



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

**CAUSE NO 693 OF 2013**

**JAMES NGUGI KAMAU.....CLAIMANT**

**VERSUS**

**PHONELINK LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. James Ngugi Kamau, the Claimant in this case worked for the Respondent, Phonelink Limited in the position of Technician from 11<sup>th</sup> September 2010 until 29<sup>th</sup> April 2013 when his employment was terminated. He brings this claim seeking compensation for unfair termination and payment of terminal dues.

2. The Respondent filed a Memorandum of Defence on 14<sup>th</sup> October 2013 and the matter proceeded to hearing with the Claimant testifying on his own behalf and the Respondent calling its Employee Relations Officer, Nelson Wafula Bruce.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent in the position of Technician at a monthly salary of Kshs.35, 000 effective 11<sup>th</sup> September 2010.

4. On 24<sup>th</sup> April 2013, the Claimant was issued with a show cause letter on allegations of failure to take instructions and to adhere to company timings and standards of performance, to which he responded on 25<sup>th</sup> April 2013. On 29<sup>th</sup> April 2013, his employment was terminated.

5. It is the Claimant’s case that the termination of his employment was unlawful and unfair. He prays for reinstatement without loss of benefits or in the alternative:

- a) Salary for April 2013.....Kshs. 41,987.00
- b) Pay in lieu of leave.....41,987.00
- c) Accrued paternity leave.....27,135.30
- d) 3 months’ pay in lieu of notice.....125,961.00
- e) 12 months’ salary in compensation.....503,844.00

f) General damages.....629,777.15

g) Certificate of service

h) Costs

### **The Respondent's Case**

6. In its Memorandum of Defence filed on 14<sup>th</sup> October 2013, the Respondent admits having employed the Claimant as a Technician at a basic monthly salary of Kshs. 36,510 plus a house allowance of Kshs. 5,477 effective 6<sup>th</sup> September 2010.

7. The Respondent states that between March 2013 and April 2013, the Claimant had on several occasions left work early, without completing leave forms as required. On 22<sup>nd</sup> April 2013, he disobeyed specific instructions issued by his manager, Firoz Mohammed, to avail his leave forms.

8. On 23<sup>rd</sup> April 2013, the Claimant wrote an email to the Respondent's Director complaining about Firoz Mohammed's conduct towards him and demanding an apology. Firoz Mohammed explained himself in writing stating that he was willing to apologise to the Claimant but also asked that the Claimant apologise for disrespecting him.

9. On 25<sup>th</sup> April 2013, Firoz Mohammed apologised for using abusive language towards the Claimant. He was issued with a written warning on 26<sup>th</sup> April 2013.

10. The Claimant was issued with a show cause letter on allegations of failure to take instructions and to follow company regulations and procedures. He responded on 25<sup>th</sup> April 2013, denying all the allegations.

11. On 26<sup>th</sup> April 2013, the Respondent held a disciplinary hearing on the Claimant's time management and absenteeism. The Disciplinary Committee recommended that the Claimant be summarily dismissed for insubordination. The Claimant was dismissed on 29<sup>th</sup> April 2013.

### **Findings and Determination**

12. There are two issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

13. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason to terminating the employment of an employee.

14. The termination of the Claimant's employment was communicated by letter dated on 29<sup>th</sup> April 2013 stating as follows:

*"Dear Sir,*

#### **REFERENCE: TERMINATION OF SERVICES**

*We refer to the above mentioned matter and further to our letter dated 24<sup>th</sup> April, 2013. We are in receipt of your explanation dated*

25<sup>th</sup> April 2013 in response to the “notice show cause” (sic) dated 24<sup>th</sup> April 2013. After careful consideration of your explanation it has been found unsatisfactory.

The management views this as a serious breach and hereby dismisses you for gross misconduct with immediate effect.

The management has noted with great concern of (sic) your irresponsible behaviour and ignorance in handling your job. Based upon deficiency in duty performance you have shown neither efforts nor improvements in recuperating your punctuality and absenteeism (sic).

You have failed to adhere to company timings & procedures/protocols despite several reminders and warnings both in verbal (sic) and in writing. Despite of (sic) being served with three (3) warning letters to refrain from such misconduct but you chose not to.

You have also been found disobeying your manager and not following instructions as required. The management therefore regrets to inform you that your services with this company have been terminated with immediate effect from today 29/04/2013.

***This action is taken in accordance to (sic) the employment Act section 44 which states Acts of dishonesty, insobriety, theft, possession of weapons, sleeping on the job, falsifying records, fighting in the company premises, failing to, or performing his/her work carelessly and improperly(sic). Also note: it also states “if an employee fails or refuses to obey a lawful or proper command which is within the scope of his duty to obey issued by his employer or person placed in authority over him.***

Kindly report to the Head office end month (sic) with arrangement to collect your terminal dues which is:

a) 29 days worked in April 2013

b) Any leave due up to date,

c) One month Notice pay.

Yours sincerely,

**FOR: PHONELINK LIMITED.**

(Signed)

**HUMAN RESOURCE MANAGER”**

15. From this letter, the termination of the Claimant’s employment had to with absenteeism and failure to follow instructions. According to further evidence adduced before the Court, the Claimant needed to pick medication from hospital every Wednesday, meaning that he would be absent from work for several hours on this day.

16. The Respondent’s witness, Nelson Wafula Bruce told the Court that the Claimant was required to complete a leave form each time he was away from work, which he declined to do. This appears to have led to a difficult working relationship with his supervisor, Firoz Mohammed.

17. The question is whether the Respondent has discharged its burden under Section 43 of the Employment Act. As held in **British Leyland v Swift [1981] 1 IRLR 91**, the test on this account is whether the reason proffered by an employer is one which would move a reasonable employer to terminate employment. The Claimant testified that he completed the leave forms as required. He however did not produce any such form before the Court nor did he serve a production notice on the Respondent.

18. Taking the evidence adduced by the parties in totality, the Court has arrived at the conclusion that the Claimant failed to complete leave forms as required and the Respondent had a valid reason for terminating his employment.

19. That settled, the next question is whether in effecting the termination, the Respondent followed the procedural fairness requirements set out under Section 41 of the Employment Act. The Claimant was issued with a show cause letter on 24<sup>th</sup> April 2013 to which he responded on 25<sup>th</sup> April 2013. He was then invited to a disciplinary hearing on 26<sup>th</sup> April 2013 after which his employment was terminated on 29<sup>th</sup> April 2013. At the disciplinary hearing, the Claimant was accompanied by two of his colleagues, Charles Mungai and Michael Karue.

20. On paper, it appears that the steps set out in Section 41 of the Employment Act were followed. However, the Court observed that the speed with which the disciplinary process was undertaken and concluded was not consistent with a fair hearing. As held by this Court in ***Rebecca Ann Maina and 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*** an employee facing disciplinary action is entitled to sufficient time to prepare their defence.

### **Remedies**

21. For the reason that the Claimant was not afforded adequate time to prepare his defence, I find the termination of his employment procedurally unfair and award him three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the fact that the Respondent has established a valid reason for the termination.

22. From the evidence on record, the Claimant was paid salary for April 2013, leave pay and notice pay. These claims are therefore without basis. The claims for paternity leave and general damages were not proved and are dismissed.

23. Finally I enter judgment in favour of the Claimant in the sum of Kshs.125,961 being three (3) months' salary in compensation for unfair termination. This amount will attract interest at Court rates from the date of Judgment until payment in full.

24. I further direct the Respondent to issue the Claimant with a certificate of service.

25. The Claimant will have the costs of this case.

26. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2016**

**LINNET NDOLO**

**JUDGE**

### **Appearance:**

Miss Mwirichia for the Claimant

Mr. Ouma for the Respondent