



**REPUBLIC OF KENYA**

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

**CAUSE NO. 572 OF 2011**

**HENRY ONDARI ..... CLAIMANT**

**VERSUS**

**TOP SECURITY SYSTEMS LTD ..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the unlawful, unfair and wrongful termination of the Claimant by the respondent.
2. The claimant was employed by the Respondent Company as an accountant with a gross salary of kshs.65, 426.00 per month. He served the Respondent until 21<sup>st</sup> October 2010 when his services were terminated on the reasons that on this day he made payments to a person known to the Respondent on personal matters totally unrelated with the terms and conditions of his employment. That the instructions and directives were issued on non-employment related matters and on issues not directly related with the Claimant employment services and his mistake should not have been used to terminate his employment. The Respondent issue unclear instructions and the adverse action taken against the Claimant was unfair. The Claimant was not given a chance for hearing so as to defend himself before the termination.
3. The claim is loss and damages for premature dismissal before retirement age. On 21<sup>st</sup> October 2010 the Claimant was aged 48 years and had expected to work until age 60 and should be paid all due salaries; Service pay is due at 15 days salary for 5 years worked with the respondent; compensation at 12 months' salary; loss of earning capacity; incorporeal loss for assault occasioned by Respondent officer on the claimant; and costs of the suit.
4. The claim is also that the Claimant has suffered loss following the illegal, malicious and unfair termination. Such malice is on the basis that the termination was for grounds not set out in law; no terminal dues were paid; the allegations against the Claimant was not justified; rules of natural justice were not observed; he was denied his constitutional right to defend himself; and instructions issued at the work place were of non-employment matters.
5. In evidence, the Claimant testified that upon employment by the respondent, his supervisor was the managing Director Mr Arusi. On 21<sup>st</sup> October 2010 Mr Arusi came to the office at noon and gave the Claimant Kshs.20, 000.00 as dues for another employee he had employed in his other company and had decided to terminate her employment. He had decided to pay her for the days worked. She would come in later for the Claimant to pay the issued amounts.
6. The lady came at 1pm while Mr Arusi had left at Noon. He calculated here terminal dues amounting to kshs.14, 000.00 and paid. He was left with a balance of Kshs.6, 000.00. When Mr Arusi

returned at 2pm he briefed him and gave him the balance left. He however complained that the Claimant had overpaid by a day and despite calculation, such was an overpayment. Arusi became very angry, bitterly complained and an argument ensued. The Claimant was then called to Mr Arusi office and issued with a letter of summary dismissal on the grounds that he had overpaid an employee by one day.

7. The Claimant went to Kilimani police station since he had been abused – used words like stupid, idiot, bastard – it was not fair for his employer to use such words on him. The next day the Claimant was called to the office to calculate his terminal dues. They could not agreed of days of service and payments due;

Service pay for 5 years from 1999;

32 days leave

2 days worked in November

8. The Claimant was paid kshs.100, 000.00 by cheque and after a week he had to come back for the balance but they did not agree. The Claimant took the option to file the claim.

9. The Claimant also testified that he was not given a hearing before his summary dismissal. The Respondent called him names instead of giving him a hearing. This resulted in unfair termination as the Claimant had no chance to say why he had paid the Kshs.14, 000.00 to the lady. Present when the Claimant and Arusi were arguing were Elizabeth Kinyanjui the secretary and Jonah Masinde.

10. On cross-examination, the Claimant testified that there was no agreement on the service payment due for 5 years. An amount of kshs.80, 000.00 was agreed with regard to leave days due. November salary was not paid and there is no evidence that PAYE was remitted. The Respondent paid kshs.100, 000.00 was paid.

## **Defence**

11. In defence the Respondent admitted that they had employed the Claimant and had a net salary of Kshs.51, 100.00 per month. The Claimant was terminated in accordance with the law as while undertaking his duties he failed to carry out assigned tasks diligently. Before termination on 21<sup>st</sup> October 2010 the Claimant was given a hearing, there was a misunderstanding following failures to do allocated work properly. At the hearing were Elizabeth Kinyanjui and Kamal Mohamed when the Claimant stated that he was not ready to work for the respondent. The Claimant calculated what he thought were his terminal dues and handed this to the respondent. On several occasions the Claimant had verbal warnings with regard to his work conduct and cannot attribute the alleged loss and damages to the Respondent as the termination was due to his own making.

12. The Respondent was always willing and ready to pay the Claimant kshs.187, 396.00 Service pay per section 35(5) of the Employment Act which offer was sent to the claimant. That the Respondent is still willing to pay;

15 days salary for each year worked at kshs.187, 396.15;

Unpaid leave Kshs.80, 512.00;

22 days worked in November at kshs.47, 960.00

**Total Kshs.315, 868.15**

Less PAYE, NSSF and NHIF at kshs.86, 539.52

**Total due Kshs.229, 328.63**

13. These dues should be less Kshs.100, 000.00 that the Claimant has since received and he has since refused to accept the balance of kshs.129, 328.63.

14. The Respondent later learnt that while the Claimant was in their employment, he carried out administrative and accounting duties for a rival company Leading Locks Limited and was paid for his services. The Claimant gave confidential information to the rival company leading the Respondent loosing crucial business as the rival company had the advantage of the Claimant sharing information with them based on inside knowledge from his work with the respondent. The rival company was supplying alarms systems. The Respondent was therefore entitled to dismiss the Claimant and his claim should be dismissed with costs.

15. In evidence the Respondent called 3 witness.

16. Yohoshua Arusi testified that he is the chief executive officer of the Respondent managing all its work. The Claimant worked with the Respondent for 5 years but on 21<sup>st</sup> October 2010 he was dismissed. He told the Claimant to pay a lady from a sister company for 9 days work but he paid for 10 days. When he asked why such was paid, the Claimant insisted that he included the days the lady came to collect her money all being 10 days. Mr Arusi testified that he should at the Claimant noting that it was not for him to decide who or how much was to be paid and in response the Claimant shouted back stating that if his work was not appreciated he should be let go on condition his terminal dues were paid. On this statements from the claimant, Mr Arusi asked him to compute his terminal dues so that he could pay and be let go. The Claimant gave terminal dues amounting to Kshs.229, 000.00 which he accepted as he was the accountant. The Respondent paid kshs.100, 000.00 and the balance should be kshs.129, 000.00. The Claimant refused to take this amount and asked to be paid double.

16. Mr Arusi also testified that he gave the Claimant one (1) month notice on 21<sup>st</sup> October 2010. The dues owing;

15 days' pay for each year	kshs.187, 000;
Unpaid leave	Kshs.80, 000.00;
22 days worked in October 2010	kshs.47, 000.00;
Less PAYE	Kshs.86, 039.00;
<b>Balance</b>	<b>kshs.229, 328.63;</b>
Paid kshs.100, 000.00	
<b>Dues</b>	<b>kshs.129, 328.63.</b>

17. The Claimant reported the matter to the police but he was never called or charged with any offence.

18. Mr Arusi also testified that he later learnt that the Claimant went to work for Leading Lock Ltd his competitor and he gave then all his secrets. He had an alarm in China with his upgrade and the Claimant gave Walter the owner of Leading Locks Ltd information and the address in China and were able to make contact and make changes. The Claimant and the competitor Leading Locks Ltd knew that the Respondent had heavily invested in the alarm system and he had a company in China to upgrade the same. The company in china confirmed that they sold similar alarm systems to Leading Locks ltd where the Claimant worked while in the employment of the respondent. The claim for wrongful termination does not arise and it was justified. The Claimant wanted to leave and despite efforts to remain with the Respondent he was adamant. He has caused a lot of damage to the Respondent business by sharing business secrets with rival companies; while the Claimant was employed by the Respondent he prepared tenders for the Respondent to Safaricom and he would later go to Leading Locks Ltd and put the same

tender at a lower rate and they ended up getting the tender while the Respondent lost. The Respondent lost a lot of business over time and was forced to lay off employees.

19. In cross-examination the witness confirmed that he owns Doughnut Ltd and the Claimant overpaid an employee who was working at this sister company. When asked why he did so he had no reasons at all thus leading to his termination. He shouted at the Claimant who shouted back and insisted on being terminated and went ahead to prepare his own terminal dues. There was a verbal hearing as no minutes were taken and then he was released.

20. Elizabeth Kinyanjui also testified that she is the secretary of the Respondent and recall the 21<sup>st</sup> October 2010 while in her office she heard a commotion between Arusi and the claimant. The Claimant was shouting at his boss Mr Arusi. She was asked to do a termination letter with one (1) month notice. She tried to calm the Claimant down and asked him not to make a hasty decision to leave the Respondent but he was adamant that he was tired working for the Respondent and should be paid his dues.

21. The other witness was Jonah Masinde who testified that he is a Welder working with the respondent. He was previously working with Leading Locks Ltd in 2010 to 2011. He was paid his salaries through vouchers prepared by Henry Ondari his colleague at Top Security from 2000 to 2009. He left that employer and joined Leading Locks Ltd where he met the Claimant [Henry Ondari] who came in as the accountant. He would report to work at 3pm in the evening. He prepared staff salary vouchers and payments would be made by a different person. He also learnt that the Claimant was working for the Respondent in the morning.

## **Submissions**

22. Both parties filed their written submissions. The Claimant filed on 28<sup>th</sup> September 2015 while the Respondent filed on 22<sup>nd</sup> March 2016.

23. The Claimant submit that he was wrongfully and prematurely terminated from employment with the Respondent who also refused to pay his terminal dues. He was not heard in his defence. He was only paid kshs.100, 000.00 but the Respondent has refused to pay the balance of terminal dues owing.

24. The Claimant also submit that his dismissal was not fair or lawful as the Respondent did not act in accordance with section 41 of the Employment Act. The Respondent witness testified that on 21<sup>st</sup> October 2010 there was a misunderstanding with the Claimant when he gave instruction that an employee be paid dues for 9 days but the Claimant paid for 10 days. Such misunderstanding arose due to the reason that the Claimant had no written instructions and relied on what the Respondent told him. The sanction of termination was too harsh for the mistake made due to the misunderstanding. Section 43 of the Employment Act places the burden of proof on the employer to prove the reasons for termination but in this case, at the time of termination, there was nothing that justified the same. The claim is for;

- |  |                     |
|--|---------------------|
| a. 15 days service pay at              | kshs.187, 396.15;   |
| b. Unpaid leave                        | kshs.80, 512.00;    |
| c. October salary                      | kshs.47, 960.00     |
| d. Compensation for unfair termination | Kshs.785, 112.00    |
| e. Loss of income                      | kshs.9, 421,344.00; |
| f. Loss of earning                     | kshs.1, 000,000.00; |
| g. Incorporeal loss                    | Kshs.2, 000,000.00  |
| h. Costs and interest.                 |                     |

25. The Respondent should not make any PAYE or other statutory deductions as such were paid while the Claimant was in employment and the due amounts cannot therefore be subject to PAYE deduction after wrongful termination.

26. The Respondent on their part submit that the Claimant was employed vide contract dated 3<sup>rd</sup>

October 2005 as an Accountant. He was under a confidentiality clause not to divulge any information pertaining to the company in a manner detrimental to the operations of the respondent. He was also required not to carry out other business during work hours as such would constitute sufficient grounds for dismissal.

27. On 21<sup>st</sup> October 2010 the Respondent issued the Claimant with a termination notice and on 25<sup>th</sup> November 2010 he was paid kshs.100, 000.00 as part payment of terminal dues and the balance was to be collected later. The Claimant was however not loyal to the Respondent and divulged information to a rival company contrary to his contract of employment which was sufficient ground for dismissal as held in **Hivac limited versus Park Royal Scientific Instruments Limited (1994) 1 AER.**

28. The dismissal was fair and lawful as when the Claimant was asked why he overpaid an employee he lost his temper and demanded that he should be terminated. This is confirmed by Ms Kinyanjui the Respondent secretary who testified that she tried to dissuade the Claimant against demanding that he be terminated but he remained adamant. Pursuant to section 41 and 43 of the Employment Act, the Claimant was given a hearing and there were valid reasons for his termination.

29. The respondent also submit that the parties mutually agreed that the Claimant terminal dues were;

15 days service pay;

Unpaid leave;

November salary.

30. The Respondent paid kshs.100, 000.00 and was to pay the balance but the Claimant filed the suit herein and has refused to collect the balance. The Claimant is therefore not entitled to the remedies sought as they are not justified and no evidence was submitted in support of the claims.

31. The Respondent has relied on the following cases – **HCCC No.1077 of 1991 Henry Njenga versus Shell Chemicals Co. of Eastern Africa; Anthony Mulaki versus Addax Kenya limited, Cause No.822 of 2012; Alphonse Maghanga versus Operations 680 Ltd, Cause No.146 of 2012.**

## **Determination**

32. On 21<sup>st</sup> October 2010 the Claimant was issued with 30 days' notice of employment termination. The reason for termination was that there had been a misunderstanding between the Claimant and the respondent arising from the Claimant overpaying salary by an extra day to an employee of a sister company, doughnut Limited.

33. The Respondent witness Mr Arusi confirmed that when he came back to the office on 21<sup>st</sup> October 2010 at 2pm and realised the Claimant had overpaid another employee, he shouted at the Claimant who equally shouted back and in such shouting, the Claimant lost his temper and said that he knew the Respondent did not want his services and therefore should be let go. The Claimant on his part testified that the Mr Arusi started shouting at him using abusive words and was forced to report the matter to Kilimani police Station. He was asked to compute his terminal dues which he did but the Respondent refused to pay him and proceeded to dismiss him without hearing so as to defend himself and say why he had overpaid the employee. That his reasons for overpaying arose from the fact that there was a misunderstanding between him and Mr Arusi noting the verbal instructions he had been given.

34. The Claimant was terminated from his employment with the respondent. He was given notice of 30 days. The Claimant has challenged his termination on the basis that it was unfair; section 43 of the Employment Act requires that;

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the*

*termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

35. Where there is termination of employment, the burden is on the employer to prove that the reasons for termination are fair and that at the time of such termination the reasons that exist are genuine and warrant such termination. However, Hearing of the employee in his defence is required under section 41 of the Employment Act, even where the employer intends to give an employee termination notice or has already issued such notice of termination.

36. As held by this Court in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2014] eKLR**; even in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under section 41 of the Employment Act must be followed as they are mandatory. The requirement is to call the employee to attend hearing in the presence of a fellow employee of his choice where his defence is submitted for consideration by the employer. Without such defence being heard and discussed, the employee is left exposed to the whims of the employer to terminate at will. The right to terminate an employee is no longer unrestricted as section 41 of the Employment Act has created a safeguard to ensure natural justice is achieved at the shop floor where the facts are best established.

37. Where an employer therefore fails to hear the employee at the work place or fail to set modalities to ensure that the employee is given a hearing before termination either through a policy guide or a human resource manual, such an employer is left exposed to claims such as this one. The requirements under section 41 of the Employment Act being mandatory, where not followed, the resulting termination becomes procedurally unfair.

38. The reasons for termination are that there was a misunderstanding between the Respondent officer and the claimant. Such resulted in a shouting match which ended in the Claimant losing his temper and offered to leave the Respondent employment. Also there was the reason of the Claimant overpaying an employee of Doughnut Limited. All factors put into account, the Claimant did not resign or retire from his employment with the Respondent despite evidence that in his anger or temper he asked to be terminated. The termination letter is authored by the respondent. As such, the process of termination was not mutual. It was the Respondent who terminated the Claimant and issued notice vide letter dated 21<sup>st</sup> October 2010.

39. Though the reasons for termination are noted by both parties as there being a misunderstanding and an overpayment, the procedural requirements antecedent to any termination of employment were not adhered to by the Respondent as the employer. Such I find resulted in procedural unfairness that is contrary to section 45 of the Employment Act.

40. The evidence that the Claimant was moonlighting while still employed by the Respondent is introduced through the amended statement of defence. The Respondent also called evidence to this effect. The letter of termination was however for the reasons of their having been a misunderstanding and overpayment of a salary. At 21<sup>st</sup> October 2010, this did not form a reason for termination. The Respondent has not counter-claimed for any business losses or potential losses that can reasonably be foreseen due to sharing of business information by the Claimant and despite his contract of employment being clear on this fact. The Respondent does not seek for any remedy.

41. The Claimant has not put any reply to the amended defence and noting matters confirmed in the evidence of the Respondent such will be put into account in the final orders.

## **Remedies**

42. The claims relate to

- a. Benefits in respect of loss of income;
- b. Benefits in respect to service;
- c. Benefits in respect of wrongful dismissal;
- d. Benefits in respect of lost earnings;
- e. Incorporeal loss.

43. The claims for loss of income and lost earnings are on the basis that the Claimant was wrongly terminated and he had expected to work until he was 60 years. On the other hand lost earning are claimed on the basis that the termination was wrongful and the Claimant has lost capacity to earn a living. However the Claimant was issue with notice of termination of employment which notice he served and has not challenged such notice herein. Such notice is due under section 35 of the Employment Act which allow either party to an employment contract to issue the other with notice to terminate the contract. Equally, on the claim for lost earnings, the Claimant has since secured new employment and he did not challenge the defence with regard to averments that while in the employment of the Respondent he also worked for a rival company where he shared business secrets of the employer that was specifically addressed din his employment contract but he went contrary to such terms. Such is a matter grave, and even though the Respondent has not counter-claimed in this regard, the claim for lost earning on the face of such evidence cannot suffice. It has to fail.

44. Service pay is due to an employee under the provisions of section 35(50 read together with 35(6). The Claimant has not attached his pay slip herein for the Court to assess the nature of statutory deductions that were made on his monthly salary. However the Claimant has contested a deduction of PAYE, NSSF and NHIF dues from his terminal dues on the grounds that such had been deducted and paid while he was in the employment of the Respondent and the terminal dues should not be subjected to similar deductions. This then confirms that the Claimant had his statutory deduction made to KRA, NSSF and NHIF while he was with the respondent. As such, this being a Court of equity, there can only be granted that which is lawful and due as of right to the Claimant unless there is a consent noting the contested claims. On the payment of statutory dues, service pay is not payable.

45. I find no contest with regard to leave days due and not taken. Such is a right under section 28 of the Employment Act and where earned and not taken, an employer can convert the same into a payment. Such is confirmed at kshs.80, 512.00.

46. The salary due for November 2010 where not paid and was with regard to time the Claimant was serving notice is due. Such is confirmed at kshs.47, 960.00.

47. On the finding that there was procedural unfairness, putting into account the evidence of his moonlighting with Leading Locks Ltd while in the employment of the Respondent the clamant is awarded compensation equivalent to 6 months' pay. Such is based on the last gross salary paid at Kshs.65, 426.00 all being Kshs.329, 556.00.

48. Noting the Claimant was paid kshs.100, 000.00 immediately upon termination, the balance due has not been paid despite demand through his advocates, even where the Respondent believed that the terminal dues owing were only Kshs.129, 000.00 such ought to have been paid to the Claimant and where such was a wrong amount, once suit was filed, such would have been secured. As such, costs for the suit are due.

**I enter judgement for the Claimant against the Respondent in the following terms;**

- a. **The termination was procedurally unfair;**
- b. **Compensation awarded at Kshs.329,556.00;**
- c. **Unpaid leave awarded at kshs.80,512.00;**
- d. **Salary due for October 2010 awarded at kshs.47,960.00;**
- e. **The amounts due at (a), (b), (c ) and (d) above shall be paid less kshs.100,000.00 already paid and acknowledged by the Claimant as part-payment of terminal dues;**
- f. **Monies paid to the Claimant shall be subject to the provisions of section 49(2) of the**

**Employment Act; and  
g. Costs awarded to the claimant.**

**Orders accordingly.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2016.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga

.....  
.....