



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

**AT MOMBASA**

**CAUSE NO. 528 OF 2014**

**JAMES GITAU MUKURIA.....CLAIMANT**

**VS**

**CONSOLBASE CONTAINERS**

**FRIEGHT STATION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of employment by the respondent on 7. 1. 2014. The respondent has denied liability for unfair termination as alleged by the claimant and averred that the claimant was dismissed for poor relationship with fellow employees and sexual harassment to his junior employees.

2. The suit was heard on 20. 6. 2016 when the claimant testified as (CW1) but the respondent never called any witnesses to offer her defence. After the hearing neither the claimant nor the respondent filed submissions.

**Claimant's Case**

3. CW1 stated that he was employed by the respondent on 7. 11. 2011 as the Chief Security Officer. His salary was Kshs.80250 plus telephone allowance of Kshs.3000 per month

4. On 6. 1. 2014, he proceeded on compassionate leave for 2 weeks but 2 days into his leave, he received a phone call from his colleague Mr. Crispin Bukhale informing him that the HR Manager Mr. Mwinyi was calling him to his office. That when he went to the office on 8. 1. 2014, the HR Manager gave him a dismissal letter dated 7. 1. 2014.

5. The reason for the dismissal cited in the dismissal letter was high handedness and bad interpersonal relationship with his juniors. CW1 denied the alleged reason for termination and contended that he was appraised in December 2013 and scored 80% for which he was paid a bonus of Kshs.60188.

6. He also denied ever being served with any warning letter before the dismissal for any wrong doing. He therefore contended that the reasons cited were false including the alleged sexual harassment.

7. He also denied that he was invited to a meeting on 7. 1. 2014 to discuss his conduct and in which

meeting he allegedly agreed to have his services terminated amicably.

8. He prayed for the reliefs sought in the suit including over finance because he used to work extra hours than agreed in the contract of employment.

### **Analysis and Determination**

9. There is no dispute that the claimant was employed by the respondent as the Chief Security Officer between 7. 11. 2011 and 7. 1. 2014 when he was terminated. The issues for determination are:

- (a) Whether the reasons for his termination were valid and fair.**
- (b) Whether the procedure followed before the determination was fair.**
- (c) Whether the termination was unfair.**
- (d) Whether the reliefs sought should issue.**

### **Valid and fair reasons**

10 The reasons cited for the termination of the claimant's services were poor interpersonal relationship with other team players and sexual harassment to his junior fellow workers. The claimant denied the said poor relationship with fellow workers and the alleged sexual harassment to his juniors.

11. Under section 43, 45 and 47 (5) of the employment Act (EA), the employer has the burden of proving and justifying the reason for terminating the services of his employee. In this case the respondent never filed any witness statement and never adduced any evidence to prove and justify the reasons cited for terminating the claimant's services. I therefore find that the respondent has failed to discharge her burden of proving that the reasons cited for dismissing the claimant were valid and fair to warrant the dismissal.

### **Procedure Followed**

12. The respondent alleged in her defence that she discussed the conduct of the claimant with him in a meeting held on 7. 1. 2014 and the claimant agreed to have his services terminated. That the termination was terminated through a mutual agreement signed between the her and the claimant and as such the procedure of fair hearing pointed in the Employment Act was not applicable in this Case.

13. The claimant has however denied ever attending the alleged meeting of 7. 1. 2014 and maintains that he only went to the HR Manager's office on 8. 1. 2014 when he was served with termination letter dated 7. 1. 2014. He also denied ever signing any mutual agreement to have his services terminated on 7. 1. 2014

14. I have carefully perused the documents filed by the claimant and the respondent and found no mutual agreement signed on 7. 1. 2014 or earlier were the claimant consented to have his services terminated for the reasons cited in the termination letter or at all. Additionally the respondent never called any witnesses to rebut the evidence by the CW1. Consequently, I find on a balance of probability that the respondent did not follow a fair procedure before terminating the claimant's services on 7. 1. 2014.

15. Under section 41 of the EA, an employer is barred from terminating the services of his employee before first according to him a personal hearing in the presence of a fellow employee of his choice. In this case the responded did not prove that the claimant was invited to any disciplinary hearing in presence of a fellow employee of his choice was admitted in paragraph 12 of the defence.

### **Unfair termination**

16. Under section 45 (2) of the EA, termination of employment of an employee is unfair if the employer

fails to prove that it was founded on a valid and fair reason (s) and that it was done after following a fair procedure. As demonstrated above, the respondent never filed any witness statements and never attended court to adduce any evidence. She therefore failed to prove that the reasons cited for dismissing the claimant were valid and fair and that the termination was done after following a fair procedure. Consequently, I find on a balance of probability that the termination of the claimant contract of employment was unfairly and unjustifiably terminated within the meaning of section 45 (2) of the Act.

### **Reliefs**

17. The claimant prayed for payment in respect of public holidays and overtime worked during his years of service. However I dismiss the same for lack of particulars and evidence that he was made to work overtime by the employer. Additionally the court has confirmed from clause 9 the appointment letter he was not entitled to extra payment for any overtime worked. The claimant signed away that right when he signed the letter of appointment accepting the terms thereon.

18. The claimant has also prayed for 12 month salary as compensation for unfair termination. I award him Kshs.481,500 being 6 months' salary as compensation for the unfair and unjustified termination. In making the said award I have considered the fact that the claimant had served the respondent for 3 years without any warning for poor performance or misconduct. Additionally, I have considered the fact that the claimant did not secure any alternative job even after one year of his dismissal.

### **Disposition**

18. For the reason stated above, I enter judgment for the claimant declaiming his dismissal from employment unfair and unjust and awarding him **Kshs.481,500** plus costs and interests.

**Signed, Dated and Delivered this 9<sup>th</sup> day of September, 2016**

**ONESMUS MAKAU**

**JUDGE**