



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 710 OF 2013**

**PATRICK MUTINDA MUTUKU ..... CLAIMANT**

**VERSUS**

**ASHUT ENGINEERING LTD ..... RESPONDENT**

Mr. Mulaku for claimant

Mr Baabu for respondent

**JUDGMENT**

1. The suit was brought vide a memorandum of claim on 16<sup>th</sup> May 2013 seeking compensation for unfair dismissal and payment of terminal dues set out in paragraph 8 of the memorandum of claim to wit;

- i. one month's salary in lieu of notice in the sum of Kshs.17,310.00 (Kshs.577 x 30); and
- ii. untaken leave for three (3) years in the sum of Kshs.51,930.00.00.

**Facts of the case**

2. The claimant was employed by the respondent as a grinder in January 2010 and was paid a daily wage of Kshs.557.00 fortnightly. The claimant worked continuously until sometimes in September 2012 when he was summarily dismissed from employment by his supervisor, Mr. Gabriel Munyao on allegation that he had failed to give the grinder he was using to a colleague who had requested for it.

3. The claimant admits that he declined to give the grinder to his colleague because he had been tasked by Mr. Gabriel Munyao to undertake and complete an urgent assignment on the day. That he proceeded to perform and complete the task. However on the following day when he reported to work Mr. Munyao told him to stop working and leave the respondent's premises immediately.

4. The claimant was not paid any terminal dues upon dismissal.

5. The claimant seeks compensation for wrongful and unfair dismissal and payment of stated terminal benefits.

**Response**

6. The respondent filed a statement of defence on 24<sup>th</sup> June 2013. The respondent states that the claimant

was a daily paid employee but was paid Kshs.577.00 fortnightly. The respondent states therefore the claimant was not entitled to any notice or payment in lieu of notice.

7. That the claimant had been paid in lieu of leave for the entire period of service. That all employees did not go on leave but were paid in lieu thereof. That the claimant worked daily except a few days when he was absent.

8. That the claimant was not dismissed from service but he absconded from work when he was asked about the failure to grant his colleague a grinder when he was requested to.

9. The respondent prays that the claimant's case be dismissed for want of proof.

10. The dispute was reported to the Ministry of Labour on 5<sup>th</sup> March 2013. The issue in dispute was "lock-out of Mr. Patrick Mutinda" the claimant herein.

11. Conciliation was not successful hence the cause.

### **Determination**

12. The issues for determination are as follows;

- i. Whether the claimant was dismissed from employment or he absconded from work.
- ii. What remedies, if at all is the claimant entitled to.

### **Issue i**

13. The claimant testified under oath that he was summarily dismissed from work by his supervisor Mr. Gabriel Munyao and for failure to grant his colleague a grinder.

14. The respondent called RW1, Mr. Gabriel Munyao Mumina who was the production manager of the respondent. He had served the respondent since 1985 and knew the claimant well. He told court that the claimant refused to give an extension wire to his colleague. That RW1 was not there when this happened. That the following day, which was 13<sup>th</sup> September 2012 at 10.00 a.m. RW1 suspended the claimant from work but the claimant failed to leave the premises and demanded for payment of his final dues until 12.30 p.m. when the claimant left the premises.

15. RW2 was Cleophas Abululi, an administrator of the respondent since 2002. RW1 knew the claimant well and told the court that the claimant was paid wages fortnightly but his dues were generated daily. The claimant worked for eight (8) days in the month of September 2012 and was paid for days worked. That the claimant was paid in lieu of leave days like all other employees. That non of the employees took leave.

16. The respondent was not able to explain away the documents produced by the claimant and in particular an unsigned letter of summary dismissal dated 12<sup>th</sup> September 2012 in which the respondent purported to summarily dismiss the claimant for failure to give an extension cable to his colleague upon request. The report of dispute also clearly shows that the claimant was locked out of the employment of the respondent.

17. The most damning evidence, is a letter dated 30<sup>th</sup> April 2012, written by RW2, Mr. Cleophas Abululi in which he admits the draft letter of summary dismissal was written to the claimant on 13<sup>th</sup> September 2012 contrary to the averments in the statement of defence and testimony of RW1 and RW2 that the claimant was not summarily dismissed but he had absconded from work. RW2 did not denounce this letter.

18. The claimant has therefore proved on a balance of probability that he was summarily dismissed from

employment by the respondent.

19. The respondent having denied this fact, did not attempt to justify the summary dismissal while insisting that the claimant absconded from work.

20. It is the court's considered view that the summary dismissal of the claimant was wrongful and unfair in that it was not for a valid reason and the claimant having not been given a show cause letter to defend himself before the summary dismissal was effected, the same was not done in terms of a fair procedure.

21. The conduct by the respondent contravened section 41 as read with section 45 of the Employment Act, 2007 and the claimant is therefore entitled to compensation in terms of section 49(1)(c) of the Act.

22. The court is guided under section 49(4) in the assessment of compensation to consider any aggravating factors and those favourable to the employer.

23. The claimant has not sought to be reinstated. He had served the respondent for a relatively short period of one year and nine months. The claimant was not paid any terminal benefits upon dismissal. The claimant lost income and career prospects and has suffered loss and damage.

24. Considering the above, the court awards the claimant six (6) months' salary as compensation for the wrongful and unfair summary dismissal in the sum of Kshs.103,860.00.

**(i) Notice pay**

25. The summary dismissal of the claimant was wrongful and unfair and the claimant is entitled to payment of one month's salary in lieu of notice in the sum of Kshs.17,310.00.

**(ii) Payment in lieu of leave**

26. The respondent ordinarily paid all its employees in lieu of leave days due to them and did not allow the employees to take leave. It should be noted that the action by the respondent is in violation of section 28(3) of the Employment Act, 2007, which guarantees for purposes of rest from work at least '*two uninterrupted working weeks leave.*' It is inhuman not to allow employees to take leave at all even where the employer pays them in lieu of leave.

27. The court is satisfied that the claimant was paid in lieu of untaken leave days and the claim for payment in lieu of three (3) years untaken leave has no merit and is dismissed.

28. In the final analysis, the court awards the claimant as against the respondent;

- i. Kshs. 103,860.00 compensation;
- ii. Kshs. 17,310.00 in lieu of notice;

**Total award Kshs.121,170.00**

- iii. The award is payable with interest at court rates from date of filing suit till payment in full;
- iv. Costs of the suit.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of May, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**