



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 935 OF 2012**

**(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> June, 2015)**

ALEX AKOTH NDONGA.....CLAIMANT

VERSUS

KENYA BUREAU OF STANDARDS .....RESPONDENT

**JUDGMENT OF THE COURT**

1. The Claimant herein Alex Akoth Ndonga filed his Memorandum of Claim on 4/6/2012 through the firm of Omulele & Company Advocate against the Respondents herein.
2. It is the Claimant's case that he was employed by the Respondents for a period of 11 years with effect from 1998 to 2009 as per his appointment letter (**Appendix 1**). As per the said letter, the Claimant was employed as an Accountant III.

The Claimant avers that he served the Respondent diligently and with honesty until his termination without reason and/or proper cause on 15<sup>th</sup> April 2009. The termination letter is annexed as **Appendix AAN2**.

3. The Claimant stated that there was an attempt to steal money from the Respondent – about 33.4 million. The Claimant then was internal Auditor and after a few weeks he was interdicted stating that he attempted to defraud the Respondents. The interdiction letter was annexed as **Appendix AAN3**.

The interdiction letter stated as follows:

**“REF: KEBS/HR/CONF/1159/1(12)**

**DATE: 2007/05/02**

**Mr. Alex Akoth Ndong'a**

**Kenya Bureau of Standards**

**P.O. Box 54974**

**NAIROBI.**

**Dear Sir**

**RE: ATTEMPTED FRAUD**

*it has come to the notice of this office that while you were deployed as an Ag. Internal Auditor of the Bureau on 20<sup>th</sup> March, 2007 the organization was about to loose Kshs.33,860.000.00 through fraudulence means.*

*This has been taken as a very serious offence, amounting to fraud or theft by servant. You are aware that the above action is liable to your dismissal from this organization according to Section 10, Clause 82(b), (d), (e), (k) and (i) of the Staff Regulation and Clause 17(c), and (g) of the Employment Act Chapter 226 of the Laws of Kenya.*

*In view of the above the Special Staff and Finance meeting held on 13<sup>th</sup> April, 2007 recommended that you be interdicted with effect from 2<sup>nd</sup> May, 2007 pending finalization of investigations by the Anti Bank Fraud.*

*On interdiction, you will be entitled to half of your basic salary.*

*Yours faithfully,*

*Signed*

*Eng. Dr. Kioko Mang'eli*

**MANAGING DIRECTOR**

4. It is the Claimant's case that the interdiction remained pending for long and he was neither charged in court or convicted in a court of law, so on 18/6/2008, he wrote an appeal to the board to consider lifting the interdiction.
5. The board didn't reply. However, he was served with a dismissal letter **Appendix AAN2** indicating that his services had been terminated. The termination letter stated as follows:

**“REF: KEBS/HR/CONF/1159/15 DATE: 2009/04/15**

**Mr. Alex Akoth Ndong'a**

**Kenya Bureau of Standards**

**P.O. Box 54974-00200**

**NAIROBI.**

**Dear Sir**

**RE: TERMINATION OF SERVICE**

*Please refer to our earlier letter Reference: KEBS/HR/CONF/1159/1/(12) dated 2<sup>nd</sup> May 2007 interdicting you.*

*This is to inform you that your services have been terminated due to loss of faith by your employer in your performance especially in the custody of its resources as per the Human Resource Policy Manual 2008.*

*The effective date of the termination is 1<sup>st</sup> April 2009.*

**Kindly return a signed copy of this letter within seven (7) days on receipt.**

**Yours faithfully**

**Signed**

**Dr. Kioko Mang'eli**

**MANAGING DIRECTOR**

6. He appealed against this dismissal and his advocate wrote demand notice to the Respondents (**Appendix AAN 6**) but this too was not replied to. The Claimant then proceeded to seek this court's intervention. At the time of dismissal, the Claimant was earning Kshs.88,852/= (gross pay) as per (**Appendix AAN 5**).
7. The Respondents filed their response on 27/9/2012 in person. Later the firm of Koceyo & Company Advocates took over the conduct of this case on behalf of the Respondents.

The Respondent averred in their response that the Claimant was lawfully and procedurally terminated on 15/4/2009. They also pleaded that the Claimant was dully paid all his dues.

8. They aver that the Claimant has also filed a similar case being High Court Petition No. 23 of 2010 which was dismissed and this claim is therefore res judicata. They asked the court to dismiss the suit accordingly.
9. This court has considered the submissions of the parties herein and issues for determination are as follows:
  - a. **Whether there were valid reasons to terminate the Claimant.**
  - b. **Whether there was due process was followed before the said termination.**
  - c. **What remedies if any, the Claimant is entitled to.**

10. On the 1<sup>st</sup> issue, the Claimant was interdicted allegedly because the Respondent was about to loose 33,860,000/= though fraudulent means when the Claimant was the Ag. Internal Auditor. There is no indication though the money was lost or stolen through the Claimant's fault or participation.

11. Under Section 43 of Employment Act 2007:

**“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”**

12. Under Section 45(2) of Employment Act 2007:

**“A termination of employment by an employer is unfair if the employer fails to prove:**

- a. **That the reason for the termination is valid.”**

13. Whereas the Claimant was informed that the interdiction will remain pending finalization of the

investigations by the Banking Fraud Unit, we are not told what the investigations yielded. We are not told that the Claimant was finally found culpable following the said investigations and the action if any that followed.

14. The Claimant remained interdicted from 2/5/2007 to 15/4/2009 – almost 2 years down the line when he was terminated and this was after he wrote to the Respondents board asking about his fate following the interdiction.

15. It is apparent therefore that the reason for the dismissal being advanced by the Respondents of having lost faith in the Claimant are not valid as they were not established. The Claimant has never been arrested nor charged or convicted in any court of law following the suspension of the Respondent and therefore the allegation of that the organization almost lost over 33 million when he was the Ag. Internal Auditor remains purely speculative without pinpointing how the Claimant was involved in the scam.

16. On the issue number 2 above no due process was also followed before the Claimant was finally terminated. Section 41 of Employment Act 2007 states that:

***“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”***

17. In case of the Claimant he was not subjected to any disciplinary hearing as envisaged above. He was denied his right to be heard and was condemned unheard.

18. Given the above scenario, the court finds that the termination of the Claimant’s services was unfair and unjustified and I declare it so.

19. On the remedies sought, I find that the Claimant is entitled to compensation as follows:

1. **1 month gross salary in lieu of notice = 83,852/=**
2. **Days worked and not paid for Kshs.41,926/=**
3. **Pro-rata leave 27,951/=**
4. **12 months salary for unlawful termination = 83852 x 12 = 1,006,224/=**

**TOTAL DUE = 1,159,953/=**

**Less statutory deductions**

**Plus costs of this suit**

Read in open Court this 11<sup>th</sup> day of June, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wambani for Claimant - Present

No appearance for Respondent