



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 380 OF 2013**

**CHARLES ABUNGU**

**CLAIMANT**

**v**

**KEN KNIT KENYA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Charles Abungu (Claimant) sued Ken Knit Kenya Ltd (Respondent) on 30 October 2013 alleging illegal, unlawful and unfair termination of employment. He sought a total of Kshs 193,206/- as a consequence.
2. The Respondent filed a Defence on 25 November 2013 and this prompted the Claimant to file a Reply on 5 December 2013. The parties also filed witness statements and documents to be relied on and the Cause was heard on 9 February 2016.
3. The Claimant filed his submissions on 2 March 2016, while the Respondent's submissions were filed on 23 June 2016 (instead of before 15 April 2016 as directed).
4. The Court has considered the pleadings, evidence and submissions and identifies the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies.*

**Whether dismissal was unfair**

**Procedural fairness**

5. Pursuant to section 41 of the Employment Act, 2007 an employer is under a statutory obligation to hear out an employee before dismissal, if the reasons are grounded on *misconduct, poor performance or physical incapacity.*
6. The Claimant's dismissal letter referred to section 44(g) of the Employment Act, 2007 and clause 17(g) of the collective bargaining agreement between the Respondent and a Union.
7. The reason(s)/particular(s) advanced during the hearing were forgery of a medical sick off certificate. That falls under *misconduct.*
8. The Claimant testified that he was called to the office on 5 November 2011 and informed that he had presented forged medical sick sheet in 2009 and instructed to go and get a letter from the hospital confirming the genuineness of the sick sheet. The hospital endorsed on the back of the sick sheet that the Claimant had been attended to but that did not satisfy the Respondent who sent him back again to get a proper confirmation. He got a letter from the hospital.

9. According to the Claimant, after presenting the letter to the Respondent's Personnel Manager he was sent home and advised to wait to be called. The call never came and he made enquiries but was advised to wait.

10. The Claimant denied being served with the dismissal letter produced in Court by the Respondent.

11. The Respondent's Human Resources Manager testified and stated that the Respondent received a complaint of forged medical stamp and signatures on sick sheets from Huruma District Hospital. Among the sick sheets was one presented by the Claimant.

12. The witness confirmed that the Claimant was sent to the hospital to get confirmation that the stamp and signatures on the sick sheets were genuine but it is only his attendance at the hospital which was confirmed.

13. In the circumstances, the Claimant was dismissed through a letter dated 6 January 2012.

14. In cross examination, the witness stated that a hearing was held on 6 January 2012 prior to the dismissal and that a representative of the Union to which the Claimant belonged was present. But she stated that she was not present during the hearing and that no records of the hearing were kept.

15. The Respondent did not mention or disclose the person who chaired or conducted the hearing. The name of the union representative who was present was also not disclosed.

16. The Court is therefore unable to accept that the Respondent complied with the peremptory requirements of section 41 of the Employment Act, 2007, with the finding that the dismissal was procedurally unfair.

17. With the finding, it is not necessary to determine whether the Respondent has discharged the burden placed upon employers by sections 43 and 45 of the Employment Act, 2007 to prove the reasons for the dismissal and that the reasons were valid and fair.

### **Appropriate remedies**

#### ***Pay in lieu of notice***

18. The Claimant sought the equivalent of 3 months wages as pay in lieu of notice.

19. The employment contract provided for 1 month notice or pay in lieu of notice.

20. The Court finds that the Claimant has made a case for an award of 1 month pay in lieu of notice.

#### ***Compensation***

21. The Claimant served the Respondent for about 12 years. Considering the length of service, the Court is of the view that maximum compensation equivalent to 12 months gross wages would be fair and appropriate.

#### ***Gratuity***

22. The Claimant's pay slip which was produced indicates he was a contributor to the National Social Security Fund.

23. Therefore, if by gratuity, he meant service pay as contemplated by section 35(5) of the Employment Act, 2007, he is not entitled to the same in terms of section 35(5) as read with section 35(6) of the Act.

24. If the Claimant was seeking gratuity on the basis of contractual agreement, he did not provide any

contractual or evidentiary basis for such an award.

### ***Certificate of Service***

25. The Respondent stated that a certificate was ready, and the Claimant should collect the same.

### ***Lost income***

26. No legal, evidential or contractual foundation for this head of claim was shown by the Claimant and the Court declines an award thereof.

### **Conclusion and Orders**

27. The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of notice                      Kshs 8,000/-

(b) Compensation    Kshs 110,400/-

**TOTAL    Kshs 118,400/-**

28. Claimant to have costs.

29. Before release of a copy of the judgment to the Claimant, he should pay the adjournment fees as ordered on 29 November 2013.

**Delivered, dated and signed in Nakuru on this 12<sup>th</sup> day of July 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant                      Mrs. Orina instructed by Manyoni Orina & Co. Advocates

For Respondent                      Ms. Lusweti instructed by Kitiwa & Co. Advocates

Court Assistant                      Nixon