



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 93 OF 2013**

**ENOCK OWINO ONYUNO**

**CLAIMANT**

**v**

**MAJANI MINGI SISAL ESTATE LTD**

**RESPONDENT**

**JUDGMENT**

1. Enock Owino Onyuno (Claimant) was summarily dismissed through a letter dated 28 September 2012 by Majani Mingi Sisal Estate Ltd (Respondent).
2. The dismissal aggrieved the Claimant, and on 19 April 2013, he filed a Statement of Claim against the Respondent stating the issues in dispute as *wrongful termination of Enock Owino Onyuno*.
3. The Respondent filed a Reply to the Statement of Claim on 30 May 2013.
4. On 10 January 2014, the Claimant filed an Amended Statement of Claim pursuant to purported leave granted on 17 June 2013.
5. The Court has perused the record and there is nothing therein to indicate that the Claimant was granted leave to amend the Statement of Claim on 17 June 2013. The record bears out that the Claimant sought and was granted leave to file and serve an Amended Memorandum of Claim on 31 May 2013.
6. The Amended Memorandum of Claim was to be filed and served before 7 June 2013, and an Amended Response was to be filed before 14 June 2013.
7. The Amended Statement of Claim filed on 10 January 2014 was therefore filed outside the time earlier ordered and without further leave, and the Court expunges it and the Amended Reply to Amended Statement of Claim from the record.
8. The parties were aware of the orders on amendment and it was unbecoming of them not to disclose this when the Cause came up for hearing.
9. The Court will proceed on the basis of the initial pleadings filed by the parties.
10. Ongaya J took the Claimant's case on 2 July 2014, while I took the Respondent's case on 12 February 2015.
11. Attempts by the parties to resolve the dispute out of Court failed.
12. The Claimant filed his submissions on 16 March 2015 instead of before 4 March 2015 as ordered at close of hearing. The Respondent's submissions were filed on 23 March 2015.
13. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *the capacities (occupation) in which the Claimant served, whether the Claimant's employment was terminated or he deserted, if termination, whether the termination of employment was unfair and appropriate remedies*.

**Capacities (occupation) in which Claimant served**

14. The Claimant's pleaded case was that he was initially employed as an electrician in 1992 and that on 10 June 2006, he was promoted to the position of Chief Electrician at a salary of Kshs 30,000/-

- per month.
15. In testimony, the Claimant stated that he was employed as an electrical technician on 1 July 1992 and that on 10 June 2006 he was promoted to Chief Electrician. He produced a letter of even date to that effect. He also produced job identity cards which indicate that he was an electrician (1992 and 2005) and Electrical Department Head (2012).
  16. The Respondent in its pleading denied that the Claimant was promoted to the position of Chief Electrician at a salary of Kshs 30,000/-.
  17. The Claimant's testimony that he was promoted in 2006 and was earning Kshs 30,000/- per month was not controverted.
  18. The Respondent's only witness Eiton Edan Stephen did not testify as to whether the Claimant was promoted to Chief Electrician.
  19. The Court has considered the testimony and job identity cards produced and find that at some point the Claimant was the Electrical Department Head and that in May 2012, his gross monthly wage was Kshs 32,090/- (pay slip was produced).

### **Whether termination of employment or desertion**

20. The Respondent contended in its Response that on 26 September 2012 the Claimant walked away never to return when he was summoned to the Estate Manager's office to discuss a disciplinary issue. Consequently, the Claimant was issued with the dismissal letter dated 28 September 2012.
21. To buttress its case, the Respondent called one witness as already alluded to. This witness joined the Respondent in November 2014 after the separation, and he stated that his testimony was based on the records and the filed witness statement of one Charles Kiget.
22. The witness statement of Charles Kiget made reference to absences from work without permission by the Claimant on 21 July 2012 and 10 September 2012.
23. According to the statement, the Claimant was asked to repair a *contactor* on 25 September 2012 but he left at around 11 am before carrying out the repairs. Mr. Kiget traced the Claimant at the workshop at about 2.30 pm and questioned him and later requested another electrician to fix the problem.
24. Further, the next day (26 September 2012), Mr. Kiget saw the Claimant near a corona machine within the estate and called him but he did heed the call. The Claimant did not report to work during the next 2 days and thus he was dismissed.
25. The Claimant on his part testified that on 26 September 2012, Mr. Kiget sent a guard to inform him to go home. He sought to meet Mr. Kiget but to no avail. He thereafter informed a shop steward and left. Later a union official gave him the dismissal letter. The next day, he was locked out of the premises and the Respondent's Personnel Manager told him on the phone his dues would be calculated and paid.
26. The Claimant also stated that he informed his Union and the Union's branch Manager had discussions with the Respondent but no resolution was reached.
27. From the testimonies of both sides, the Court can only reach the conclusion that the Claimant was dismissed for the reasons given in the summary dismissal letter and these included absences without permission and not desertion. Desertion would require an intention not to report to work which has not been proved here.

### **Whether dismissal was unfair**

#### ***Procedural fairness***

28. The Claimant contended that he was not afforded an opportunity to be heard before dismissal.
29. The officer who dismissed him was not called to testify, apparently, he had left the services of the Respondent.
30. The Respondent did not demonstrate that the Claimant was issued with any formal warning prior to the summary dismissal on 28 September 2012.
31. It also did not disclose who informed the Claimant of the allegations against him as regards the events of 26 September 2012, and who was present during the hearing, if any. The Respondent did not even disclose when the hearing was held.

32. It is clear from Mr. Kiget's statement that the absences on 21 July 2012 and 10 August 2012 were dealt with and the Claimant issued with warnings and these could not be valid or fair reasons for the dismissal on 28 September 2012.
33. The Court therefore finds that the dismissal of the Claimant was procedurally unfair.
34. With the conclusion reached, it is not necessary to discuss whether the Respondent has proved the reasons for dismissal (section 43 of the Employment Act, 2007) or that the reasons were fair and valid (section 45 of the Act).

### **Appropriate remedies**

#### ***Reinstatement***

35. It is apparent that under the circumstances in which the Claimant was dismissed, mutual trust and confidence had been lost. No exceptional circumstances have been demonstrated to justify an order of reinstatement. It would not be practicable to order reinstatement.
36. In any case, the Claimant stated in Court that he did not wish to be reinstated.

#### **Compensation**

37. As an alternative to reinstatement, the Claimant sought the maximum 12 months compensation.
38. Compensation is one of the primary remedies for unfair termination/wrongful dismissal but it is also discretionary. The Court ought to consider any, some or all of the factors outlined in section 49(4) of the Employment Act, 2007.
39. The Claimant served the Respondent for about 20 years. He is an electrician and is now serving as a pastor. Considering the length of service, the Court would award him the maximum 12 months compensation.
40. The Claimant testified and produced pay slips for February, April, May, June, July, August and September 2012. The gross wage in May 2012 was Kshs 32,090/-.
41. The Respondent denied that the Claimant was earning Kshs 30,000/- at time of dismissal. It was privy to the wage but did not disclose what it was paying. The pay slips produced by the Claimant show gross wages ranging from Kshs 19,986/- to a high of Kshs 32,090/-.
42. Based on the wage of Kshs 32,090/- for May 2012, the Court assesses the compensation as Kshs 385,080/-.

### **Conclusion and Orders**

43. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him
- a. 12 months gross wages compensation Kshs 385,080/-

44. Claimant did not file submissions on time and no explanation was offered. He is therefore denied costs. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 17<sup>th</sup> day of April 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant  
Advocates

Mr. Biko instructed by Odhiambo & Odhiambo

For Respondent

Mrs. Kairo instructed by Sheth Wathigo & Co.

Advocates

Nixon Raiback

Court Assistant