



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

**CAUSE NO. 371 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**WILSON K. TUIGONG.....CLAIMANT**

**-Versus-**

**ELDORET WATER & SANITATION**

**COMPANY LIMITED (ELDOWAS).....RESPONDENT**

**JUDGEMENT**

The Claimant herein **WILSON K. TUIGONG** filed this suit alleging unfair termination of his employment by the Respondent Eldoret Water & Sanitation Company Limited (ELDOWAS). In the Memorandum of claim filed on 8th October 2015, he seeks the following order's against the Respondent:-

- a. A declaration that the dismissal was unlawful, unprocedural and fair and the claimant be reinstated.
- b. A declaration that the dismissal was unlawful, unprocedural and unfair in the circumstance the claimant is entitled to compensation as prayed for in paragraph 12. Above.
- c. The sum of Kshs.13,201,515/- as set out at paragraph 12 above.
- d. Cost of this suit and interests at court rates from time of filing the suit until payment in full.
- e. A certificate of service as per sec. 51 of the Employment Act.
- f. Any other further and better relief the Honourable court may deem just to fit to grant.

The Respondent filed its Response to the Claim on 2nd November, 2015 denying that it unfairly terminated the employment of the Claimant.

At the hearing of the case the Claimant testified on his behalf while the Respondent called two witnesses, REUBEN KIBET TUWEI (RW1), the Managing Director, and ELIZABETH ACHIENG OWINYO NYAWADE (RW2) a director of the Respondent.

The parties thereafter filed and exchanged written submissions.

## **Background**

The uncontested facts of this case are that the Claimant was employed by the Respondent as Head of Commercial Services on 8th November, 2012. The employment was on a fixed term contract commencing 30th November, 2012 to 29th November, 2015. Subsequently the three year contract was converted to a five year contract to expire on 30th November, 2017.

The Claimant's contract was terminated by letter dated 11th September, 2015. The grounds of termination according to the letter are the following:-

- i. Showing lack of respect to the Board of directors during the Retreat in Naivasha and by the tone of your response letter.
- ii. Neglecting duty by walking out of a meeting in Naivasha on 28th July, 2015 without permission while the meeting was still in progress.
- iii. For showing no remorse and being evasive during your appearance before the Board.

Prior to the termination the claimant was issued with a show cause letter on 11th August, 2015 which he responded to on 17th August, 2015. He was invited to appear before a Special Board of Directors meeting by letter dated 2nd September, 2015 but the meeting was postponed to 11th September, 2015 after the Board realised that the Claimant had not been informed why he was to appear before the board in the letter of 2nd September, inviting him to the meeting.

Upon termination the Claimant was paid Shs.513,112.20 by cheque dated 2nd December, 2015 (after the filing of this claim). The letter forwarding the cheque to the Claimant states that it is the net salary and allowances for "the" three months in lieu of notice.

## **Claimants Case**

It is the Claimant's contention that the allegation of gross misconduct was not justified and the termination was unfair and violated the claimant's constitutional rights under Article 41 as well as the provisions of the Employment Act. The Claimant submits that the termination of his employment arose due to a misunderstanding between him and the Chairman of the board on non-revenue water targets of the Respondent at a meeting of the board held in Naivasha between 27th and 30th July 2015. The Claimant testified that during the meeting the chairman proposed non-water-revenue of 25% while at an earlier management meeting a target of 35% had been discussed and agreed upon. Non-revenue water means water that the respondent does not earn revenue from.

The claimant testified that the disagreement arose because he proposed a higher percentage of 35% while the chairman wanted a percentage of 25%. He testified that his proposal was considered by the chairman as disrespectful and was the ground of his termination. He denied being disrespectful to the chairman.

The Claimant further testified that after the issue of non water revenue had been discussed, while the chairman was making a presentation on setting of targets, the chairman started reading a publication from Harvard on setting of targets. He testified that one of the board members drew the chairman's attention to the fact that it was lunch time as it was about 1.30 pm. The Chairman agreed to adjourn the meeting to resume in the afternoon. The Claimant testified that he was having a running stomach and sought permission from the chairman then left the meeting room behind two other board members who left ahead of him. He testified that the allegation that he walked out of the meeting without permission was not true. He testified that the Managing Director asked him to go back to Eldoret the day after the disagreement with the chairman before the meeting ended, on orders of the chairman.

It is the Claimants case that the termination was unfair because when he appeared before the board the members were reluctant to hear his side of the story, and the chairman who was the complainant was chairing the meeting. He testified that before the disciplinary hearing the Managing Director (RW1) had called him to his office and told him he was under pressure from the chairman to give him a show cause

letter. He also stated there was no avenue for appeal against the decision to terminate his contract.

The Claimant further testified that at the disciplinary hearing the issues raised were not those stated in the show cause letter or in the letter inviting him for a hearing and he was not prepared to respond to the questions he was asked which were on performance. He pointed out that from the minutes of the disciplinary hearing filed in court by the Respondent one of the grounds for termination was performance which was not in his show cause letter.

### **Respondent's Case**

The Respondent averred that at the meeting in Naivasha the Claimant conducted himself in a manner disrespectful to the Board of directors by walking out of a meeting without regard to authority while the board was discussing non-revenue water which fell under his direct responsibility.

It was submitted on behalf of the Respondent that the Claimant was issued a show cause notice which he responded to, and was given a hearing by the Board before the termination of his employment. It was submitted that the termination was pursuant to clause 11 of the Claimant's contract and in compliance with section 43 and 36 of the Employment Act.

### **Findings and Determination**

The issues for determination are whether the termination of the claimant's contract by the Respondent was fair both procedurally and substantively as provided in section 41, 43 and 45 of the Employment Act, and whether he is entitled to the remedies sought.

### **Procedural Fairness**

Section 41 of the Employment Act provides that before termination of employment of an employee on grounds of misconduct, poor performance or physical incapacity the employer must explain the reason for which the employer is considering termination to the employee. The section further provides that the employer must hear and consider the representations by the employee and any person accompanying him.

In the present case the show cause notice gave grounds for disciplinary action against the claimant as lack of respect to the chairman by the claimant's response to the chairman on the issue of non revenue water, and his walking out of the meeting and going for lunch while the discussions were still ongoing. The letter dated 2nd September 2015 inviting the Claimant to the special Board meeting to be held on 4th September 2015 did not give reasons for the invitation and when the board realised the anomaly the meeting was postponed to 9th September 2015 by the Respondent's letter dated 4th September 2015. The latter letter made reference to the show cause letter and also informed the Claimant that he was at liberty to be accompanied by a witness.

Minutes of the meeting held on 11th September, 2015 show that the Claimant was interviewed by the board who made the following observations about his responses;

- *Not respectful and did not show any remorse as observed in the tone of his written response to the MD's show cause letter and from his verbal responses during the interview session with the board.*
- *Purposefully evasive with his answers and lacked facts of the occurrences at the retreat with the board members. For instance he lied about leaving the room after being granted permission and lied that he left meeting room in the company of some board members.*
- *That the answers during the interview failed to demonstrate to the board his willingness and desire to improve company's performance.*
- *The board members took a vote and unanimously resolved to terminate the services of Mr.*

*Tuigong:-*

*- For being disrespectful to persons lawfully placed in authority over him.*

*- For negligence of duty as was witnessed by the continued deterioration of performance, particularly the deteriorating debt position and increasing Non Revenue Water.*

The Question and Answer session attached to the minutes shows that most of the questions put to the claimant was on performance and further that apart from being asked to comment on the show cause letter he was not given an opportunity to make any representations except to respond to questions put to him.

From the foregoing I find that the hearing was not procedurally fair.

### **Grounds for Termination**

The grounds for termination given in the claimant's letter of termination were not the subject of the disciplinary hearing. Specifically ground 3 thereof, that is "For showing no remorse and being evasive during the appearance before the Board" is not reflected in the proceedings of the board and is a charge that was never put to the Claimant. The second ground is invalid as walking out of a meeting does not constitute neglect of duty. Ground no.3 that is being evasive is not a ground for termination.

I therefore find that there was no proof of grounds for termination as envisaged in section 43 and 45.

For the foregoing reasons I find the termination of the Claimant unfair.

### **Remedies**

The Claimant prayed for payment of Shs.13,201,515 constituted as follows:-

(i) 3 Months Salary in lieu of notice	Shs. 660,000
(ii) Leave Dues	Shs. 150,000
(iii) Severance Pay	Shs. 2,529,503
(iv) Breach(sic) of contract from 12/9/2015 - 30/11/2017	Shs. 8,305,605
(v) Compensation transfer termination	<u>Shs. 3,780,000</u>
<b>Total</b>	<b>Shs.13,201,515</b>

The Claimant admitted having been paid Shs.513,112.20 being 3 months salary in lieu of notice less deductions. This was paid while the case was pending in court. It was also alluded during the hearing that the Claimant had no pending leave as he had in fact taken more leave that he was entitled to. The Claimant therefore is not owed notice and leave and the two prayers must therefore fail and are declined.

The prayer for severance pay is also rejected as it is only payable to an employee who has been declared redundant. The Claimant was not declared redundant. There is further no contractual or legal basis for payment of salary after termination of employment from 12th September 2015 to 30th November 2017 which is the unexpired term of the Claimants contract. The prayer is thus also rejected.

On compensation the Claimant having been unfairly terminated is entitled to the same. I have taken into account all circumstances of the case and I am of opinion that 6 months salary is reasonable compensation. I therefore award the Claimant Shs.1,890,000/- based on his gross salary as per July 2015

payslip of Shs.315,000/- per month.

The Respondent will also pay Claimant's costs of the suit.

**Dated, Signed and Delivered this 6th day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**