



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 297 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETER MWANGI MAINA .....CLAIMANT**

**-Versus-**

**EQUATOR BOTTLERS LIMITED.....RESPONDENT**

**JUDGEMENT**

By his Memorandum of Claim dated 22nd July, 2015 the Claimant seeks the following orders against the Respondent.

- a) An order declaring the dismissal of the Claimant illegal, unlawful, unconstitutional, null and void and no legal effect.
- b) An order directed to the Respondent to pay to the Claimant his terminal benefits, to wit Kshs.318,012/= being three months' pay in lieu of notice and service pay of Kshs.2,438,161.00.
- c) Compensation for unfair dismissal being 12 months' salary of the Claimant.
- d) The Respondent be ordered to issue to the Claimant a certificate of service.
- e) The Claimant be paid the costs of this suit.

He alleges that his summary dismissal was unlawful, and unconstitutional for the following reasons:-

- (i) The Claimant was not given a reasonable time to explain his case, one hour not being a reasonable time.
- (ii) The Claimant did not commit any act of theft of the Respondent's property.
- (iii) The explanation given by the Claimant regarding the mistaken release of the tool box to the wrong person was reasonable and demonstrated good faith, as opposed to any theft intention, by the Claimant.
- (iv) The Claimant was not given any opportunity to be heard in his defence after the suspension on 27.12.2012.
- (v) The dismissal of 2.1.2013 was made whilst the period of suspension had not elapsed and while no investigations as undertaken in the suspension letter were done.

(vi) The dismissal of the Claimant was unjust and inequitable as the procedure adopted by the Respondent in dismissing the Claimant was unconscionable, oppressive and unreasonable.

The Respondent filed a Memorandum of Defence in which it states that the dismissal of the Claimant is lawful as there was valid reason for dismissal and the Respondent complied with fair procedure. The Respondent further avers that the Claimant was paid full terminal benefits due which he accepted and signed a discharge voucher in favour of the Respondent and he is estopped from making any further claims against the Respondent.

When the case came up for hearing the parties recorded a consent to proceed by way of written submissions. Both parties thereafter filed and exchanged written submissions.

I have considered the pleadings and the written submissions and the many authorities the parties referred the court to. The issues that arise for consideration by the court are the following -

- 1. Whether the Summary Dismissal of the Claimant was unfair and unconstitutional.**
- 2. Whether Claimant is estopped from making any Claim arising from his dismissal against the Respondent.**
- 3. Whether the Claimant is entitled to his prayers.**

## **Facts**

The facts of this case are not contested. The Claimant was employed by the Respondent as an electrician on 1st November, 1989. He rose through the ranks and by the time of Summary Dismissal on 2nd January, 2013 he was a Plant Engineer-Electrical, in the Production Department, reporting to the Technical Manager, a position he had been holding from 2nd October, 2009.

The circumstances leading to the Summary Dismissal of the Claimant were that on 19th December, 2012 the Claimant released a locked metal box to a transporter from Odex Chemicals, a company that supplied materials to the Respondent. The box was later returned by Odex Chemicals as it did not belong to them. A show cause letter was written to the Claimant on 24th December, 2012 requiring him to explain before close of the day why disciplinary action should not be taken against him for unprocedurally releasing a tool box to Odex Chemicals when it did not belong to them. The show cause letter was served on the Claimant at 16.09 pm and stated that the Respondent had interpreted the motive of his action to be theft of company property.

The Claimant responded to the show cause letter the same day and explained that the tool box had been in the workshop since 2009, that a Mr. Kamau of Odex Chemicals had been pestering him about his (Mr. Kamau's) tool box which had been left behind. That on 19th December, 2012 at about mid-day the electrical workshop was being cleared when he noticed the box marked "**Embakasi Line 1 UGANDA**". He assumed it was the tool box that Mr. Kamau of Odex Chemicals had been pestering him about and fearing that it was exposed and might get lost, the Claimant decided to call Mr. Kamau to arrange for the collection of the same. Mr. Kamau informed him that an Odex truck was on its way to deliver goods to the Respondent and he would ask a Mr. Benjamin who was with the truck to collect the "box". The Claimant therefore released the box without following what had been referred to as "normal procedure" in the show cause letter since according to him, the "box" did not belong to the Respondent. The Claimant stated in his letter that he had explained all this earlier when he was asked about it. He explained that he acted in utmost good faith, that from the markings on the box it did not belong to the Respondent, that this was an honest mistake in the belief that the box belonged to Mr. Kamau and that he had no intention of stealing the box, that had there been an intention to steal the box it would not have been returned, that the Respondent had not suffered any loss and he should not be victimised on account of his honest mistake. He further stated that the manner in which the issue had been handled amounted to defamation of his character and his reputation had been injured yet he was an honest employee of the company. He also raised issue about the timing of the show cause letter which was served upon him at 16.09 requiring

him to respond to it the same day as he was preparing to break for Christmas and that the short notice amounted to a violation of his right to fair administrative action and a reasonable hearing enshrined as in Article 47 and 50 of the Constitution.

On 27th December, 2012 a meeting was held to open and ascertain the contents of the box. The meeting which was held at 2pm at the Human Resource Manager's Office was attended by the Claimant and the following other persons -

1. Joachim Kimoja - Human Resource Manager
2. Bosco Jojevic - Automation Engineer
3. Benjamin Oduol - Electrical Forman
4. Willis Omuga - Plant Engineer Mechanical
5. Mark Maina - Security Supervisor
6. Benjamin Omondi - HR assistant
7. Erastus Tindi - Security Group
8. Benjamin Dianga - Odex Chemicals
9. Peter Maina - Culprit

The meeting concluded that appropriate disciplinary action be taken against the Claimant.

**(Below is an extract from the observations and conclusion of the meeting)**

### **Observations**

1. *The tools related to the old line and were supplied by Kronos Company.*
2. *Mr. Mina being a senior and long serving employee, had been exposed to, and knew all working tools in the plant, especially those under his jurisdiction like the said toolbox, and could not have confused it to belong to Odex Chemicals, an allegation which was seen as a theory to cover other ulterior motives.*
3. *He also knew all company procedures for-discharge of any item from the plant, which he should have followed.*
4. *The company is liable for any third party property under its custody, until it is procedurally discharged to its original owner.*
5. *Mr. Maina's assumption that the tool box belonged to Odex Chemicals did not grant him authority to discharge the item to its purported owner without due authorization.*
6. *The fact that the Odex Chemicals Company disowned Maina's theory of ownership puts his integrity to question, as far as his discharge of his duties is concerned, and the committee observed that he had a serious case to answer.*

### **Conclusion**

*Arising from the above observations, it was concluded that the, tool box did not belong to Odex Chemicals as alleged but rather to Equator Bottlers Limited. It was also clear that the box left the plant*

*un procedurally. The committee recommended that an appropriate disciplinary action be taken according to the company code of conduct as well as the law.*

On the same day the Claimant was served with an Internal Memo from the Human Resource Manager suspending him from duty. The letter reads as follows -

***INTERNAL MEMO***

*Our ref: 345*

*Date: December 27, 2012*

*From: Human Resource Manager*

*To: Peter Mwangi Maina*

*Cc: Ag. General Manager*

***Subject: Suspension***

*Following our show cause letter dated 24th December, 2012, you responded vide your letter dated the same day. Please note that the management finds your explanation unsatisfactory, you are hereby suspended for 7 (seven) days pending further investigation on the same.*

*This is with effect from today 27th December, 2012. You will be reporting to the under assigned on 3rd January, 2013.*

*Yours faithfully,*

***FOR: EQUATOR BOTTLERS LTD***

***JOACHIM MMOJA***

***HUMAN RESOURCE MANAGER***

When the Claimant reported back from suspension on 3rd January, 2013 he was served with a letter of summary dismissal. The letter is reproduced below -

***INTERNAL MEMO***

*Our ref: 345*

*Date: January 2, 2013*

*From: Human Resource Manager*

*To: Peter Mwangi Maina*

*Cc: Ag. General Manager*

*Finance Controller*

***SUBJECT: SUMMARY DISMISSAL***

*The above matter refers.*

On the 19th day of December 2012, you unprocedurally authorized the release of a tool box to Odex Chemicals, which did not belong to them. Please note the following:

1. The tool box did not belong to Odex Chemicals, a claim they have categorically denied, but rather related to the old line and was supplied by Kronos Company.
2. You being a senior and long serving employee, had been exposed to, and knew all working tools in the plant, especially those under your jurisdiction like the said toolbox, and could not have confused it to belong to Odex chemicals, an allegation which is seen as a theory to cover your ulterior motives.
3. You are well conversant with all company procedures for discharge of any item from the plant, which you should have followed.
4. Your assumption that the tool box belonged to Odex chemicals did not grant you authority to discharge the item to its purported owner without due authorization.
5. The fact that the Odex Chemicals Company disowned your theory of ownership puts your integrity to question as far as discharge of your duties is concerned.

Consequently, you are hereby dismissed from employment of this company with effect from today 3/01/2013 as per section 44(g) of the Employment Act of 2007, as well as company code of conduct clause 28 and 30. Please make necessary arrangements for clearance as well as handing over.

Yours faithfully,

**FOR: EQUATOR BOTTLERS LTD**

**JOACHIM KIMOJA**

**HUMAN RESOURCE MANAGER**

On the same day the Claimant wrote to the Respondents Acting General Manager the following letter -

From: Peter Maina

To: Ag. General Manager

Date: 03/01/13

**RE: REQUEST**

Dear Sir,

Referring to the Internal, Memo dated 3/1/2013 Subject - SUMMARY DISMISSAL, I feel its too harsh for me given the years I have worked for this company. I have been dedicated to my work and I have been loyal to these company. I therefore request you to reconsider the disciplinary action so that I can be paid my benefits for the period worked so I can be able to start new life.

Yours faithfully

**PETER MAINA**

On 16th February 2013 the Respondent wrote a letter titled "RELIEVING LETTER" to the claimant. The letter sets out the date of termination as 3rd January 2013, the benefits payable to the Claimant being one months' basic salary. At the last paragraph of the letter is a disclaimer in the following terms -

## **Full and Final Settlement**

You represent to the Company (for itself and on behalf of all its Affiliates) that you do hereby accept the terms of this letter in full and final settlement of any claims, save to enforce the terms of this letter, that you have or may have against the Company or any of its Affiliates relating to your employment, the termination of your employment or any other matter including (without limitation) any action that might be commenced before an Employment Tribunal or Court of Law including but not limited to in respect of any common law claims, including any for breach of contract or tort. In addition, you agree with the Company not to institute any legal or other action against the Company arising out of your employment relationship with the Company or the termination in terms hereof.

The Claimant was on the same date paid Shs.74,396.25 (after deductions). The claimant was also paid a sum of Shs.815,614.13 on account of pension on 8th February, 2013.

## **Determination**

### ***Whether the Summary Dismissal was unfair and unconstitutional***

For Summary Dismissal or termination to be fair an employee ought to be given a hearing as provided in section 41 of the Employment Act and there must be valid reason for the termination as provided in section 43 of the Act.

In the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013]eKLR**, Radido J. summarised the principles in section 41 of the Employment Act as follows -

- a) *That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b) *That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c) *That the employer has heard and considered any explanations by the employee or their representative;*
- d) *Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

The facts of this case do not meet the said principles. Although there are minutes of a meeting which is titled "**DISCIPLINARY PROCEDURE - PETER MAINA - PLANT ENGINEER ELECTRICAL**" the contents of the minutes do not conform to the disciplinary process. Indeed the opening paragraph of the minutes clearly sets out the purpose of the meeting in the following terms -

*The event started with the Human Resource Manager explaining that the said tool box left the plant without following the right procedure. He went further to say that Mr. Maina Peter gave the authorization for the tool box to leave the plant to be ferried to Odex Chemical in Nairobi. He said that the security office did not detect the box leaving the plant. He explained that the purpose of the meeting was to open the box and ascertain its contents in the presence of witnesses.*

The conclusion of the meeting was that disciplinary action be taken against the Claimant. This is a further confirmation that the meeting of 27th December 2012 was not for disciplinary process but rather investigative, and that meeting recommended that disciplinary action was to be taken thereafter. The same was commenced by the suspension of the claimant on the same day. The Respondent thereafter dismissed the claimant without subjecting him to a disciplinary hearing as envisaged in section 41 of the Act.

On the grounds of dismissal, the claimant clearly explained the circumstances under which he released

the tool box to Odex Chemicals. The Respondent did not bother to confirm from Mr. Kamau of Odex Chemicals if indeed what the claimant had stated was true. The letter of dismissal states that the grounds for dismissal are section 44(g) of the Employment Act. There is no such section in the Act. I presume the author of the letter intended to refer to section 44(4)g of the Act which provides that it is a ground of dismissal if -

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

Section 43 of the Act provides that -

#### **43. Proof of reason for termination**

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

It is clear from the explanation of the claimant given in his response to the show cause letter that there was no intention to steal the tool box. The Respondent did not make any inquiry that would lead it to "genuinely believe" that the Claimant committed a criminal offence. Nothing was stolen. No property was lost. There was no proof of valid reason for dismissal under section 44(4)(g) of the Employment Act.

The summary dismissal of the claimant was therefore without valid reason and without compliance with the provisions of a fair hearing under section 41 of the Act. The summary dismissal was thus unfair within the provisions of section 45(2) of the Employment Act which provides that -

*(2) A termination of employment by an employer is unfair if the employer fails to prove—*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason—*

*(i) related to the employee's conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure.*

#### **Whether the Claimant is estopped from making any claim arising from his summary dismissal**

The Respondent has in both the Memorandum of Defence and in the written submissions stated that the claimant signed a disclaimer that the payments he got were in full and final settlement and that it is clear that the payments were in full and final settlement and that he could not raise a case against the respondent in respect of the employment that had been terminated. The Respondent submitted that raising of the matter in court is an afterthought and renegeing on an agreement that had already been sealed.

It was submitted for the Respondent that the principle of Estoppel provides that once an agreement has been sealed and executed a party to the agreement cannot come back and re-open it. The Respondent relied on Cause No.296 of 2013 between **Augustine Odhiambo Abiero Versus K.K. Security Ltd** in which the court at page two (2) observed that -

*"It is trite that estoppels refers to a bar that prevents one from asserting a claim or a right that contracts what he has said or done before. Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when through a false representation of facts or conduct, the person to be estopped has induced another person to act in certain way that resulted to substantial prejudice. Promissory estoppel on other hand does not deal with representation of facts as in equitable estoppel but only on a promise which the promisor reasonably expected the promisee to act on it. If the promisee acts on the promise to his detriment, the promisor is prevented from denying the promise even if it was not supported by any consideration.*

*The question that arises is whether the claimant has established the defence of estoppel in either of the above types. Regrettably the court's opinion is that he has not. No written or other form of evidence was adduced to prove the alleged promise to settle the matter amicably if suit was not filed. What the court was treated to was mere allegations of an advise to the claimant to remain humble and cooperative with the respondent in order to earn a reinstatement."*

The Respondent further relied on the judicial authority of **Inject Diesel Services Ltd v Kenya Engineering Workers Union Cause 70 of 2006** at pages 6 & 7 where Mukunya J. ruled that:

*"Having observed that a contract of employment must be formal, then the formal acknowledgement of receipt of what was the entitlement to the employee in law discharged the employer from any further obligations in the contract." The doctrine of estoppels in the law of contract requires that the party is stopped from reliance upon an element in the contract that side had expressly stated was no longer valid and binding. When a party in a contract states in writing that the payment received was in full and final settlement, the same party cannot in all fairness come back and claim any further benefits in the same contract."*

The Claimant on the other hand submits that there was no full and final payment of all claims that arose as a result of the summary dismissal. It was submitted that the letter relied upon by the Respondent stated that the terminal dues would be processed as per the claimant's current terms and conditions of service, which were never disclosed, and that no such terminal dues were ever calculated. It was the Claimant's submission that the only item calculated was the untaken leave entitlement which was paid and which the claimant is not claiming. That the doctrine of estoppel would only arise if he claims what has already been paid being leave entitlement which he is not claiming.

It was submitted for the Claimant that estoppel applies only if a person has induced another to act in a certain way that results in substantial prejudice. That the Claimant cannot be said to have given a promise to the Respondent which the Respondent acted upon to its detriment. That indeed it is the Claimant who was prejudiced by the letter as his dues were not worked out or paid and he was deceived into being paid his unpaid leave and baptizing the leave payment as "final separation payment" and "final dues upon retirement". It was submitted that the claimant had not been terminated nor had he retired on 3rd January, 2013, but he had been summarily dismissed on 2.1.2013. It was submitted that in that letter, the Claimant was only paid his leave days, not other benefits. That he was not paid his entitlement in lieu of notice, or service pay or gratuity.

I agree with the Claimant's argument that the claimant did not make any promise which the Respondent relied upon to its detriment. There is also no evidence that there were discussions between the parties during which the claimant accepted what was offered by the Respondent on the promise not to pursue the claim for unfair termination. It is not even clear whether the Respondent is pleading equitable or promissory estoppel. All the same, neither equitable or promissory estoppel arises out of the facts of this case and I find and hold accordingly.

## **Remedies**

The Claimant prayed for 3 months salary in lieu of notice in the sum of 318,021. The claimant did not adduce evidence to prove that he is entitled to 3 months notice. He is only entitled to one month's gross

salary. The Claimant's gross salary according to the payslip for December 2012 is Shs.106,007.18. The Respondent did not submit any evidence to the contrary. The claimant is therefore entitled to one month's gross salary in lieu of notice as provided under section 49(1) in the sum of shs.106,007.18 which I award him.

The Claimant further prayed for compensation equivalent to 12 months salary and a certificate of service. The Claimant is entitled to both under the law. Taking into account the fact that the Claimant's dismissal was unfair and his length of service of more than 24 years it is my opinion that an award of maximum compensation of 12 months gross salary is reasonable. I award the Claimant Shs.1,272,084.00 as compensation. The Respondent shall also issue a certificate of service to the Claimant in terms of section 51 of the Employment Act. There is evidence that the Claimant was paid Shs.85,500. It is however not specified in the payment advise attached as Appendix 15 of the Respondents Submissions what the payment is in respect of. Even the "Relieving Letter" does not state what the payment is in respect of only referring to it as "Final Separation pay of Shs.74,396" and a basic salary. This being the case it will be deemed that the said payment is not part of what has been awarded by the court.

### **Conclusion**

In the final analysis, I find and order as follows:-

1. The summary dismissal of the Claimant by the Respondent is hereby declared unfair.
2. The Respondent shall pay the claimant the following -
  - (i) One month's gross salary in lieu of notice Kshs.106,007.18.
  - (ii) Compensation for unfair dismissal  
(12 months gross salary) Khs.1,272,084.00.
3. Certificate of Service.
4. The Respondent will pay Claimant's Costs of this suit.
5. The decretal sum shall attract interest at court rates from date of judgment.

**Dated and signed and delivered this 29th day of September, 2016**

**MAUREEN ONYANGO**

**JUDGE**