



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATION COURT OF KENYA**

**AT MOMBASA**

**ELRC CAUSE NO. 49 OF 2015**

**FRANCIS MUKWANA TSAMA.....CLAIMANT**

**VERSUS**

**KWALE INTERNATIONAL SUGAR CO. LTD..... RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The issue in this case is about unfair termination of Claimant employment and failure to pay terminal dues by the Respondent. It is the Claimants case that the termination was unfair both procedurally and substantively and prays for damages.

The Respondent has however denied liability for unfair termination and averred that the 2. Claimant was dismissed for gross misconduct and poor performance. It is the defence case that the dismissal was justified because the Claimant's conduct was detrimental to the Respondent and her clients.

3. The suit was heard on 17.6.2015 when the Claimant testified as Cw1 while the defence called no witness. Thereafter the Claimant filed written submissions.

**EVIDENCE**

4. Cw1 was employed by the Respondent on 28.5.2011 as security officer. The contract was verbal. His salary was kshs.17,000 per month which was paid using a payroll. He was working for 12 hours a day, 7 days a week including public holidays.

5. On 12.8.2014, Cw1 reported to work as usual at 6 .am but at 10 am, a clerk from the Human Resource office served him with an unsigned suspension letter. The reasons for the suspension were that Cw1 was marking as present guards who were absent, failure to report to the Head of Department, and theft of Diesel and fertilizer. The suspension was indefinite pending hearing on notice.

6. Cw1 went to see his Manager and also called the Managing Director (MD), **Mr. Hashir Kotecha** at Nairobi to enquire about the suspension but the Managing Director said he was not aware of the same. The Managing Director however asked Cw1 to send a scanned copy of the suspension letter and go home as directed by the letter. After one month, Cw1 called the Managing Director on 20/9/2014 to enquire about the hearing he was promised *vide* the suspension letter. The Managing Director's however disconnected the call but send an Sms using telephone number to call Cw1 telling him that he had already been dismissed and that there was need of any hearing by a disciplinary Committee. The Managing

Director's Sms further accused Cw1 of being rude to everyone and of making threatening calls to the Managing Director through third parties. Cw1 however denied even making any threatening calls to the Managing Director either in person or through third parties.

7. After receiving the Sms from the MD, he proceeded to the labour office and lodged a complaint. The Respondent was served with several letters by the Labour Officer but filed no response. Later Cw1 was called by the labour officer to collect his cheque for kshs.12,480 drawn by the Respondent as the Cw1's final dues on separation. Cw1 rejected the cheque because the sum was little and Respondent never gave particulars of the payment. Cw1 then instructed a counsel who served a demand letter dated 9.12.2014 and thereafter filed this suit after the Respondent failed to respond to the demand letter.

8. Cw1 contended that the termination of his employment was unfair because he was dismissed *via* an sms, without prior notice and without being accorded a fair hearing to defence himself. He maintained that he was not aware whether he was dismissed on ground of the allegation made in the suspension letter or those in the Managing Director Sms. Cw1 therefore prayed for compensation for unfair termination of his employment.

9. He further prayed for payment pf salary in *lieu* of Notice and leave days earned in the 3 years he worked for the Respondent. He contended that for the whole period of service, he was made to work every day for 12 hours including public holidays due to the essential nature of services (security) he was rendering.

### **ANALYSIS & DETERMINATION**

10. There is no dispute that Cw1 was employed by the Respondent and that Cw1 was dismissed *via* an sms on 20.9.2014. The issues for determination are whether the dismissal of the Claimant was unfair and whether the reliefs sought should issue.

#### **Unfair Dismissal**

11. The undisputed evidence by the Claimant is that he was suspended an *vide* unsigned letter on 12.8.2014 and dismissed *via* sms on 20.9.2014. The reasons cited in the suspensions letter and in the dismissal sms were different and the Claimant was never heard on allegations cited in both the suspension letter and the sms under **Section 43** and **47** of the Employment Act (E.A). The burden of proving and justifying the reason for dismissal in proceeding like this, lies with the employer. In addition under **Section 45** of the Act, the employer must prove that the reason for dismissal was valid and fair and that the procedure followed to dismiss the employee was fair.

12. The procedure is fair if, it complies with **Section 41** and **51** of the Act **Section 41** requires that before dismissing an employee for misconduct and poor performance, as in this case, the employer must first explain the reason for which the dismissal is contemplated. During such proceedings the employee must be allowed to be accompanied by a fellow employee of his choice both of whom must be accorded a chance to air their resentations before a decision is made. The proceedings must be conducted in a language understandable to the employee. **Section 51** on the other hand requires that after termination of employment, the employer must give the employee a certificate of service.

13. In this case the procedure stated above was not followed. The reason for the dismissal was not explained to the Claimant as required under **Section 41** of the EA and the Claimant was never accorded a chance to defend himself. The Respondent never tendered any evidence to rebut the Claimant's evidence and as such she did not discharge her burden of prove of substantial and procedural fairness as required under **Section 45** of the EA. She also did not discharge the burden of justifying the grounds of the dismissal as required under **Section 47(5)** of the E.A. Consequently, the court finds and holds that the dismissal of the Claimant was unfair and unjustified.

#### **RELIEFS**

14. In view of the foregoing findings the termination of the Claimant's employment is declared unfair as prayed. Under **Section 49(4)** of EA, the court is bound to consider the wish of the employee in determining which relief to award. In this case the Claimant did not pray for reinstatement under **Section 49(3)** of EA but instead he sought damages under **Section 49(1)** of the EA. He is therefore awarded kshs.17000 being one month salary in *lieu* of notice, kshs,102,000 being 6 month compensation for unfair termination and kshs.35,000 being pay in respect of 63 leave days earned. The prayer for overtime is however dismissed for lack of evidence.

### **DISPOSITION**

15. For the reasons and findings stated above judgment is entered for the Claimant declaring the Claimant unfair and awarding kshs.154,700 plus costs and interest.

It is so ordered.

**Dated signed and delivered at Mombasa this 31<sup>st</sup> day of July 2015.**

**O. N Makau**

**JUDGE**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**