



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 48 OF 2015**

**BETWEEN**

**PETER KYALO NDETEI ..... CLAIMANT**

**VERSUS**

**THREE WAYS SHIPPING SERVICES [K] LIMITED .....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Katu Advocate instructed by Siocha Okemwa & Company Advocates for the Claimant*

*Ms. Ombat Advocate instructed by Cootow & Associates, Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on the 4<sup>th</sup> February 2015. He states he was employed by the Respondent Company as a Mechanic, on the 1<sup>st</sup> August 2010, earning a basic salary of Kshs. 25,000 per month. He was issued fresh terms through a letter dated 13<sup>th</sup> July 2011. Under the new terms, his salary was reviewed to Kshs. 34,261 monthly. He was placed on Administrative leave on 19<sup>th</sup> November 2013, to enable the Respondent investigate allegations against the Claimant, that the Claimant was involved in theft of its Clients' tyres and car parts. He states he was indefinitely suspended without pay. He states that if the Respondent terminated his contract, the Respondent should be compelled by the Court to pay to him the following:-

- a) Salary in arrears from 1<sup>st</sup> November 2013 to 31<sup>st</sup> January 2015 at Kshs. 513,915.
- b) Accrued annual leave for 2013/ 2014 at Kshs. 48,426.
- c) 1 month salary in lieu of notice at Kshs. 34,261.
- d) 12 months' salary in compensation for unfair termination at Kshs. 411,132

Total..... Kshs. 1,007,734

e) Salary from February 2015 to-date.

f) Certificate of Service to issue.

g) Costs and interest.

2. The Respondent filed its Statement of Response on the 23<sup>rd</sup> February 2015. The Claimant was suspended after preliminary investigation showed he was involved in theft of the Respondent's Client's tyres and car parts. He was asked to keep his phone contact open during suspension. He turned off his phone, and efforts by the Respondent to reach the Claimant were fruitless. He worked under a fixed term contract, which expired on 30<sup>th</sup> December 2013. The contract having expired, the Claimant has nothing to demand from the Respondent. The Claim has no merit, and should therefore be dismissed with costs to the Respondent.

3. The Claimant gave evidence and rested his case, on the 8<sup>th</sup> October 2015. The Respondent testified through its Human Resource Manager Fredrick Michael Otieno, and rested its case on the 1<sup>st</sup> March 2016. The dispute was last mentioned on the 28<sup>th</sup> June 2016 when the Parties confirmed the filing of their Closing Submissions, and the decision of the Court scheduled for delivery on the 30<sup>th</sup> September 2016.

4. Peter Kyalo Ndeti told the Court he was initially employed in August 2010. He was issued a written contract after 1 year, in 2011. The contract did not have a specific duration. He was placed on suspension, on the ground that the Respondent was investigating loss of its Clients' tyres and car parts. He was to be called by the Respondent once investigation was complete. He was tied down and could not look for work elsewhere. The Respondent had his contacts. He was not called at any time after the investigation. He wrote to the Respondent in January 2014, requesting to be paid his salary for November and December 2013. There was no response. He sought the assistance of his Trade Union, who reported the matter to the Labour Office. The Respondent did not submit to the process of conciliation. The Claimant instructed his Advocates who issued demand letter before commencement of the Claim; still the Respondent did not make amends.

5. Cross-examined, the Claimant testified he was employed prior to the year 2011. He had pay slips capturing the period before 2011. The contract of 2011 did not show the salary payable to the Claimant. He had applied for 4 days of leave and provided the Respondent with a Reliever. It was upon return that he was issued the letter of suspension. It is not true that he just left. He was the Assistant Foreman at the workplace. It is not true that the Claimant turned off his phone and could not be reached while on suspension. He did not receive any word on finalization of the investigation. He did not receive any letter of termination. It is not true that the Claimant terminated his contract, or rushed to Court and filed this Claim. He did not go on annual leave. He testified on redirection that suspension was on theft allegation, not on his absence from work. He had on request from the Respondent given all his contacts, including the names of his next of kin. He was not asked to record any statement with the Police on the allegations of theft.

6. Fredrick Michael Otieno Opot's evidence is that he was not in employment when the Claimant worked and left employment. His evidence was gleaned from the Claimant's employment file. He confirmed the Claimant was suspended for being suspected to have been involved in theft at the workplace. The record indicated he was advised to leave his contact with the Respondent. He could not be reached, and therefore was not given a hearing before termination. The Respondent only came to hear about the Claimant again, on receiving the Court Summons. His contract was not terminated by the Respondent. It was a 2 year contract beginning 1<sup>st</sup> January 2011. The Claimant left 1 month before his contract expired.

7. Questioned by the Counsel for the Claimant, Opot testified he was not in employment while the Claimant worked. The Claimant was in a fixed term 2 year contract. There was a report made to the Police after theft occurred. The Respondent left it to the Police to investigate. There was no way of reaching the Claimant while on suspension. Opot did not know that the Claimant was not at work when theft is alleged to have occurred. He did not know why the Claimant was issued a Certificate of Service

by the Respondent. The Respondent did not have any communication from the Labour Office on the matter. It did not have his letter of demand before action. Redirected, Opot told the Court the Respondent did not have the power to direct the Police in its investigation.

8. In issue is:-

a) Whether the Claimant's contract of employment was terminated at all by the Respondent, and if so whether termination was based on valid ground and carried out fairly.

b) Whether the Claimant merits the remedies sought.

The Court Finds: -

9. This matter appears to have some shared history with ***E&LRC Cause Number 242 of 2015, between Charles Kyalo Mutua v. Threeways Shipping Services Limited***. The Court shall therefore not belabour analyzing what facts are shared, and shall as far as it is practicable and fair to do so, adopt the findings in the above Cause, in resolving the current Cause.

10. It was the finding of this Court in the former Cause that the Respondent did not carry out its own internal investigation on the alleged theft. It did not frame up any charges against the suspect Employee. There was no charge against the concerned Employee. No criminal charges were taken out against the Employee. There were no charges at the workplace. It is fair, based on the evidence in the current Cause, to make similar findings. The allegation of theft against the Claimant was not established.

11. The Respondent raised a similar line of response with regard to both matters, on the procedure. It was said the Employees were suspended to pave way for investigation. They were requested to leave their phone lines open. They would be contacted during suspension and at the end of the investigatory process, and duly advised on the next cause of action. They were contacted by the Respondent, both were unreachable. At the same time, it was the position of the Respondent that in any event, the Employees' contracts were expiring on 30<sup>th</sup> December 2013. They would not be entitled to claim their contracts were unfairly terminated, as those contracts were due to lapse about the same time the Employees were suspended.

12. The Court rejected this line of argument in the previous case. The contract in the previous case was found to involve a Ugandan Company and therefore unhelpful to the Respondent's line of thought. In either Cause, the Employee was not advised his contract would not be renewed. There was no communication after suspension. Expiry of the fixed term was not the reason for termination. The reason can, in the absence of a letter of termination, be read from the letter of suspension. It was alleged the Claimant was involved in theft of tyres and car parts. Suspension was before the date the contract of employment was alleged to expire. It was incumbent upon the Respondent to follow the procedure which commenced with suspension, to its logical conclusion, rather than muddy the waters with the unconvincing assertion that there was a fixed term contract which expired, thereby placing the Claimant beyond the protection of the fair termination law.

13. It is the view of the Court that termination in the current Cause, as in the previous one, was initiated by the Respondent through the letter of suspension, and was unfair both on substantive and procedural grounds. It failed in meeting the standards prescribed under Sections 41, 43, 45 and 47 [5] of the Employment Act 2007. The Claimant is entitled to compensation for unfair termination. ***He is granted 10 months' gross salary at Kshs. 342,610.***

14. ***He is granted 1 month salary in lieu of notice at Kshs. 34,261.***

15. The claim for annual leave at Kshs. 48,426 was not supported by the evidence of the Claimant. He told the Court he never went on annual leave. He claims annual leave for 2013/ 2014. He had just come from annual leave when he was sent away on suspension. In his demand letter at page 21 of his bundle of documents, he states his annual leave lapsed 16<sup>th</sup> December 2013. The Court did not understand which

years the accrued annual leave claimed, relate to. The prayer is rejected.

16. He prays for unpaid salary from the date of suspension to-date. He separately prays for salary arrears from 1<sup>st</sup> November 2013, to 31<sup>st</sup> January 2015. He did not explain to the Court what the date 31<sup>st</sup> January 2015 signifies. It is true the Respondent did not give him any letter terminating his contract of employment. He was paid nothing during the indefinite suspension. It was stated in the letter of suspension that the Respondent may or may not compensate the Claimant for the period under suspension. This was ambivalent. Most aspects of the suspension letter are equivocal. The Court's reading from the other paragraphs of this letter is that the Respondent would compensate the Claimant at the end of the investigation, if the investigation did not result in a finding of guilt against the Claimant. As there was no such finding in any form, there is no reason why the promise to compensate the Claimant should not be endorsed. The Respondent stated compensation would not exceed 70% of the Claimant's annual salary. It would not be fair to have the Respondent pay the Claimant arrears of salaries to-date. Parties have accepted their relationship ended. The Respondent had an obligation to give a clear date of termination. No date was given. The Employee feels and not without justification, that he was left unknowing of his employment status. He was not free to move on. He should be compensated as suggested in the letter of suspension. The amount of compensation should not be an endless flow of salary which he has not worked for, and which he is not working for. Parties have accepted they are no longer in an employment relationship, the only problem being in the date when that relationship ended. The problem has the Respondent as its creator. The Claimant cannot be blamed, having requested through the Labour Office and through his Advocates, to be told what his employment status after suspension, was. ***He is granted 70% annual salary at Kshs. 239,827 to compensate him for the unpaid, indeterminate period of suspension.*** This should be fair and sufficient remedy to meet prayers [a] and [e] stated at paragraph 1 of this Judgment.

17. ***The Respondent shall avail to the Claimant his Certificate of Service.***

18. ***No order on the costs and interest.***

IN SUM, IT IS ORDERED:-

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

***b) The Respondent shall pay to the Claimant 10 months' salary in compensation at Kshs. 342,610; 1 month salary in lieu of notice at Kshs. 34,261; and compensation under the terms of suspension at Kshs. 239,827- total Kshs. 616,698.***

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

***d) Certificate of Service to issue.***

***e) No order on the costs.***

Dated and delivered at Mombasa this 29<sup>th</sup> day of September 2016

James Rika

Judge