



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1619 OF 2011**

**ISAAC MAKANGA OPISA.....CLAIMANT**

**VERSUS**

**FUN NAN SHOP LIMITED.....RESPONDENT**

**JUDGMENT**

1. According to the memorandum of Claim filed on 23<sup>rd</sup> September, 2011 the Claimant avers that he was verbally employed by the Respondent on 15<sup>th</sup> February, 2008 as a supervisor. He worked until 2<sup>nd</sup> September, 2011 when again according to him, he was verbally terminated without any reason.
2. He pleads that he took his annual leave on 1<sup>st</sup> July, 2011 and upon his return on 1<sup>st</sup> August, 2011 he was told by the 2<sup>nd</sup> Respondent that he was to be paid one month's notice pay and public holidays. No reason was given to him by the Respondent why he wanted to pay him.
3. The Claimant considered his termination unfair and unlawful and therefore seeks from this Court an order that the Respondent pays him salary for the days he has been kept out of employment at the rate of Kshs.11,550 per month. He further seeks an order for payment of notice, accrued leave, public holidays, house allowance, overtime, severance pay and full compensation for loss of employment which he quantified at Kshs.427,120.50.
4. The Respondent denies the Claimant's claim stating that they did not terminate the Claimant's services but rather the Claimant absconded duties. The Respondent further averred that the Claimant was found to have been colluding with suppliers to fix commodity prices and stealing from the Respondents. According to the Respondent the issue was investigated and Claimant asked to resume duties but he declined to do so.
5. The Respondent further avers that the Claimant's services were terminated for absconding duty in accordance with section 44(4) (a) of the Employment Act.
6. At the trial the Claimant stated in his evidence that for the period he worked, he never went on leave and that he worked even during public holidays. His duties were to serve customers and receive supplies under supervision. He stated that his appointment and termination was done verbally.
7. He reported his dismissal to the Labour Office but got no solutions hence he decided to file the claim in Court. According to him, he was never accorded a chance to defend himself against any accusations and that he knew of no complaints against him in his place of work.

8. In cross examination, he denied knowledge of one Janet Mutheu and further stated that he has never been taken to Parklands Police Station over any allegations against him.
9. He stated that he was once asked to go on compulsory leave and did not know why he was asked to do so.
10. The Respondent's witness Mr. Walter Ambundo informed the Court that the Claimant was not dismissed. It was his evidence that in 2010, the Respondent started to experience losses arising from overstocking and over pricing.
11. The Claimant was warned about it and he undertook to improve. According to Mr. Ambundo, the Claimant proceeded on leave thereafter and his assistant took over from him. Improvement was realized as losses reduced. When the Claimant returned from leave he was asked about the difference but could not explain.
12. According to Ambundo, the Claimant instead went away and came back the next day and asked that he be paid his 3 years leave.
13. Mr. Ambundo further testified that in February, 2011 there was theft in the shop and one of the culprits, Naomi, mentioned the claimant. Although his name was taken to the police, he was neither arrested nor charged with any offence.
14. Mr. Ambundo stated that upon dismissal, the Respondent offered to pay the Claimant his dues but he declined to take them.
15. In closing submissions to the Court, Ms. Wangare for the Claimant submitted that the Claimant's termination of employment was unfair and that the Claimant did not abscond duties. According to the counsel, the Respondent did not follow fair procedure in terminating her client's employment.
16. That being the case, counsel submitted that the Claimant is entitled to 12 months wages as compensation for unfair termination of employment. Counsel further submitted that her client is entitled to his monthly pay for the period he has been out of the Respondent's employment.
17. Counsel for the Respondent on the other hand filed no final submissions though directed by the Court to do so.
18. From the summary of averments in the pleadings and evidence by the Claimant and Respondent's witness, it can be said that there is no dispute that the Claimant was an employee of the Respondent and that his services were terminated at some point.
19. What appears to be in dispute is the reason and procedure for terminating the Claimant's services.
20. According to the Claimant he was never involved in any theft or impropriety at work. He was never warned of any hence according to him he did not understand why his services were terminated. Further in terminating his services the Respondent failed to follow the procedure laid down in the Employment Act.
21. The Respondent on the other hand justified the termination on the ground that the Claimant was found guilty of colluding with suppliers in fixing prices of commodities delivered to the Respondent. It was further the Respondent's position that the Claimant's name was mentioned by one of the suspects in a theft incident as being complicit in the theft.
22. In a claim arising out of termination of a contract, the employer shall be required to prove the reasons for termination and where the employer fails to do so, the termination shall be deemed to

have been unfair (see section 43(1) of the Employment Act).

23. This implies that the onus of proof on a balance of probability is placed on the employer when it comes to a claim for termination of contract of employment. All an employee requires to do is to allege that his or her contract of employment has been terminated for invalid reason or reasons and the onus of proof of such reasons automatically shifts to the employer.

24. The Claimant was terminated for the reason that he colluded with suppliers in fixing commodity prices, leading to losses and that he was complicit in theft that occurred at the Respondent's premises.

25. No evidence of losses was tendered in Court to prove the first limb of the accusations against the Claimant. Concerning the theft, no evidence was called to connect even peripherally, the Claimant with the alleged theft. Even if it could have been of less probative value, it would have been plausible enough to call the investigating officer who dealt with the theft incident to shed some light on the possible involvement of the Claimant.

26. The foregoing being the case, the Court reaches the finding that the Respondent failed to prove reasons for terminating the Claimant's services with the consequence that the termination is declared unfair within the meaning of section 45 of the Employment Act.

27. Where the Court reaches a finding that an employee has been unfairly terminated, it can award upto 12 months wages as compensation. In this particular case the Court awards the claimant 7 months wages as compensation for unfair termination of employment.

28. The Court further awards him one month's salary in lieu of notice of termination.

29. Regarding leave, this was not adequately proved, in any event the Claimant admitted in cross-examination that he went on compulsory leave for 21 days in 2011.

30. In conclusion, the Court awards the Claimant the sum of Kshs.92,400/- together with costs and interest. The Respondent shall issue the Claimant with a certificate of service.

31. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of February 2015

Abuodha J. N.

Judge

Delivered this 13<sup>th</sup> day of February 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge