



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 60 OF 2015 [consolidated**  
**with No. 61 and 62 both of 2015]**

**BETWEEN**

**1. FRANCIS MASIKA WAMBUA**  
**2. MAYIKUMA MANYONGE ASMA**  
**3. MOSES GAKUHA GITITU.....CLAIMANTS**

**VERSUS**

**WELLS FARGO LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Wachira King'ang'ai & Company Advocates for the Claimants*

*Walker Kontos Advocates for the Respondent*

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**JUDGMENT**

1. The 3 Claimants filed separate suits against their former Employer, which were consolidated on the 12<sup>th</sup> March 2016, with file number 60 of 2015 serving as the reference file.
2. All the Claimants testified on the 28<sup>th</sup> June 2016, as did Respondent's Human Resources Manager, Mr. Stephen Kang'ethe. The matter was last mentioned in Court on the 29<sup>th</sup> July 2016, when the Parties confirmed the filing of their Closing Submissions.

**1<sup>st</sup> Claimant**

3. The 1<sup>st</sup> Claimant told the Court he was employed by the Respondent as Mechanic, on 1<sup>st</sup> February 2009. He was alleged by the Respondent to have stolen Respondent's items in December 2012. He was charged in Court for the offence of theft by servant in January 2013. He was bailed out. When he reported

for work, he was advised by the Human Resource Manager not to report to work until the criminal case was determined. The criminal case dragged on for some time until 7<sup>th</sup> November 2014 when it was dropped for lack of evidence. The Claimant reported to work after this and was denied access. No letter of termination issued. He states he is apprehensive the Respondent might have unlawfully terminated his contract. He prays the Court to grant to him:-

- a. 1 month salary in lieu of notice at Kshs. 18,570.
- b. Unpaid salary from January 2013 to-date at Kshs. 445,680.
- c. Damages for unlawful termination at Kshs. 222,840.
- d. Severance pay from 2009 to 2012 at Kshs. 74,280.

Total ..... Kshs. 761,370

- e. Certificate of Service to issue.
- f. Costs, interest and any other relief.

4. The 1<sup>st</sup> Claimant testified he has never received any letter of termination of employment from the Respondent. Employees normally signed letters from the Respondent, in acknowledgement of receipt. He did not receive any letter alleging he had deserted. Cross-examined, the 1<sup>st</sup> Claimant testified he did not drive the Respondent's Probox car, on the material date when theft is alleged to have take place. He was not caught trying to ferry out Respondent's items, using the car. He was arrested a week after the incident. It is not true that he ran away. He did not receive the letter of summary dismissal. He was suspended, and claims salary for the period on suspension. The address on the letter of summary dismissal belonged to the Respondent. Similarly, the letter of employment bore Respondent's address. This was used when the Claimant was in active employment. Redirected, the Claimant told the Court he ran away for a week because he had personal differences with the supervisor Mr. Simiyu. There was no communication advising the 1<sup>st</sup> Claimant that he had been suspended.

#### 2<sup>nd</sup> Claimant

5. Mayikuma Manyonge Asma, the 2<sup>nd</sup> Claimant herein, testified he was employed by the Respondent as a Mechanic in September 1998. He left in similar circumstances as the 1<sup>st</sup> Claimant did, in December 2012, after the Respondent complained the Claimants had stolen its items. He earned Kshs. 11,008 per month as of December 2012. He prays for:-

- a. 1 month salary in lieu of notice at Kshs. 11,008.
- b. Unpaid annual leave for 2012 at Kshs. 11,008.
- c. Unpaid salary from January 2013, to the date of filing suit.
- d. Damages for unlawful termination at Kshs. 132,096.
- e. Severance pay from 1998 to 2012 at Kshs. 154,112.

Total ..... Kshs. 572, 416

- f. Certificate of Service to issue.
- g. Costs and any other reliefs.

6. The 2<sup>nd</sup> Claimant told the Court on cross-examination that he was arrested outside the Respondent's Workshop, on the 1<sup>st</sup> January 2013. It is not true that he deserted. He was bailed out on the 8<sup>th</sup> January 2013. He reported to the Human Resource Manager after bail. It is not true that he was remanded throughout. He confirmed upon redirection that the Claimants were bailed out the same day they were charged. They reported after they were bailed out. They were advised to wait for the outcome of the criminal case. The case was terminated in their favour. They again reported but were not taken back. The 2<sup>nd</sup> Claimant was not paid any terminal dues. Proceedings in the criminal trial show they were bailed out.

### 3<sup>rd</sup> Claimant

7. Moses Gakuha Gititu, 3<sup>rd</sup> Claimant herein, was employed by the Respondent as a Mechanic on 8<sup>th</sup> July 2004. His salary was Kshs. 12,000 per month as of the date of exit. He left together with his Colleagues, based on similar grounds. His grievance and remedies claimed are similar to those of his Colleagues. He seeks:-

- a. Salary of 1 month in lieu of notice at Kshs 12,000.
- b. Unpaid annual leave for 2012 at Kshs. 12,000.
- c. Unpaid salary from January 2013 until the date of filing the Claim at Kshs. 288,000.
- d. Damages for unlawful termination at Kshs. 144,000.
- e. Severance pay 2004 to 2012 at Kshs. 96,000.

Total..... Kshs. 552,000

- f. Certificate of Service to issue.
- g. Costs and any other reliefs.

8. The 3<sup>rd</sup> Claimant confirmed he was arrested, charged and bailed out together with his Co-Claimants. He did not desert, and did not see Respondent's letter alleging Employees deserted. He did not receive the letter, and saw it for the first time in Court.

### Respondent's case

9. The Respondent holds that the Claimants were summarily dismissed for gross misconduct. Procedure was fair. The Claimants were involved in attempted theft of their Employer's items at the workplace. They were arrested by the Police and charged in Court. They were summarily dismissed on the 2<sup>nd</sup> February 2013.

10. Stephen Kang'ethe testified the Claimants ran away after the attempted theft. The Respondent reported the offence to the Police. They were away from work for more than 14 days. The Respondent had no option but to separate. Kang'ethe signed the letters of desertion. He would not have issued these letters if the Claimants had not deserted. The Respondent has a procedure for aggrieved Employee to appeal against its decisions. The Claimants did not appeal against the decision using that procedure. The Respondent waited for 14 days, before considering the Claimants to have deserted. They were not under suspension. Suspension is always in writing. Kang'ethe did not sign such a letter.

11. Cross-examined, Kang'ethe stated the Respondent writes to its Employees using C/O the Respondent, and normally invites Employees to pick such letters. He sent the letter of desertion to the Mombasa Office. He has no reason to say the letters were not received by the Claimants. He did not have delivery book showing the letters were received at Mombasa Office. The letters of dismissal/desertion were not mentioned in the Statement of Response. This was through error attributable to Respondent's previous

Advocates. It was up to the Police to summon Witnesses in the criminal case. The case was terminated because Witnesses failed to give evidence. The Claimants were arrested at the workplace. They were not available at the workplace to be given a disciplinary hearing. It is not true that the letters of summary dismissal, and certificates of service, were drafted after the Claimants filed their respective Claims. Kang'ethe had no reason to manufacture documents. On redirection, he testified that Asma's desertion letter was sent to his address in Kitale. Gititu's was sent to his address in Mombasa. They deserted. The Respondent did not admit any claim in its Response.

### **Submissions**

12. The Claimants submit termination was unfair and unlawful. The decision was not even communicated to them. They reported back after they were bailed out, and upon acquittal. The Respondent did not take them back. They submit they merit the prayers sought.

13. The Respondent submits Claimants were summarily dismissed, and not entitled to notice pay. They were not suspended, and do not merit salaries for alleged period of suspension, calculated up to the date of filing Claims. They were caught ferrying some items from the workshop. Once the Employer has stated that the power to terminate was invoked, the Employee cannot dispute whether the decision has been made; it can only be disputed if termination was fair and lawful [see *John K. Chelimo v. National Cereals Produce Board [2013] e-KLR*]. Termination was not based on redundancy. The claims for severance pay are misplaced.

### **The Court Finds:-**

14. The 3 Claimants were employed by the Respondent as Mechanics on various dates. They left employment in disputed circumstances, after they were arrested and charged for attempting to steal some items from the Respondent's workshop. They were arrested, and arraigned in Court on 8<sup>th</sup> January 2013.

15. Their position is that they went back to work after they were bailed out. They were asked by their Supervisor to keep off, until their criminal trial was concluded. They considered themselves under suspension, for the period the criminal trial took place. They did not receive the letters of summary dismissal/ desertion, alleged to have been sent to them by the Respondent. They should in their view be treated as though they were in continuous employment, and paid salaries up to the time of filing Claims.

16. The Court formed the view that the Claimants were suspected of stealing by their Employer. From the evidence, the incident happened on 29<sup>th</sup> December 2012. Once reported to the Police, the Claimants, for reasons best known to them, did not continue with their normal work schedule. The 1<sup>st</sup> Claimant explained that he ran away, because he had personal differences with his Supervisor. He was arrested a week after he abandoned his workstation and charged.

17. After the Claimants were arrested and taken to Court, there is evidence in the proceedings that they were bailed out. The Court does not believe the Respondent when it states that the Claimants were in custody for over 14 days, and considered to have deserted, or that they did not report back after obtaining bail. Once bailed, they would have no incentive to flee the workplace. They reported back, and were, the Court agrees, advised to keep away until the criminal case was determined.

18. The letter from the Respondent alleging that the Claimants deserted work from 5<sup>th</sup> January 2013, and that their whereabouts were unknown, does not seem to the Court to be persuasive. The Respondent caused the arrest of the Claimants, when they offered themselves to record statements on the 5<sup>th</sup> January 2013. The whereabouts of the Claimants would not be unknown, the Respondent having handed them over to the Police.

19. There is a Memorandum written by the Respondent's Mombasa Branch Manager to Respondent's Office in Nairobi. The Memorandum is dated 3<sup>rd</sup> January 2013, yet in its recommendation, mentions that the 1<sup>st</sup> Claimant resurfaced at the workplace on the 5<sup>th</sup> January 2013. It states the 1<sup>st</sup> Claimant was

handed over to Makupa Police Station, where he was still being held. The Respondent would not just handover Employees to the Police, and being the complainant, having a direct interest in the criminal trial allege not to know where the Employees were. The assertion that the Claimants deserted, or were in custody for over 14 days, has no merit. They may have fled before arrest and bailing out, not after that. They returned after obtaining bail, but their Employer had made up its mind there was no returning. The dating of the Memorandum above, raises suspicion on the authenticity of the documents relied on by the Respondent, in supporting its position that the Claimants deserted.

20. Desertion is an employment offence, and it must be treated by the Employer like other employment offences. The offence must be shown to have taken place, investigated, and the Employee invited for a disciplinary hearing. The Respondent was a complainant in the criminal case, had the personal details of the Claimants, and could not therefore say the Claimants were unavailable for a disciplinary hearing. There were letters written to the Claimants according to the Respondent, after the Claimants' arrest. There was not a single letter inviting them for a hearing on desertion. This ground cannot stand in justifying termination.

21. The act of removal of the Respondent's items from the workplace was nonetheless shown to have taken place. The Claimants were charged with attempted theft, and absolved of a criminal offence. This did not however translate into explaining away the employment offence which took place at the workplace. The finding of the trial Court, in the criminal case, was not intended to serve the disciplinary process at the workplace. The Respondent did not advise the Claimants that their employment with the Respondent depended on the outcome of the criminal case. The letter of summary dismissal did not refer to the criminal case. The Respondent was entitled to investigate the employment offence independent of the criminal process, and take an independent decision from what the Court in the trial Court eventually took.

22. The Court herein is satisfied the Claimants committed or were on reasonable and sufficient grounds suspected of having committed a criminal offence against, or to the substantial detriment of their Employer or Employer's property. Having been so suspected, they fled for about 1 week leading to the day of their arrest. They committed employment offences under Section 44 [4] [a] and [g] for which the Respondent would be entitled to summarily dismiss them. The Court finds there was valid ground in terminating the Claimants' contracts as required under Section 43 and 45 of the Employment Act 2007.

23. They were not formally charged at the workplace or heard, as suggested elsewhere in this Judgment. They were available and were not invited for any hearing. Procedural fairness was disregarded. The Respondent did not meet the standards of fairness under Section 41, 45 and 47 of the Employment Act 2007.

**24. *The Claimants are granted 3 months' gross salary each, in compensation for unfair termination.***

25. The Respondent did not prove service of the letters of summary dismissal and desertion. The effect of this would not be that the Claimants deem themselves as in continuous employment, up to this day. They testified they went back to work after they were bailed out, but were told to await the outcome of their criminal trial. They went back after the criminal trial was terminated on 7<sup>th</sup> November 2014, but the Respondent locked them out. The Court was not persuaded the letters of summary dismissal / desertion were received by the Claimants. However, the Claimants had not been formally suspended. They did not repudiate their contracts, and consider themselves as constructively dismissed. They kept asking the Respondent for their return to work date.

26. The Claimants however must have understood their contracts to be at an end, once they reported to the Respondent after they were acquitted, and were locked out. If they considered the outcome of the criminal trial the defining event, the refusal by the Respondent to open its gates to them after this event, should have informed the Claimants that the contracts were at an end. In the view of the Court, at this point, both Parties must have come to know there was no turning back. The Claimants were not in active service for the period they were under criminal trial. The Respondent failed by not communicating termination of employment while the criminal trial was ongoing. There was no clear evidence the

Claimants received the letters ending the relationship, but at the time there was a lockout, it should have become clear there was no possibility the relationship would continue. The Claimants merit compensation for the period they were not paid their salaries during the criminal trial. This does not have to be the entire salaries earnable had they remained actively in employment during the criminal trial. They did not work, and to grant salaries to-date would violate the concept of fair remuneration. Furthermore they had initially fled when they were suspected of theft. They did not from the outset, act like they were innocent or purposed on sustaining their contracts. They created a situation of mistrust and lack of confidence. ***They are allowed minimal compensation for the period they were on trial, at 2 months' gross salary each.***

27. As termination was justifiable, based on valid ground, the Respondent was not obliged to issue notice or pay in lieu of notice. There were employment offences shown to have been committed warranting no notice, or less notice than allowed under the contract or statute. In other words, the Respondent had valid reason to summarily dismiss the Claimants under Section 44 [4] of the Employment Act 2007. The plea for notice pay is rejected.

28. The prayer for severance pay is misplaced. As pointed out by the Respondent, severance is paid on redundancy, under Section 40 of the Employment Act 2007. There was no redundancy situation, suggested anywhere in the proceedings. The term 'severance pay' is sometimes used interchangeably with the term 'service pay.' The Court examines if what is prayed as 'severance pay' was, in the circumstances, intended to be 'service pay' under Section 35[5] of the Employment Act 2007. The Court finds service pay, is likewise not payable as the Claimants were subscribed to the N.S.S.F, as shown in their pay slips.

29. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants pray for annual leave for the year 2012. The Respondent appears to concede this in the dismissal/desertion letters. ***The 2 Claimants are allowed their prayers for annual leave pay.***

30. Certificates of Service shall be released to the Claimants.

31. No order on the costs.

IN SUM, IT IS ORDERED:-

***a. Termination was based on valid reasons, but lacking in fairness of procedure.***

***b. The Respondent shall pay to:***

***i. Francis Masika Wambua: 3 months' gross salary in compensation for unfair termination at Kshs. 55,710; and 2 months' salary in compensation for the period of the criminal trial at Kshs. 33,140- total Kshs. 92,850.***

***ii. Mayikuma Manyonge Asma: 3 months' gross salary in compensation for unfair termination at Kshs. 33,024; 2 months' gross salary to compensate the period of the criminal trial at Kshs. 22,016; and 21 days of annual leave for the year 2012 at Kshs. 8,884- total Kshs. 63,924.***

***iii. Moses Gakuha Gititu: 3 months' gross salary in compensation for unfair termination at Kshs. 36,000; 2 months' salary for the period of the criminal trial at Kshs. 24,000; and 21 days of annual leave at Kshs. 9,692- total Kshs. 69,692.***

***c. Certificates of Service to issue.***

***d. No order on the costs.***

Dated and delivered at Mombasa this 2<sup>nd</sup> day of December 2016.

James Rika

Judge