



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**CAUSE NO. 1815 OF 2013**  
**ERICKSON LUKANO ..... CLAIMANT**  
**VERSUS**  
**DELMONTE KENYA LIMITED..... RESPONDENT**

Mr. Ogutu for claimant

Mr. Uviu for respondent

**JUDGMENT**

1. The suit was commenced vide a statement of claim on 13<sup>th</sup> November 2013 and amended on 10<sup>th</sup> February 2014. The claimant seeks:

- i. Twelve months salary as compensation for unlawful and unfair termination of employment.
- ii. Arrear salary for seventeen (17) days in the sum of Kshs.40,280.
- iii. Fifty (50) days salary in lieu of notice Kshs.137,800.
- iv. Twenty eight (28) days untaken leave Kshs.55,082.28; and
- v. Leave travelling allowance Kshs.2,500.

**2. Facts of the claim**

The claimant relies on the statement of claim and annexure thereto, oral testimony and submissions.

3. The facts of the case are that on 25<sup>th</sup> August 2008, the respondent employed the claimant as a senior engineering stores clerk. That he worked faithfully and diligently until 21<sup>st</sup> January 2013 when his head of department Mr. Aranda made allegations that he had received a bribe of Kshs.500 from a supplier called JAMES of Aquva Supplier Limited. Mr. Aranda alleged he had received an anonymous call to that effect. The claimant had earlier worked for the respondent under a one year contract between 23<sup>rd</sup> August 2007 and 23<sup>rd</sup> August 2008.

4. The claimant was summarily dismissed on 5<sup>th</sup> February 2013 inspite that the said James denied having given a bribe to the claimant. The claimant earned Kshs.55,082.28 per month at the time.

5. The claimant reported the dispute to the Ministry of Labour. The conciliator recommended that the claimant be paid compensation after finding that the dismissal was unlawful and unfair.

6. At the time of dismissal the claimant stated he was not paid salary for the days worked between 19<sup>th</sup> January 2013 to 4<sup>th</sup> February 2013. He also stated that he had twenty eight (28) days untaken leave, that he was entitled to fifty (50) days in lieu of notice and payment for leave travelling allowance. He prays the court to award him as prayed.

## **Response**

7. The respondent filed a statement of response on 19<sup>th</sup> December 2013. The respondent denies that the claimant's last salary was Kshs.55,082.28 and that he had served the respondent faithfully and diligently.

The respondent states that the dismissal was lawful and fair in that the claimant was given due notification and a hearing before his services were terminated in accordance with the provisions of Section 41(1) of the employment Act, 2007.

The respondent further states that the claimant is not entitled to the reliefs sought, including payment in lieu of notice since he was summarily dismissed for gross misconduct. That he was entitled to days worked up to 4<sup>th</sup> February 2013 and prorata leave.

8. The claim for compensation is denied.

The respondent called RW1, Bernard Kinaga Makeka, to testify in support of its case. He was employed on 1<sup>st</sup> June 1994 as Industrial Relations Officer and had filed a witness statement dated 17<sup>th</sup> February 2013 which he adopted as his testimony in this case. He told the court that the claimant committed a dismissible offence. That he was subjected to a disciplinary process and was lawfully dismissed.

9. That there was a complaint from suppliers that the claimant was soliciting cash from suppliers when they made deliveries to the respondent.

The complaint was from a supplier on email sent to one Jones Aranda. The email was dated 18<sup>th</sup> January 2013. It was produced before court and it reads;

*“we are sorry to report repeatedly, solicitation of cash by your stores clerk, Erickson Lukano.”*

10. RW1 stated that the claimant admitted he had received a calendar and Kshs.500 from one of the suppliers. A show cause letter dated 25<sup>th</sup> January 2013 was given to the claimant. The claimant responded by a letter dated 29<sup>th</sup> January 2013.

11. Disciplinary hearing was conducted. The claimant was accompanied at the hearing by two shopstewards. The defence was not satisfactory and the claimant was dismissed on 4<sup>th</sup> February 2013. The letter of dismissal provides the reasons that the claimant violated his terms of service, Code of conduct and respondent's business Ethics Policy by receiving gifts which he did not declare being a calendar and Ksh.500.

12. That the conciliator recommended that the summary dismissal be reduced to termination and he be paid two months salary as compensation. The respondent accepted the verdict but the claimant declined and came to court.

13. RW1 denied that himself and one Gerald Matoke had personal interest in the case in that they wanted to get rid of the claimant and get RW1's brother in-law Thomas Mugabe employed to fill an advertised position. The position was filled after shortlisting three (3) clerks internally and the claimant did not apply for the position. RW1 stated that Mugabe was employed in 2011 as a records clerk while the claimant was a senior records clerk.

14. The respondent prays that the suit be dismissed with costs except payment of the recommended sum by the conciliator in the sum of Kshs.51,682.

## 15. Determination

1) Was the dismissal of the claimant for a valid reason and in terms of a fair procedure?

2) Is the claimant entitled to the reliefs sought?

### Issue i

16. In his pleadings, testimony and submissions, the claimant maintains that the Human Resources manager, RW1, Industrial Relations Manager and Head, Engineering being from same ethnic community, conspired to get the claimant dismissed from employment to create room for promotion of the brother in-law of RW1 called Thomas Mugabe. That this indeed happened after the claimant's dismissal.

17. The claimant states that the dismissal was unlawful and unfair and he suffered loss and damages as a result of the calculated victimization. That he was unable to pay rent, service his loans and was black listed by the credit bureau. He urges that he be compensated and he be paid terminal benefits.

18. The respondent reiterated the testimony by RW1 in its written submissions and offered to settle the claim as per the recommendation of the conciliator.

19. It is strange, that a reputable employer would rely on one anonymous email alleging grant of Kshs.500 and a calendar to a longstanding employee without any tangible evidence. The explanation by the claimant that a supplier by the name James bought sodas to the internees in his department and did not give any money to the claimant was not seriously challenged by RW1.

20. The evidence by the claimant that upon dismissal the in-law of RW1 was immediately promoted to a position he was most favoured to ascend to appeared to the court a reasonable explanation to the rushed decision to dismiss the claimant for a non-offence. The court finds the conspiracy theory credible in the circumstances of this case. In this circumstance the court is inclined to protect the weaker and vulnerable party in the absence of any exonerating evidence from the respondent.

21. The court agrees with the findings by the conciliator Mr. Pius Kamau, that the investigations into the allegations levelled against the claimant were not conclusive.

22. The conciliator faulted the said whistle blower for failing to channel the complaint openly.

23. The court therefore finds that the claimant has proved on a balance of probability that the summary dismissal was not for a valid reason and was therefore wrongful.

24. The claimant is therefore entitled to compensation in terms of Section 49 of The Employment Act, 2009.

25. In this regard, the claimant had served the respondent for a period of about four (4) years and there is no evidence of any adverse employment record against him prior to the alleged incidence.

26. The claimant lost his source of income unlawfully and suffered loss and damage he has described herein.

27. The claimant sought compensation rather than be reinstated. He was not paid terminal benefits upon dismissal even though the respondent had offered to comply with the conciliator's recommendation which was not acceptable to the claimant.

28. The court awards the claimant eight (8) months salary as compensation for the unlawful dismissal in

the sum of Kshs.440,658.24.

a. The claimant is therefore entitled to payment of terminal benefits as follows:

i. In lieu of one (1) month notice following finding of unlawful dismissal in the sum of Kshs.55,082.82.

ii. Arrear salary for seven (17) days for the month of January 2013 having worked up to 21<sup>st</sup> January 2013 in the sum of Kshs.40,280.

iii. Payment in lieu of 23.74 leave days as admitted in the sum of Kshs.43,588.40.

29. Judgment is therefore entered in favour of the claimant against the respondent for;

a) Kshs.440,658.24 compensation.

b) Kshs.55,082.82 in lieu of one month notice.

c) Kshs.40,280 arrear salary.

d) Kshs.43,588.40 in lieu of leave.

**Total award Kshs. 579,609.46.**

e) Interest at court rates from date of filing suit till payment in full.

f) Costs of the suit.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of November 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**