



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1622 OF 2014**

**JONATHAN MASILA MUTIA.....CLAIMANT**

**VS**

**LEO INVESTMENTS LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by Memorandum of Claim dated 2nd September 2014 and filed in Court on 16th September 2014 seeks compensation for unlawful termination together with terminal dues. The Respondent filed a Statement of Defence on 5th December 2014. The Claimant testified on his own behalf and the Respondent called its Chief Accountant, Abdul Hussein.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a gardener at a monthly salary of Kshs.2,500 from 1995. He was later promoted to the position of swimming pool attendant/caretaker at a monthly salary of Kshs.18,000.

3. On 4th April 2014, the Claimant was summarily dismissed. He states that the dismissal was without a justifiable cause and was in violation of his rights under the law. In the Memorandum of Claim, the Claimant claims the following:

- a. Salary for February 2014 (less Kshs.1,500 advance).....Kshs.16,500
- b. Salary for 4 days worked in April 2014.....2,400
- c. One month's pay in lieu of notice.....18,000
- d. Leave pay.....18,000
- e. 12 months' salary in compensation for unlawful termination.....216,000
- f. General damages
- g. Costs plus interest

**The Respondent's Case**

4. In its Statement of Defence dated 30th September 2014 and filed in Court on 5th December 2014, the Respondent states that the Claimant was involved in theft at the work place. In particular, the Respondent accused the Claimant of colluding with other employees to siphon fuel from the Respondent's generator. He was therefore summarily dismissed for breach of his contractual obligation. In its defence,

the Respondent denies owing the Claimant any dues.

## **Findings and Determination**

5. In the course of the trial, the Respondent admitted all the claims made by the Claimant save for the claims for compensation for unlawful termination and general damages. These are therefore the only issues for determination in this case.

## **The Termination**

6. The Claimant states that the termination of his employment was unjustifiable and unfair. On its part, the Respondent avers that the Claimant was guilty of theft and the termination of his employment was therefore justifiable. Arising from the allegations of theft, the Claimant was arrested and charged in the Chief Magistrate's Court at Kiambu. He was subsequently acquitted under Section 210 of the Criminal Procedure Code.

7. The accusations made by the Respondent against the Claimant are within the province of gross misconduct which renders an employee liable to summary dismissal. Section 41 of the Employment Act, 2007 provides as follows:

**41.(1). Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the ground of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.**

8. From these legal provisions, and as held by **Mbaru J** in **Kenya Union of Commercial Food and Allied Workers v 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, 2007 are mandatory.

9. Employers must understand that it is in the course of internal disciplinary processes at the work place that a valid reason for termination of employment is established. An employer who fails to seize this opportunity cannot come to Court and try to do what he ought to have done internally at the work place. When the Court sits, it does not seek to re-enact the internal disciplinary process. Rather, it seeks to review the employer's decision and attendant processes.

10. I must add that the fact that an employee is arrested and charged with a criminal offence does not in itself render the employee liable to dismissal. In addressing this issue in **Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR** this Court held that criminal proceedings are distinct from internal disciplinary proceedings at the work. An employer cannot therefore rely on the pendency of criminal proceedings to justify disciplinary action. The only exception is where the law or the internal disciplinary rules of an employer expressly provide that an employee facing criminal proceedings is either interdicted or suspended.

11. That said and having looked at the proceedings and ruling emanating from the Criminal Court, it seems to me that there were no reasonable grounds to link the Claimant with the alleged siphoning of generator diesel. I must therefore reach the conclusion that the Respondent had no valid reason for dismissing the Claimant. Further, the Respondent failed to comply with the procedural fairness requirements set out in law.

12. Consequently, I award the Claimant twelve (12) 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 in the dismissal transaction, including failure to pay dues that were not in dispute.

13. With regard to the Claimant's employment record, there was no evidence that the past warning letters produced by the Respondent were actually served on the Claimant. The Court therefore disregarded them in reaching its decision. No case was made for general damages which claim fails and is dismissed.

14. Ultimately I make an award in favour of the Claimant in the sum of Kshs.216,000 being twelve (12) months' salary in compensation for unjustifiable and unfair termination of employment. The award amount will attract interest at court rates from the date of the award until payment in full.

15. The Claimant will have the costs of this case.

16. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF MARCH 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyakiangana for the Claimant

Mr. Mwangi Kigotho for the Respondent