



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 370 OF 2014**

**BETWEEN**

**NICHOLAS ALEX OTIENO ..... CLAIMANT**

**VERSUS**

**LUSTMAN & CO. [1990] LTD ..... ..RESPONDENT**

*Rika J*

**Court Assistant: Benjamin Kombe**

***Ms. Ang'awa Advocate, instructed by S.O.Oguk & Company Advocates for the Claimant***

***Mr. Ngaira Advocate, instructed by Kennedy Ngaira & Associates, Advocates for the Respondent***

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

**[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]**

**[1]** The Claimant filed his Statement of Claim, on the 6<sup>th</sup> August 2014. He states he was employed by the Respondent Company as a Cleaner Supervisor on 20<sup>th</sup> July 2007. His contract was terminated on the 15<sup>th</sup> January 2014 by the Respondent. He claims this was done, without justifiable cause. The Claimant was never heard. He earned a monthly salary of Kshs. 10,000 as of the date of termination. He seeks the following orders against the Respondent:-

- (a) A declaration that termination was unfair and unlawful.
- (b) Payment of 1 month salary in lieu of notice; gratuity for the 6 years worked; 12 months' salary in compensation for unfair termination; costs; and any other relief the Court considers just and expedient to grant.

**[2]** The Respondent filed its Statement of Response on the 14<sup>th</sup> October 2014. The Claimant collected money from the Respondent's Clients and failed to remit the same to the Respondent; he assaulted a Workmate; he was drunk while at work; he disobeyed the instructions of the Respondent by presenting himself at the workplace during his non-working hours; he slept at the workplace; he abused his

Workmates; he absented himself from work for 3 weeks; and worked for another Company while still an Employee of the Respondent. He was asked not to report to work until the case involving the assault of his Workmate was resolved. He owed the Respondent a loan sum of Kshs. 5,000 at the time he left employment. The Respondent prays for dismissal of the Claim and counterclaims the sum of Kshs. 5,000 from the Claimant.

[3] The Claimant gave evidence, and closed his case in the presence of the Parties' Advocates, on the 5<sup>th</sup> October 2015. Hearing of the Respondent's case was scheduled for hearing, upon the close of the Claimant's case, on the 11<sup>th</sup> February 2016. This hearing date was fixed in open Court with the concurrence of the Advocates.

[4] Neither the Respondent, nor its Advocates attended Court on the 11<sup>th</sup> February 2016. The proceedings were marked as closed, and the decision of the Court reserved for 23<sup>rd</sup> May 2016.

[5] The Claimant told the Court the Respondent collected rent as an agent. He was initially stationed at the Kenya Ports Authority. He was relocated to Makupa, then to Ferry from where his contract was terminated. His boss harassed him for demanding to be paid a monthly allowance of Kshs. 5,000 for unblocking sewerage. He disagreed with a Colleague, but did not fight. He was called by his boss on the 16<sup>th</sup> January 2014, and told not to report to work. He received the letter of termination on the 26<sup>th</sup> May 2014. His salary was Kshs. 11,050, but had been lowered to Kshs. 9,500 by the time he left. He worked for 6 ½ years.

[6] Cross-examined, the Claimant testified his contract was to last for the duration the Respondent had a contract with the Kenya Ports Authority. It is not true that the Claimant's contract lapsed. There was a code of ethics regulating the Claimant. The Claimant went for his Mother's Burial, and found the work environment had changed for the worse, after he came back from the Burial. He served as a ticket Clerk at the Ferry. At no time did he collect money from Clients, and fail to remit. He earned Kshs. 9,500 per month for 2 years. The salary was not reduced on demotion. He was demoted from the position of a Supervisor to ordinary clerk, in September 2013. He never smoked bhang; he did not fight a Colleague; and never went to work inebriated. He had not been warned, not to present himself at the workplace, outside his shift hours. He started working for another Company in March 2014, not October 2013. It is not true that he worked for two Companies and earned two salaries. He never insulted other Workmates. He just argued with them. The Claimant had been promised Kshs. 5,000 for unblocking sewerage. The Claimant told the Court, in concluding his evidence that he was never charged by the Respondent with being drunk at work, or for working with another Company. He prays the Court to allow the Claim.

*The Court Finds:-*

[7] The evidence from the Claimant, though not given as a crystal clear narrative, is unchallenged. It is not disputed he worked for the Respondent Company for 6 ½ years. He was a Cleaner Supervisor, but also worked as a ticketing Clerk at some point in time. He gave various figures as being his monthly rate. He states his salary was raised and reduced at certain times. His first salary as shown in his contract of employment dated 20<sup>th</sup> July 2007 was Kshs. 10,000. The Court adopts the rate of Kshs. 11,050 given in his evidence as being the rate he earned before it was reduced to Kshs. 9,500.

[8] The Respondent had the obligation to show termination was based on valid and fair reasons, and that due process, as demanded under Section 41 and 45 of the Employment Act was adhered to. The Respondent avoided giving evidence, and avoided taking responsibility for the termination decision in its Statement of Response. It is stated that the Respondent asked the Claimant merely to stay away, until his assault of his Workmate was resolved. Was this a suspension, termination, or exactly what did keeping away mean? There were no charges made against the Claimant. Several accusations are made against the Claimant in the Statement of Response. There is not one accusation which was put to the Claimant. Justification is not shown by the number or gravity of accusations. The Claimant was never charged with any of the alleged offences. He was not called to answer to any of the accusations. The allegation about assault of a Workmate seems to have been the last straw in the mind of the Respondent. But no

investigations, no charges, and no disciplinary process flowed from this allegation. Workmates alleged to have been assaulted by the Claimant were not brought before the Court. In the end, there was no substantive justification, and no procedural fairness preceding termination.

**[9]** The Claimant has shown termination was unfair. ***He is granted 10 months' salary in compensation at Kshs. 110,500.***

**[10]** ***He is allowed the prayer for notice pay at 1 month salary computed at Kshs. 11,050.***

**[11]** The Claimant prays for gratuity for the 6 years worked. There is no specific clause in his contract for gratuity. Gratuity, like service pay is meant to recognize and reward the Employee's years of service. The Respondent did not place before the Court any material to show that it had any Social Security Plan to buffer the Claimant against the ravages of unemployment. Gratuity, Service Pay, Severance Pay are forms of social security payments. The Employee's years of service are recognized and rewarded, while the social problems emanating from his loss of employment are mitigated. The Respondent did not show there was any Social Security Plan in place. ***The Claimant is allowed service pay under Section 35[5] of the Employment Act, at 18 days salary for every year completed in service, amounting to Kshs. 45,900.***

**[12]** Although the Claimant alludes to leave payment under paragraph 13 of his Statement of Claim, annual leave pay is not one of his prayers. No specific amount is claimed. None was made specific in the evidence of the Claimant. There shall be no order on annual leave pay.

**[13]** The Respondent did not support its counterclaim with any material or evidence. The counterclaim is rejected.

IN SUM, IT IS ORDERED: -

***(a) Termination was unfair.***

***(b) The Respondent shall pay to the Claimant 10 months' salary in compensation at Kshs. 110,500; 1 month salary in lieu of notice at Kshs. 11,050; and service pay at Kshs. 45,900 – total Kshs. 167,450.***

***(c) The full amount shall be paid within 30 days of the delivery of this Award.***

***(d) Costs to the Claimant.***

***(e) Interest granted at 14% per annum from the date of the delivery of this Award.***

**Dated and delivered at Mombasa this 24<sup>th</sup> day of June 2016.**

**James Rika**

**Judge**