



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**OF KENYA AT NAIROBI**  
**CAUSE NO. 1029 OF 2015**

**BRAMWEL LENNOX ENDOVO.....CLAIMANT**

**VERSUS**

**NU-PLAN ENGINEERING & DESIGN LIMITED.....RESPONDENT**

**JUDGMENT**

**Pleadings**

1. The Claimant filed his claim on 16.6.2015 through the firm of Burton Isindu and Company Advocates seeking damages for unlawful and unfair termination of employment and his terminal benefits.
2. He states that he was initially employed by Magadi Soda Company Management Limited which was subsequently taken over by Tata Chemicals Magadi Company Management Limited. It is his contention that he among other employees was declared redundant under an arrangement that required the Respondent vide a letter of appointment dated 15<sup>th</sup> January, 2008, at a net salary of 65,000.
3. He avers that this was unilaterally, irregularly and unlawfully reduced to Shs. 50,000/= was in December, 2008, and further reduced to Shs. 44,049/= as from February, 2013, which he consistently contested. He also states that the Respondent failed to remit statutory deductions from his salary since 2008.
4. He contends that on or about 23.12.2014, the Respondent unlawfully and unfairly terminated the Claimant's employment on false and malicious allegations of gross misconduct based on an isolated and misunderstood incident between one Frederick Anyasi and the Claimant which occurred in August 2014, in the ordinary course of business. He states that he wrote to the Respondent sufficiently explaining the incident and the matter was settled.
5. The Claimant states that provisions of the Employment Act regarding termination of employment were not followed and as such the same was unfair and unlawful.
6. The Respondent filed a statement of response to the memorandum of claim on 13.7.2015 through the firm of Ayieko Kangethe and Company Advocates wherein they admit the employment relationship but deny that salary deductions were unlawful.
7. They state that any reductions in salary were done with mutual understanding of all stakeholders and took into account the economic hardships that the Respondent and the industry in general were going through.

8. The Respondent avers that the incidence leading to his termination consisted of threats that could lead to serious bodily injury or even loss of life and they could not condone this behavior. That the Claimant was given an opportunity to explain himself but the explanation given was not satisfactory. They state that due process was followed in terminating the Claimant's employment.

9. They deny failing to remit the Claimant's statutory deductions and state that the Claimant was entitled to payment of gratuity as he was a registered member of NSSF.

### **Evidence**

10. In evidence the Claimant stated that he worked for the Respondent by virtue of a restructuring process of Magadi Soda Company, his original employer, having joined them at a salary of Shs. 65,000/= which persisted for the 1<sup>st</sup> year but reduced to Shs. 50,000/= during the 2<sup>nd</sup> year without any agreement with the affected parties. The Relationship became strenuous as a result and he together with other employees wrote protest letters to the Respondent which did not make things any better.

11. In August, 2014, he stated that he reported for duty as usual but a disagreement ensued as employees were changing shift and he was asked to show cause for the occurrence of that day. He stated that he wrote a letter to the Respondent explaining but he was not reprimanded and continued working as usual.

12. He alleged that on 23.12.2014, when he was off duty he was called to collect his letter of termination following the events of 20.8.2014. He stated that due process was not followed in terminating him.

13. In cross-examination, the Claimant stated that he was not involved in any negotiations with the Respondent to review his salary downwards. He stated that he was dismissed four months after he wrote to the Respondents explaining the incident of August, 2014, which was a long time after the incident and in his mind the matter had been resolved. He stated that he was paid Shs. 55,000/= at termination.

14. The Respondent put up one witness who stated that indeed there was restructuring and the Claimant had been absorbed from Magadi Soda Company. His new contract was at a salary of 65,000/= for 1<sup>st</sup> year and for the 2<sup>nd</sup> year the salary was to reduce to Shs, 55,000/=. In the 2<sup>nd</sup> year Magadi Soda Company indicated to the Respondent that they were having a problem and needed to downgrade the contracts. This was communicated to the affected parties and they agreed to accept Shs. 50,000 as salary.

15. RW1 further stated that thereafter negotiations with Magadi Soda continued leading to an increase in salary for staff and fitters were now to be paid Shs. 55,000/= with effect from 1<sup>st</sup> January, 2013. All was well according to RW1 until they received information that the Claimant was involved in a commotion with his colleague at work.

16. Pursuant to this information the Claimant was required to explain the occurrence which he did but his explanation was not satisfactory. RW1 talked to the Claimant thereafter but apparently he was very uncooperative which led to the decision to terminate him. He further stated that he was paid all his dues and all statutory deductions were remitted accordingly.

### **Submissions**

17. The Claimant in submissions stated that Article 41 of the Constitution of Kenya, Section 26(1) of the Employment Act and Section 5 of the Labour Relations Act prohibits an employer to change the terms and conditions of employment in a way that prejudices an employee. He submits that the Respondent breached the aforesaid provisions and should be ordered to release all the wrongfully withheld or reduced salaries to the Claimant.

18. It is the Claimant's submission that the Respondent failed to remit NHIF, NSSF and P.A.Y.E as required by statute and should be ordered to compute and remit the same accordingly. They refer to their Appendix 8 to prove this assertion.

19. The Claimant states that he was dismissed as a result of an incident that occurred four months before and he states that he was not given a warning, never informed of the alleged reports made to the Respondents, he was not informed who his accusers were and was never given an opportunity to defend himself.

20. He states the dismissal was unfair, unlawful and irregular and prays for compensation as claimed. He also prays for an order that the Respondent issues him with a certificate of service.

21. The Respondent submits that the contract of employment between an employer and employee is a matter of private contract. In the instant case the Employer Magadi Soda was experiencing serious financial problems which it brought to the attention of the Respondent who in turn brought it to the attention of the employees.

22. It is their submission that they could not go back into their pockets to pay the employees since they were also losing money as a result of the financial difficulty Magadi Soda was experiencing. It is the Respondent submission that all statutory deductions were remitted and no evidence was led to the contrary by the Claimant.

23. As to the allegation of unfair termination the Respondent submits that there was a valid reason for termination as clause 5 of the appointment letter indicated that breach of safety regulations would lead to termination. It is their contention that due process was followed. The Claimant was issued with a Notice to show cause letter in August 2014 and he was allowed four months before he was terminated. They pray for the Claim to be dismissed.

24. Having considered evidence from both parties, the issues for determination by the Court are as follows:

**1. Whether there were valid reasons to dismiss the Claimant.**

**2. Whether due process was followed before dismissal of Claimant.**

**3. What remedies to grant in the circumstances.**

25. On the 1<sup>st</sup> issue, the Claimant was employed by the Respondent on 1.12.2008 vide the appointment letter dated 15.1.2008. The letter indicated as follows:

***“You will retain your current consolidated salary of Shillings Sixty Five Thousand only per month (65,000/=) less statutory deductions for a period of one year starting 1<sup>st</sup> December 2007. The same shall be renegotiated at the expiry of the said period”.***

26. It is clear that this salary was to be renegotiated at 1<sup>st</sup> December 2008 when the 1<sup>st</sup> year ended and it is on record that the salary of these employees was reduced in December 2008 to 50,000/= per month. Whether this was done after negotiations or not is not clear but Appendix 8 is an indication that some meetings took place between the Respondent and its employees and the issue of reduction in salary was discussed and shown to be necessary due to the economic downturn which the employees understood.

27. The contention by the Claimant that his salary was unlawfully reduced is therefore not fair as this affected a cross section of employees and the reason/s for the same were discussed and seen as necessary to keep the Respondent afloat.

28. On the 2<sup>nd</sup> issue, the termination letter of the Claimant dated 23<sup>rd</sup> December 2014 indicate that he was being terminated for offences committed way back in August 2014 for which he had been asked to respond and he responded vide a letter dated 21.8.2014.

29. This was after it found that the Claimant had sent a ‘bad’ text to his colleagues. It was also felt that he

disrespected authority by addressing the Respondent's Director by name. The letter further alludes to the fact that the Claimant was still a threat to his work mates making team work difficult – what the Claimant was seemingly continuing to do is not clear as to explanation is given under Section 43 (1) and (2) of Employment Act:

***“(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.***

30. The reasons for termination must be reasons which exist and which must be clear. In the case of Claimant, alluding to “reports reaching us” is vague as the Claimant should be made to understand what he is actually being accused of doing and this must be explained to him. This was not the case in case of the Claimant and this Court finds that there were no valid reasons to terminate the Claimant's services.

31. On the 3<sup>rd</sup> issue, it is evident that the Claimant was not taken through any formal hearing process. Section 41 of Employment Act states as follows:

***“(1). Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.***

32. A hearing as envisaged under Section 41 of Employment Act would have been an appropriate opportunity to explain to Claimant what reports had reached the Respondent so that he is asked to respond to the allegations before being terminated.

33. In the absence of valid reason and in absence of due process this Court finds that the termination of the Claimant was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:

***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.***

34. In the premise, I find the Claimant's case has merit and I find for Claimant and award him as follows:

***1. 1 months salary in lieu of notice 55,000/=***

2. *Annual leave not taken of 8 days = 55,000 x 8/12 = 20,952/=.*

3. *Certificate of Service.*

4. *12 months salary as damages for unlawful termination = 55,000 x 12 = 660,000/=.*

*TOTAL = 735,952/= - Less statutory deductions*

5. *Respondents to pay costs of this suit.*

Read in open Court this 19<sup>th</sup> day of September, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Isindu for Claimant – Present

Wamboi holding brief for Ayieko for Respondent – Present