



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1382 OF 2013**

**GEORGE KIGUDWA MULWALE.....CLAIMANT**

**VERSUS**

**TINTORIA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant seeks an award of Kshs.168,692 as compensation for what he considers wrongful and unfair termination of his services.
2. The background of this suit is that the claimant was employed on 1<sup>st</sup> May, 2010 by the respondent as a pressing machine operator in the respondent's laundry at a monthly salary of Kshs.9,000/= which was increased to Kshs.10,000/=.
3. The claimant's services were later terminated on 10<sup>th</sup> July 2011. He avers that his termination was without notice and that he was not paid for the 10 days worked in July, 2011. By the time of his termination, the claimant avers that he had worked for 14 months. He claimed that he never proceeded on leave for the entire duration he worked for the respondent and that he was neither provided with a house nor paid a house allowance by the respondent.
4. The claimant averred that the termination of his services was contrary to the principles of natural justice and section 41 of the Employment Act.
5. The respondent on its part averred that the claimant consistently failed in performing his duties diligently and was responsible for the frequent breakdown of respondents machinery.
6. The respondent further averred that the claimant was afforded an opportunity to be heard and in fact tendered his defence in writing. His defence was duly considered and a decision made to terminate his services.
7. At the trial the claimant repeated most of the averments in his memo of claim and reaffirmed that he was never warned over the breakdown of pressing machines and that he was never issued with a show cause letter and that upon dismissal he was never given the dismissal letter.
8. The respondent called as witness one Jackson Muli who stated that there was a problem with the

machine the claimant was using. It fell down and brought about a short circuit. According to him the claimant placed the machine badly and which is why it fell.

9. It was his evidence that the claimant was asked to write an explanation over the damaged pressing machine and later dismissed. It was further his evidence that the claimant was not paid house allowance because he was new.

10. In his final submissions before Court, Mr. Khalwale for the claimant submitted that the contention that the claimant at the time of termination of his employment had worked for 14 months and 10 days hence section 45 (3) of the Employment Act which formed the basis of the respondent's preliminary objection did not apply. In any event, Counsel argued, Justice Lenaola in the case of **Samuel Momanyi v. the Ag & Another** had declared section 45 (3) of the Employment Act unconstitutional as it purported to deny the petitioner the rights and freedoms in the Constitution.

11. Concerning summary dismissal Counsel submitted that an accidental or even intentional damaging of a machine at the place of work is not one of the reasons given under section 44(4) to justify summary dismissal of an employee.

12. Counsel for the respondent on the other hand submitted that the High Court's declaration in Momanyi's case was made on 18<sup>th</sup> May, 2012 yet the claimant's dismissal took place on 10<sup>th</sup> July 2011 therefore the High Court's declaration could not apply retrospectively.

13. Regarding date of appointment, counsel submitted that whereas the claimant avers that he was appointed on 1<sup>st</sup> May, 2010, the earliest document was a letter of confirmation referring to his appointment letter dated 5<sup>th</sup> September, 2010 and confirming his position effective 5<sup>th</sup> November, 2010. According to Counsel therefore, the claimant had not worked for a period of thirteen months even taking into account the earlier date.

14. Concerning reason for dismissal, Counsel submitted that willful neglect to perform work which was an employee's duty to perform, or carelessly and improperly performing any work which from its nature was the duty of such employee to perform carefully and properly was ground to justify summary dismissal.

15. On the process of dismissal Counsel submitted that the claimant was afforded an opportunity to give his version of events which he did in writing. The respondent considered his representations and a decision was made to dismiss him. According to Counsel therefore, the claimant's dismissal being summary he was not entitled to any benefits or pay in lieu of notice.

16. The claimant averred in paragraph 3 of his memorandum of claim that he was employed on or about 1<sup>st</sup> May, 2010 as a worker in the respondent's laundry at a basic pay of Kshs.9,000/= which was later increased to Kshs.10,000/=. This averment was conceded to by the respondent at paragraph 5 of its memorandum of response except that the respondent added that the claimant was obligated to perform his duties diligently at all times. If this be the case, by ordinary arithmetic counting, by the time the claimant was terminated on 10<sup>th</sup> July, 2011, he had worked for about 13 months and ten days. It therefore cannot be true that he had not worked for more than 13 months. To this extent the provision of section 45 (3) of the Employment Act which formed the basis of the respondent's preliminary objection does not apply to the claimant. But even if it did, there is the decision by my brother Justice Isaac Lenaola in the case of **Samuel G. Momanyi v. The Ag & Another** where the learned Judge declared section 45 (3) of the Employment Act 2007 to be inconsistent with the provisions of articles 28, 41(i), 47, 48 and 50 (i) of the Constitution. As much as I feel that this might not be an appropriate moment for me to dive into the intellectual deep end of the arguments for or against my learned brother's decision, all I can say is that I am inclined and persuaded by the profound manner in which he approached the issue at hand and I am impressed by his purposive interpretation of the Constitution vis-à-vis section 45(3) of the Employment Act.

17. Back to the merit of this case the claimant averred that he was terminated for unjustifiable reasons and in terminating him no fair procedure was followed. The respondent on the other hand averred that it had valid reasons for dismissing the claimant and that it followed a fair procedure prior to summarily dismissing him.

18. Section 41(2) of the Employment Act provides that an employer shall before summarily dismissing an employee under section 44(3) or 4 hear and consider any representations which the employee may on the ground of misconduct, and the person, if any chosen by the employee make.

19. The undated handwritten letter found at page 11 of the respondent's bundle of documents produced at the trial gives the claimants version of the mishap regarding the pressing machine and his apologies. The comments on the letter state that he was sent home pending investigation. And a decision was made by the management to terminate his services. He was found responsible for the frequent iron machine break down due to lack of due care.

20. Although the respondent states the claimant was summarily dismissed no dismissal letter was produced to show the nature of dismissal and reason for such dismissal. Further whereas the notes on the hand written letter by the claimant talked of investigations, no report of such investigation was produced during the trial or annexed as part of respondent's documents to show the nature and extent of the claimant's culpability in the frequent damage to ironing machines.

21. In considering termination of an employee under the current Act, stringent procedure has been laid down such that whereas an employer may have a valid and justifiable reason for terminating an employee's services, the Court may still find such termination unfair because the employer did not follow a fair procedure in terminating the employee's services. In this particular case the respondent may have had a valid reason for terminating the claimant's services, but the procedure adopted in dismissing the claimant was not fair. The Court therefore declares his dismissal as unfair and awards him as follows:-

**Kshs.**

(a) One month's pay in lieu of notice.....	10,000.00
(b) Salary for 10 days worked in July 2011.....	3,570.00
(c) House Allowance at 1/3 basic pay for 14 months.....	47,000.00
(d) Leave with pay.....	10,000.00
(e) 3 months wages for unfair termination of Services.....	<u>30,000.00</u>
	<u>100,570.00</u>

21. The respondent shall issue the claimant with a certificate of service.

22. The Court further awards the claimant costs of the suit.

23. It is so ordered.

Dated at Nairobi this 27<sup>th</sup> day of February 2015

Abuodha J. N.

Judge

Delivered this 27<sup>th</sup> day of February 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge