



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 568 OF 2010**

**(Before Hon. Justice Maureen Onyango on 26.1.2015)**

**EDWIN OMONDI ACHWADA ..... CLAIMANT**

**-VERSUS-**

**TANDU ALARM SYSTEMS LTD ..... RESPONDENT**

**JUDGMENT**

The claim herein was filed by the claimant Edwin Omondi Achwada against his former employer Tandu Alarm Systems Ltd. The Memorandum of Claim dated 20th May 2010 through Namada & Co. Advocates was filed in court on 24th May 2010. The claimant filed an Amended Memorandum of Claim dated 27th July 2012 on 30th July 2012. He alleges that he was unfairly dismissed. He seeks payment of notice, service pay, leave not taken and compensation in the sum of Kshs 165,558.40. He further prays for interest and costs.

The respondent filed a Reply to the Memorandum of claim through Kantai & Co. Advocates on 16th July 2010. The respondent denied all allegations in the claim and averred that the claimant was lawfully dismissed for gross misconduct. The respondent further averred that the claimant's lawful dues were computed but he refused to collect the same.

The case was heard on 18th June 2014. The claimant testified on his behalf. The respondent's Operations Manager Lloyd Kiriimi Abuga testified on its behalf. The parties filed written submissions thereafter.

The claimant was represented by Mr. Makokha instructed by Namada & Co. Advocates while the respondent was represented by Mr. Kamau instructed by Waruhiu K'owade & Ng'ang'a Advocates.

The claimant testified that he was employed by the respondent as a security guard on 4th July 2007 and worked until 12th April 2010 when he was summarily dismissed from employment while guarding at Panari Hotel.

The claimant testified that on 12th April 2010 he was working at the basement entrance barrier when he allowed a vehicle without a parking sticker to be parked in the basement at around 11.00 am. He

stated that the person he allowed to park was a tenant known to him but his parking sticker was on a different car. His supervisor came and asked him why he had allowed in a vehicle without a sticker. He was then asked by the supervisor to report to the head office at the junction of Ngong road and Ole Odume road where he met the Operations Manager Mr. Lloyd Kirimi. The Operations Manager asked him to explain what happened at Panari which he did. He was then handed the letter of dismissal.

The claimant testified that on the same day, the supervisor found him with an electric water heater which was given to him by an employee of Panari to warm water for drinking. He stated that he worked from 6 am to 6 pm with no break for meals and were not allowed to eat at work.

The claimant's letter of dismissal contained 2 grounds for the dismissal, allowing an unauthorized vehicle to access the basement parking without authority, and being in possession of an electric water heater used for boiling water using client's electricity contrary to company's regulations. He later appealed through his letter of 14th April 2010. The claimant prayed for orders as prayed in his claim.

Mr. Lloyd Kirimi Kabuga, the respondent's Operations Manager (RW1) testified that on 12th April 2010 the supervisor at Panari Hotel reported that the claimant had allowed an unauthorized vehicle to enter the basement parking against instructions. He then dispatched a controller to visit the location. The claimant later appeared before him on the same day and admitted the charges which RW1 had verbally explained to the claimant and the claimant asked for forgiveness. He then issued the dismissal letter to the claimant.

RW1 testified that instructions are posted at the premises where employees work and all employees are taken through training before they are deployed. RW1 testified that the claimant had previously been arrested together with other guards while working at Mavji Construction when there was some loss but was released when the respondent paid for the loss. The claimant was transferred to Panari after the incident. RW1 further testified that the claimant had a previous warning letter which was not produced in court.

RW1 testified that the dismissal of the claimant was fair. That the claimant's terminal dues which constituted salary, house allowance and overtime for 12 days worked, 8 days leave and uniform refund all amounting to Kshs 11,341/= was computed but the claimant declined to accept it. He prayed that the claim be dismissed.

I have considered the pleadings, testimonies of witnesses and the written submissions.

The claimant relied on the following authorities which I have considered; **Hellen Nechesa V Kamongo Waste Paper Ltd [2013] eKLR, Edwin Nyamanga V Silver Holdings Ltd [2014] eKLR, and Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKLR.**

The respondent relied on the following authorities; **Koech V African Highlands and Produce Company Limited and Another [2006] 2EA 148, Bachitter Singh Chase V Barclays Bank of Kenya Ltd HCCC 4549 of 1987, Ladislaus Mukasa V Uganda Commercial Bank, [1994] 11 KALR 21, Kigunda V Barclays Bank [1973] EA 569 and Boston Deep Sea Fishing V Ausell (1886 - 90) All ER 65.**

This court has on numerous occasions made pronouncements on what constitutes fair dismissal. As provided in Sections 41, 43 and 45 of the Employment Act, there must be valid reason and the procedure must be fair.

In the present case, the incidents for which the claimant was dismissed occurred on the same date as the dismissal. He was sent to the head office by his supervisor, and when he arrived at the head office, was asked to explain what happened and thereafter handed the dismissal letter.

RW1 testified that the claimant admitted the offences and asked for forgiveness. This is not documented. The admission referred to by the respondent is an appeal that the claimant wrote 2 days

after his dismissal, on 14th April 2010. I have perused it, and it is not an admission but an explanation that the incident for which he was dismissed occurred due to a misunderstanding between the claimant and his supervisor.

There is no evidence that the respondent complied with the procedure under Section 41 of the Employment Act. The facts as narrated by the claimant and RW1 suggest that the letter of dismissal was prepared before the claimant arrived at the head office. The claimant was thus never given a hearing before the decision to dismiss him was reached.

For the foregoing reasons, the dismissal was unfair and I find accordingly. The claimant seeks the following remedies; notice, service pay, payment in lieu of leave for the year 2008 and compensation.

Having found the dismissal unfair, the claimant is entitled to notice. I award him the same. The respondent did not contest the sum claimed of Kshs 10,892/= as gross pay and I award the claimant the said sum.

On service pay, the Regulation of Wages (Protective Security Services) Order provides for payment of gratuity at 18 days salary after completion of 5 years. Since the claimant had not worked for 5 years, he is not entitled to service gratuity. The claimant's payslip shows that he was a member of NSSF and he is therefore not entitled to service pay as provided in Section 35(5) of the Employment Act as he is excluded by Section 35(6).

On the prayer for leave for 2008, there is no dispute that the claimant was employed on 3rd July 2007. RW1 confirmed this but stated the claimant was not entitled to leave for that year as he was a casual.

Section 28 of the Employment Act provides that an employee qualifies for annual leave after the completion of 2 months service irrespective of the nature of employment. In any event casual employment does not last for more than one month. Section 37(1)(a) provides that casual employment is automatically converted to monthly contract after 30 days continuous employment. The claimant is therefore entitled to leave for 2008 as prayed in addition to the leave he was granted by the respondent of 8 days due upto the date of dismissal. I award the claimant 26 days for 2008 in the sum of Kshs 5,312/= (based on his last basic pay).

Having been unfairly dismissed, the claimant is entitled to compensation in terms of Section 49(1) (c). Having worked for less than 3 years and taking into account all the circumstances of his case and the factors in Section 49(4) of the Act, I award him 4 months gross salary as compensation in the sum of Kshs 43,568/=.

The decretal sum shall attract interest from date of judgment. The claimant will also have costs of his case.

In summary therefore I award the claimant the following:-

- |                   |                 |
|-------------------|-----------------|
| i. Notice         | - Kshs 10,892/= |
| ii. Leave         | - Kshs 5,312/=  |
| iii. Compensation | - Kshs 43,568/= |

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**TOTAL = KSHS 59,772/=**

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This is in addition to the terminal benefits offered by the respondent in the sum of **Kshs 11,341/=** making a total of **KSHS 71,113/=**.

Orders accordingly.

**Dated and delivered in Nairobi this 26th day of January 2015.**

**MAUREEN ONYANGO**

**JUDGE**

*In the presence of:*

..... for claimant(s)

..... for respondent(s)