



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1399 OF 2014**

**JOSEPHAT MUTINDA MWANZIA.....CLAIMANT**

**VS**

**TANDU ALARMS SYSTEMS LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by a Statement of Claim dated 19th August and filed in Court on 20th August 2014 seeks compensation for unlawful termination of employment and payment of terminal dues.
2. The Respondent filed a Memorandum of Defence on 29th October 2015 to which the Claimant responded on 10th November 2015. At the trial, the Claimant testified on his own behalf and the Respondent called its Quality Assurance Auditor, Henry Ochoki Rayoli and Human Resource Officer, Joy Muguro as well as the Claimant's former colleague, Josephat Kapchanga.

**The Claimant's Case**

3. The Claimant was employed as a security guard initially by the Respondent's predecessor, AUA Ltd. In the year 2004, the Respondent took over the management of AUA Ltd and offered to employ the Claimant in the same position of security guard at a monthly salary of Kshs. 9,000. The Claimant states that the Respondent undertook to honour all accrued benefits owed to him by AUA Ltd. The Claimant's salary was progressively increased to Kshs. 19,671.47 as at the time he left the Respondent's employment.
4. The Claimant further states that from the year 2006, he performed the duties of an x-ray screener for which he had been trained by the Respondent. Although it was mutually agreed that he would be paid a monthly allowance of Kshs. 1,000 for performing the duties of an x-ray screener, the Respondent did not honour this commitment.
5. The Claimant worked for the Respondent until 7th July 2014 when his employment was terminated without a justifiable cause and without notice. He states that his explanation in answer to the charge of disobeying lawful instructions was not taken into account.
6. He claims the following:
  - a) declaration that the termination of his employment was unlawful
  - b) Screening training allowance

- (October 2006-December 2012).....Kshs. 63,000
- c) Uniform refund.....4,000
- d) Allowances from AUA Ltd
- e) Leave allowance for 2004, 2005 and 2006
- f) 1 month's salary in lieu of notice.....19,671.47
- g) 12 months' salary in compensation for unfair termination.....235,409.64
- h) Severance pay (1999-2014)
- i) Unremitted pension benefits
- j) General damages
- k) Costs

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

7. In its Memorandum of Defence filed in Court on 29th October 2015, the Respondent admits having employed the Claimant as a security guard at a monthly salary of Kshs. 10,911.68 plus a house allowance of Kshs. 1,636 effective 30th July 2004.

8. On 4th July 2014, the Claimant reported for duty late, an offence he had previously committed. Despite having arrived late, the Claimant idled lazily near the changing rooms while smoking a cigarette, contrary to company rules and regulations. Upon being questioned by his superior, Henry Rayoli, the Claimant showed disrespect and lack of remorse. Rayoli therefore completed a defaulter charge sheet and reported the incident to the Human Resource Department.

9. The Claimant was issued with a show cause letter on 7th July 2014. In his response, the Claimant stated that on 4th July 2014, he was unable to change into his uniform as a female guard was in the changing room. He also admitted smoking openly at the main gate.

10. By notice dated 7th July 2014, the Claimant was invited to a disciplinary hearing to be held on 8th July 2014. On 14th July 2014, he was summarily dismissed. His subsequent appeal was declined. The Claimant's entire claim is denied.

### **Findings and Determination**

11. There are three (3) issues for determination in this case:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in effecting the termination the Respondent followed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

### **Reason for Dismissal**

12. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for getting rid of an employee; whether by termination or summary dismissal. This Court has stated elsewhere that the burden placed on the employer under this provision is to demonstrate the existence of a reason that would move a reasonable employer to terminate employment (see *Paul Waigiri Muriuki Vs Nairobi Water and*

**Sewerage Company Ltd [2015] eKLR).** In this respect, the Court must exercise restraint not to descend into the workplace and replace the employer's decision with its own. If in the circumstances of the case the employer acted reasonably, then the Court must not interfere.

13. On 7th July 2014, the Claimant was issued with a show cause letter stating as follows:

*“Dear Josphat,*

**SHOW CAUSE WHY**

*It was reported on 4th July 2014, you reported late and when you were asked for reason why you reported late and (sic) you responded rudely. In addition, you light (sic) a cigarette at the NAS Plastics gate instead of putting on your uniform.*

*The management is concerned about your behaviour at work and you are hereby called upon to submit your written explanation and show cause why disciplinary action should not be taken against you.*

*Your explanation should reach the undersigned at 1200 hours of the date of this letter.*

*Yours faithfully*

**TANDU ALARM SYSTEMS LTD**

*(Signed)*

**JOY MUGURO**

**HUMAN RESOURCE OFFICER”**

14. By letter dated 7th July 2014, the Claimant was summoned to a formal disciplinary hearing which was to take place on 8th July 2014. He was subsequently dismissed by letter dated 14th July 2014 which stated as follows:

*“Dear Josphat,*

**SUMMARY DISMISSAL**

*It is with regret that Tandu Alarm Systems Ltd has decided to serve you with a summary dismissal of your services with effect from 14th July 2014.*

*It was reported that on 4th July 2014 you willingly failed to follow lawful instructions given to you by your in-charge, you reported to your assignment late on several occasion (sic) and you have been warned severally that smoking while at the clients' premises is prohibited. These offenses have justified being served with summary dismissal. According to The Employment Act, 44 Sec 4(a) states (sic) the summary dismissal is justified if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*

*You are therefore instructed to arrange to return all company items in your possession to facilitate calculation of your final dues if any.*

*You have the right to appeal to (sic) this dismissal of your services in writing, within 48 hours from the date of this letter. Please direct your response to the Managing Director.*

*Yours faithfully*

**TANDU ALARM SYSTEMS LTD**

(Signed)

JOY MUGURO

**HUMAN RESOURCE OFFICER**

15. Looking at the foregoing correspondence cumulatively, it would appear that the offences facing the Claimant had to do with his conduct which also affected his performance. The Respondent's 1st and 2nd witnesses tendered corroborative evidence on the events of 4th July 2014 which eventually led to the Claimant's dismissal.

16. Moreover, even gauging from the Claimant's own e-mail dated 18th July 2014, it would appear that at the time the Claimant was leaving, the reason for his dismissal was clear. It seems to me therefore that the Respondent has discharged its burden under Section 43 of the Employment Act, 2007.

**Termination Procedure**

17. I now turn to the termination procedure. Section 41 of the Employment Act, establishes the following mandatory procedure for handling cases of misconduct:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- (b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- (c) That the employer has heard and considered any explanations by the employee or their representative;

18. Additionally, Section 12 of the Act requires an employer who has more than fifty (50) employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

19. The Claimant was issued with a show cause letter on 7th July 2014 to which he was required to respond on the same day at 1200 hours. The Respondent's Human Resource Officer, Joy Muguro told the Court that the Claimant was required to respond to the show cause letter within two (2) hours. In similar fashion, the Claimant was given a one (1) day notice to appear for a formal disciplinary hearing.

20. Like all meetings, a disciplinary meeting must be called with due notice to all affected parties (see **Lenaola J in Republic v Kenya Medical Training College Ex Parte James Kipkong'a Kandagor [2004] eKLR**). In fact, because disciplinary meetings carry the potential of punitive outcomes, where due notice is not given, then the entire disciplinary process is marred with illegality and unfairness. This was the holding of this Court in **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** and I find no reason to change my mind.

21. The procedural fairness requirements set by Section 41 of the Employment Act cannot be satisfied by a tick-box approach. In examining for compliance, the Court must be satisfied that the Claimant was not just taken through the motions with a predetermined outcome. The hearing must be real and substantive and in this case, the Respondent in failing to afford the Claimant adequate time to prepare and present his defence, missed the mark thus rendering the dismissal procedurally unfair.

**Remedies**

22. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service, employment record and

conduct of both parties. I further award the Claimant one (1) month's salary in lieu of notice.

23. The claims for screening allowance and allowances carried over from AUA Limited as well as leave allowance for 2004-2006 were not proved and are dismissed. Similarly no basis was laid for the claims for severance pay, un-remitted pension benefits and general damages which are also dismissed. From the clearance certificate produced by the Respondent, the Claimant was refunded his uniform deposit and this claim must therefore also fail.

24. Finally, I make an award in favour of the Claimant in the following terms:

a) 6 months' salary in compensation for unfair dismissal.....Kshs.118,026

b) 1 month's salary in lieu of notice.....19,671

**Total.....137,697**

25. The Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

26. is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MAY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Amutara for the Claimant

Miss Kamau for the Respondent