



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.254 OF 2015**

***(Before D. K. N. Marete)***

**LEONARD MAKOKHA KWENA.....CLAIMANT**

**VERSUS**

**PANOCAL INTERNATIONAL LTD.....RESPONDENT**

**JUDGMENT**

This matter was originated by way of a Memorandum of Claim dated 29th May, 2015. The issue in dispute is therein set out as;

*“Unfair termination, Dismissal, Non payment of Terminal dues and damages.”*

The respondent in the Respondent's Written Statement of Defence dated 3rd November, 2015 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times to this claim and particularly from 1st February, 2007 to 27th November, 2012 he worked for the respondent as Human Resource Manager. His salary was Kshs. 38,600.00.

It is the claimant's petition that;

4. *The Claimant avers that he was implicated on a false charge of conspiracy to commit a felony contrary to section 393 of the penal code and stealing by servant contrary to section 281 of the penal code. Vide CR 2956/2012 at Kitale Law Courts.*
5. *The aforesaid fabricated charges were reasons that led to the Claimant's unfair termination and dismissal.*
6. *The trumped up charges were however dismissed against the Claimant under section 215 of the CPC on the 29/4/2015.*

The claimant further claims that after his acquittal, he attempted to settle the matter amicably through reconciliation but this was thwarted by the respondent. This action was unlawful, wrongful, unfair and inhuman as he was not afforded a hearing as is required in labour laws and the principles of natural justice as the respondent's approach and actions were prosecutorial in nature. This is made worse by the refusal to pay terminal benefits as hereunder;

i. *Unpaid salary for the month of November 2012 – Kshs. 38,600/=*

ii. *Service gratuity calculated at 22 days salary for every completed year of service being  $22/30 \times 38,600 \times 6$  months KSHS. 1,551,720/=*

iii. *Payment in lieu of unpaid leave for the entire duration of service being  $38,600/= \times 67$  months KSHS. 2,586,200/=*

12. *The Claimant further submits that as a result of above, he suffered abrupt loss of income, trauma and inability to meet his continuing obligations as a result which he seeks compensation at 12 months gross salary Kshs. 463, 200/=*

He prays as follows;

- a. *A declaration that the respondent's dismissal of the Claimant was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.*
- b. *An order for payment for the Claimants terminal dues and damages totalling to Kshs. 4,601,120/=.*
- c. *An order for the respondent to pay cost of this suit plus interest thereon.*

The respondent admits that the claimant was on her employment as Human Resource Manager but denies that his performance was diligent or even to her satisfaction. It is

the respondent's further case that the offences of omission and commission of the claimant actually inflicted financial loss to the respondent and led to the loss of confidence in the Claimant to the extent that it was in the best interest of the respondent to sack the claimant.

It is also her case that the charges brought against the claimant were based on diligent investigation by the police and after being satisfied that the claimant and the co-accused had committed an offence/offences. The termination was therefore lawful in the circumstances.

The respondent's further case is that though the claimant had committed an offence that amounted to gross misconduct, he was summoned to appear before a disciplinary committee constituted by the respondent to show cause why he would not be dismissed for gross misconduct but ignored the summons and also failed to make any form of representation with regard to accusations against him. The allegations in paragraph 8 that he was condemned unheard therefore do not hold any water.

This is clearly demonstrated and acknowledged by the claimant who in his written submissions admits refusal to appear before the disciplinary committee as follows;

*“... the claimant wishes to state that the suspension letter was done as a second thought and the claimant saw it unfit to appear since he had already been arrested and arraigned in court ... Furthermore the Respondent had already formed an opinion and made his position known by arraigning him in court.”*

In the penultimate the respondent avers that the claimant committed a criminal offence to the substantial detriment of his employer, the respondent, by listing ghost casual workers and converting money due to the said non-existent workers to his own use. He further unlawfully and recklessly neglected to inspect the payroll to ensure that sacked employees' names were not included. This was an abdication of his contractual duty as the Human Resource Manager. He therefore prays that the claim be dismissed with costs.

This matter came to court variously until the 11th April, 2016 when the parties agreed to

dispose of the matter by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought
2. Who should pay costs of the suit?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The parties hold opposing positions on this. The claimant submits unfair and unlawful termination was connected to his arrest and charges at the Kitale Law Courts vide Criminal Case No. 2956 of 2012 – Republic Vs Leonard Makokha & Others

The claimant seems to buttress his case by relying on an acquittal judgement delivered on 29th April, 2014 which remains uncontroverted by the respondent. The absence of an appeal against this means that the respondent is satisfied.

The respondent submits a case of lawful termination of employment in that the claimant was served with a show cause letter and required to appear before a committee constituted by the respondent to answer the allegation/accusation made against him but the claimant ignored the summons and failed to make any representation in his defence. She also annexes a statement by the Human Resource Manager, Judellene Namwenya detailing the procedure followed from the stage of suspension to dismissal of the claimant. This evidence has not been challenged or at all.

The respondent further seeks to rely on the authority of S. 44 (1), (3) and 44 (4) that permit dismissal under certain circumstances. This is as follows;

*Section 44 (1) of the Employment Act describes summary dismissal as follows:-*

*“Summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.*

44 (3)

*Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his own conduct indicated that he has fundamentally breached his obligations arising under this contract of service.*

44 (4)

*Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise*

*to the same, or whether any other matters not mentioned in this Section, constitute justifiable or lawful grounds for the dismissal if:-*

a) ...

c)...

*d) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

*g) an employee commits, or on reasonable and sufficient grounds is suspected to having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

The termination of employment was in the circumstances therefore procedural fair.

The termination was communicated in a letter dated 5th March, 2013 which expressed terminable dues payable to the claimant as follows;

- *Salary for the days worked as of 28<sup>th</sup> November, 2012*
- *Three months half salary for the period you were on suspension*
- *Outstanding leave days earned and not taken as of 28<sup>th</sup> November, 2012*
- *Certificate of service.*

This was computed as follows;

- *November 2012, salary Kshs. 38,640/=, 100% (full salary)*
- *December 2012 Kshs. 19, 320/= 50% (half salary)*
- *January 2013, Kshs. 19,320/=, 50% (half salary)*
- *February 2013, Kshs. 19,320/=, 50% (half salary)*
- *Annual leave for 2012 at Kshs. 33,488/= (26 days x Kshs.1288 rate)*

An amount of Kshs. 130,088.00 being the claimant's terminal dues was payable to the claimant. The claimant has therefore failed to demonstrate a case of unlawful termination of employment in accordance with S. 47 (5) of the Employment Act, 2007.

The respondent further seeks to rely on the authority of **Wenslaus Oduki Odinga vs. Kenyatta National Hospital Board (2013) eKLR citing David O. Owino vs. Kenya Institute of Special Education (Industrial Court Case No. 453 of 2013** where it was held as follows;

*“Acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straight forward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of prove of requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not in itself render the employer's decision wrongful or unfair.”*

From the foregoing, it is obvious that the respondent's case overwhelms that of the claimant. The claimant has miserably failed to demonstrate a case of wrongful, unfair and unlawful termination of his employment. I therefore find the termination lawful and hold as such.

On a finding of a lawful termination of the employment of the claimant, he becomes disentitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with an order that each party bears its own cost of the claim. And this clears all the issues for determination.

Delivered, dated and signed this **3<sup>rd</sup>** day of **June** **2016**.

**D.K.Njagi Marete**

**JUDGE**

Appearances

2. Mr. Samba instructed by Samba & Company Advocat
3. Miss Chelimo holding brief for Mr. Kimani instructed by Kimani Kahete & Company Advocates for the claimant.