



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

**AT NAIROBI**

**CAUSE NUMBER 1457 OF 2013**

**LARRY S. AYODI.....CLAIMANT**

**VERSUS**

**CONSUMER CONNECT LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant herein was employed on 31<sup>st</sup> September, 2011 by the respondent as a merchandiser at a salary of Kshs.13,000/= . He worked as such until 14<sup>th</sup> march, 2013 when he claimed he was summoned by one Mr. Dismus Shitambasi and dismissed verbally.
2. He contended that his dismissal was without a reason and that prior to dismissing him he was never accorded a chance to be heard. Upon dismissal he was paid only for the days worked.
3. The respondent refuted the claimant's allegations and averred that the claimant was dismissed after verbal warnings and two written warnings which cited fundamental breaches of his obligations at the workplace. The respondent averred that the claimant persistently absented himself from his work station to conduct personal errands for others. The respondent further averred that the claimant repeatedly used abusive language to his superiors and respondent's clients.
4. At the hearing the claimant stated Mary and he were called by Dismus and terminated because they were "kichwa ngumu". They were not issued with termination letters. He denied ever receiving the warning letters attached at page 4 to 5 of the respondent's bundle of documents. He denied prior knowledge of the accusations against him. It was his evidence that the communication of the decision to terminate him was in the presence of his supervisor. In cross examination he denied performing work for other people.
5. The respondent's first witness Mr. Dismus Shitambashi stated that the claimant was not a good worker in that he failed to deliver reports and was rude and used to leave the machines unattended. It was his further evidence that the claimant started to vend his own products through the machine. According to him the claimant was warned severally but never changed.
6. The respondent's second witness, Mr. Oper testified that he received complaints about the claimant's performance and that the claimant was asked severally to change but failed to do so. It was his evidence that the claimant never went on leave because he had not continuously served the respondent for twelve months. According to him the claimant was initially on probation for 5 months. He further stated that no body in the company got house allowance.

7. In his final submissions Mr. Wathome contended that the warning letters were merely prepared for purposes of defending the suit and that the claimant testified that he was never issued with any. Counsel further submitted that the claimant was neither given a notice to show cause nor heard before he was dismissed. He was only summoned and informed that there was no more work for him to do. According to counsel, RW1 insisted the claimant was heard before dismissal yet no minutes were filed to show that a disciplinary hearing was conducted. According to counsel therefore, the respondent failed to discharge the burden of proving that the claimant's dismissal was fair and justified.

8. Mr. Oyata for the respondent on the other hand submitted that the claimant failed to dispense with the burden of proof where they merely denied having received any warning or termination letters.

9. According to counsel, the respondent intimated at the hearing that the information to sever the employment relationship was conveyed to the claimant clearly and that the purpose of the meeting was wholly appreciated by the claimant. The claimant attended the hearing with his floor supervisor Mr. Asango.

10. In termination of employment cases, the legal requirements are basically two. First, there must be a valid or justifiable reason for terminating an employee's services. Second the process must be carried out through a fair procedure. The burden of proof that the termination was unfair in terms of reason and procedure lies on the employee while the responsibility to prove the validity of the reasons for termination is on the employer.

11. The employee is the claimant in this suit he alleges that the termination of his services was unfair because he was not made aware of the reasons for his termination. He however said in his oral testimony in Court that when he was called by Mr. Dismus and was told that his services were being terminated for the reason that he was "kichwa ngumu". He denied prior knowledge of these accusations. The communication of reasons why his services were being terminated was made in the presence of Mr. Andrew who he came to the meeting with his supervisor.

12. In order to prove the reasons for the termination of the claimant's services, the respondent attached to its memorandum of response, two warning letters in which the claimant was accused of running personal errands for members of staff at SCB Chiromo which meant as such times he was not available at his workplace to fully undertake his responsibilities. The claimant was further accused demonstrating disrespect towards some staff members of the facility management company based at Chiromo. The respondent further attached the claimants' termination letter in which the reasons for termination of his services were set out.

13. The claimant never filed any reply to the memorandum of response to respond to these attachments. In his testimony in Court, he however denied ever receiving the warning letters and the termination letter. Counsel for the claimant further submitted that no minutes were exhibited in Court to show any disciplinary hearing took place. The claimant however did not dispute that he received Kshs.4994/= and signed for it. In the final payment from attached to the respondent's memorandum of response it is stated that the payment was his final dues.

14. As observed earlier in this judgment, the onus of proof of unfairness of termination of employment lies on the employee. In this case it was incumbent upon the claimant to show that the accusations against him were unfair or invalid and that in terminating him no fair procedure was followed. On the part of the respondent, the consideration is whether a reasonable employer would terminate the services of an employee for similar reasons. The claimant was accused of absenting himself without authority from his workplace for a considerable period of time to attend to personal errands at a fee.

15. He was further accused of rudeness towards colleagues. These are reasons for which a reasonable employer would dismiss. Apart from denial of knowledge or receipt of the warnings and dismissal letter, the claimant did not tender any evidence that he had not received the said letters besides it is contradictory that he should admit signing the final payment form as acknowledging payment of his terminal dues yet deny receiving a termination letter.

16. The dealings between the claimant and the respondent were part verbal and part written hence it would be unreasonable to insist on written minutes of disciplinary hearing. Whereas the Court does not encourage this practice, every case must be determined on its own circumstances further a disciplinary hearing which is purely a management process cannot be tested against the rigours of a Court trial.

17. In this case the Court finds that there existed reasonable grounds for terminating the claimant's services however the respondent failed to prove to the required threshold that the claimant was accorded a fair hearing before termination of his services. To this extent the Court will award him four months salary in lieu of notice.

18. Second, on the admission of the respondent that no house allowance was paid to staff, yet this is a legal requirement, the Court will award him house allowance for the 18 months he worked for the respondent. That is:- Kshs.

- a. Four months pay for unfair termination.....52,000.00
- b. Unpaid house allowance for 18 months at 15%  
basic pay.....35,100.00  
87,100.00
- c. No order on costs.

19. 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**