days.

15. Finally the claimant is awarded one month salary being kshs.19,000/= as compensation for unfair dismissal. In so awarding, the court has considered the fact that the claimant majorly contributed to his dismissal through gross misconduct. Secondly, the court has considered the fact that the claimant had worked for the respondent for a short time and has been adequately compensated by way of service pay herein above.

### **Disposition**

For the reasons stated above, judgment is entered for the claimant for **kshs.106,400/=** plus costs and interest.

**Signed, dated and delivered at Mombasa this 19<sup>th</sup> day of February, 2016.**

**ONESMUS MAKAU**

**JUDGE**