



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 495 OF 2010**

**JAMES NDUNGU WARORUA.....CLAIMANT**

**VERSUS**

**MUNICIPAL COUNCIL OF LIMURU.....RESPONDENT**

**JUDGMENT**

1. According to the memorandum of claim filed on 5<sup>th</sup> May, 2010 the claimant averred that he was employed on 10<sup>th</sup> August, 1998 by the respondent as a watchman. At the time of termination the claimant was earning a gross salary of Kshs.10,920/=.
2. The claimant was dismissed on 26<sup>th</sup> October, 2007 which dismissal he claims was unfair, unprocedural and unlawful. He further complained that he was not paid his lawful dues upon termination.
3. The claimant further contended that the termination of his services took place after the respondent's council had been dissolved and after being directed not to employ or dismiss any employees.
4. The respondent on its part refuted the claimant's claims and averred that his services were lawfully and properly terminated by the respondent upon justifiable reasons to wit repeated gross misconduct in discharge of his duties. The respondent accused the claimant among others of repeatedly absenting himself from duty without leave, commission of criminal offenses of dishonestly handling properties of the respondent. According to the respondent, the claimant was severally warned verbally and in writing but took no heed.
5. The respondent further averred that on the night of 4<sup>th</sup>/5<sup>th</sup> August, 2015 their premises were broken into and respondent's property stolen when the claimant and his colleague were supposed to be guarding the said property. They were both arrested and charged in Limuru Court with the offenses of stealing and failing to prevent theft. The case was terminated with the acquittal of the claimant and upon acquittal he was reinstated with full entitlements. The respondent complained that after reinstatement, the claimant continued misconducting himself despite warning both verbal and written.
6. On 19<sup>th</sup> October, 2007, the claimant was properly suspended from the respondent's employment with an opportunity being given to him to defend himself before the respondent's Finance, Staff and General Purposes Committee.

7. According to the respondent therefore, the claimant was guilty of repeated, gross misconduct, was duly warned and given opportunity to be heard.

8. In his oral testimony, the claimant stated that he attended the disciplinary meeting. He was later while on leave issued with a letter retiring him on public interest. It was his evidence that his retirement was never discussed at the disciplinary meeting. Upon retirement he was paid money from the LAFT fund and his salary for the month of October, 2007.

9. In cross-examination he denied knowledge of letters attached to the respondent's memorandum of response. He further stated that he was not on duty when the lorry's differential went missing.

10. The respondent on its part called one witness, Mr. Alio Adan Ali who stated he used to work for the respondent as a security officer. It was his evidence that the claimant was dismissed after several warnings. The warnings were between 1999 and 2007 and some of them were produced in Court. He stated that the claimant used to absent himself from work, stole items he was meant to guard. He further stated that the claimant used to switch off lights and sleep while at work. According to him therefore, there was enough reason to terminate the claimant's services.

11. The claimant's services were terminated on 23<sup>rd</sup> October, 2007 by way of retirement in public interest. The letter of retirement attached to his memorandum of claim as appendix 2 gave in detail the background that informed the decision to retire the claimant. The respondent in its memorandum of response elaborately demonstrated the reasons and process taken in retiring the claimant. Appendices R23-29 contain notices of meetings and minutes of discussions of the issues that led to the claimant's retirement. The Court has carefully considered these supporting documents as well as testimony by the respondent's only witness Mr. Alio Ali and is reasonably persuaded that there were sufficient reasons for retiring the claimant in public interest. The Court is further convinced that a proper and fair procedure was followed in arriving at the decision.

12. However these findings whereas sound, do not apply to the claimant's case. The claimant's case fell under the regime of the repealed Employment Act where there was no obligation on the employer to give reasons for dismissal. The concept of unfair dismissal for which compensation was available was not provided for in the repealed Act. The claimant having been terminated on 26<sup>th</sup> October, 2007 cannot benefit from the provisions of the current Employment Act which came into force on 2<sup>nd</sup> June 2008.

13. In the circumstances the Court reaches the conclusion and finds that the orders sought cannot be granted with the consequences that the suit is hereby dismissed with costs.

12. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of May 2016

**Abuodha Jorum Nelson**

**Judge**

Delivered this 13<sup>th</sup> day of May 2016

**In the presence of:-**

...for the Claimant and

.....for the Respondent.

**Abuodha Jorum Nelson**

**Judge**