



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 527 OF 2014**

**BETWEEN**

**KUZUNGU KENGA KATANA.....**  
**CLAIMANT**

**VERSUS**

**READY CONSULTANCY CO LIMITED.....**  
**RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Mr. Muchiri Advocate instructed by Jackson Muchiri & Company Advocates for the Claimant*

*Ms. Maina Advocate instructed by Marende Birir Shimaka & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

**[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]**

1. The Claimant filed his Statement of Claim on 29<sup>th</sup> October 2014. He states he was employed by the Respondent Company as a Welder/ Fitter, in May 2009, earning a monthly salary of Kshs. 21,150 or the equivalent of Kshs. 705 per day. He was attached to work at one of the Respondent's Client, Mombasa Maize Millers. He was summarily dismissed on the 21<sup>st</sup> January 2013, in circumstances he feels were unfair and unlawful. He seeks the following orders against the Respondent:-

- a. 12 months' gross salary in compensation at Kshs. 253,800.
- b. Annual leave pay covering a period of 3 years at Kshs. 63,540.
- c. 1 month salary in lieu of notice at Kshs. 21,150.
- d. N.S.S.F and N.H.I.F deductions made but not remitted to the Statutory Bodies for 24 and 31 months respectively amounting to Kshs. – 9,600 and 9,920.
- e. Severance pay for 1 month for every year completed at Kshs. 63,450.

Total..... Kshs. 421,370.

- f. Certificate of Service to issue.
- g. Costs and Interest.

2. The Respondent filed its Statement of Response, on the 17<sup>th</sup> November 2014. It concedes the Claimant was its Employee. His monthly gross salary was Kshs. 18,330. He was summarily dismissed, fairly and lawfully. He was found culpable of gross misconduct.

3. The Claimant gave evidence on the 12<sup>th</sup> May 2015. The Respondent called its Assistant Operations Manager, also serving as the Human Resource Manager, Mr. Ibrahim Mboja, who testified on the same date as the Claimant, bringing the hearing to a close. The matter was last mentioned in Court on the 3<sup>rd</sup> June 2015, when the Parties confirmed the filing of their Closing Submissions.

4. Mr. Katana testified he earned about Kshs. 705 per day, the equivalent of Kshs. 21,150 per month. He was on shift on the 6<sup>th</sup> January 2013. It was night shift. He used to repair the mortar in the maize mill. The mortar had ceased. Unfortunately the spanner he was using in undertaking the work fell in the mill. He informed his Colleague Mr. Otieno, who was milling. They looked for the spanner but were unable to trace and remove it. Otieno advised they continue looking for the tool in morning.

5. In the morning the Supervisor, Mr. Julius Mtangili declined to hear any explanations from the Claimant. The Claimant left for home. He was called while at home and told his Supervisor had organized for the mortar to be changed. While it was being changed, the spanner came off the conveyor belt. Nothing was damaged. The Claimant was nonetheless dismissed. He had worked for 5 years. He had earlier served State Company Ken Gen, accumulating more than 12 years in his area. This was the first incident of the kind, involving the Claimant. He testified he never took annual leave. He was not issued notice of termination. Statutory deductions were made on his salary and not remitted. He prays his Claim is allowed.

6. Answering questions from the Respondent's Advocate, the Claimant stated the incident happened on the 6<sup>th</sup> January 2013. He reported the occurrence to the Miller on duty Mr. Otieno. Ronald was in the same shift as the Claimant. He asked the 2 to inform the Supervisor Mr. Mtangili. The Claimant recorded a Statement. He also wrote a report on the Daily Occurrence Book. He specified in his report that the spanner had fallen in the mill. Other Employees would be telling untruths, if they state the Claimant did not register the incident. He received the letter to show cause and gave an explanation. All the other Employees similarly gave their explanations. The N.S.S.F Statements attached to the Claim related to the year 2014. The Claimant did not have updated Statements. He had received a warning letter. It was alleged by the Respondent that the Claimant was given to absenteeism. This was not true. Redirected, the Claimant testified the warning dated 21<sup>st</sup> January 2013 related to the same incident over which he was dismissed. He was warned and dismissed.

7. Mboja explained that the Respondent is an outsourcing firm. It had outsourced the Claimant to Mombasa Millers. The Claimant dropped a spanner in the mill. He was supposed to record the incident in the register. He did not do so. His Co-Employees asked him to do so. He did not register the incident. He alleged he would not do so because there was bad blood between him and the Supervisor. The Supervisor worked for the Client Company, Mombasa Millers. The Claimant and his other Colleagues present during the occurrence were employed by the Respondent.

8. They were all required to show cause. The Claimant replied. The issue of his absenteeism was similarly raised. The Claimant alleged he was ill on the date alleged to be absent. He did not bring medical proof. He did not seek leave before absenting. There was a recommendation after he was heard, that his contract is terminated.

9. The Respondent remitted statutory deductions. If there were any defects, it would be with these Statutory Bodies. The Claimant never applied for annual leave. Had he done so, the Respondent would have granted him leave.

10. Mboja testified upon cross-examination that he holds a Diploma in Human Resource Management, as well as a first Degree in the same field, from Moi University. The Claimant was given a hearing on the 18<sup>th</sup> January 2013. The proceedings were not recorded. He was accompanied by Mr. Kioko, his Workmate. Kioko had a disciplinary case going on at the same time. The Claimant advised the Management Kioko would accompany him to the meeting. Kioko however, is not shown to have defended the Claimant at the alleged disciplinary meeting. Statutory dues were remitted in full. Mboja agreed he did not have evidence on full payment of these dues to the relevant Body.

11. The Claimant submits he did all he was required to do, in reporting the falling of the spanner in the mill, and in remedying the situation. There eventually was no damage occasioned the mill. The Claimant received a first warning letter with regard to the incident on the 21<sup>st</sup> January 2013. He was advised, " *this behaviour constitutes grounds for summary dismissal as provided for in the Employment Act 2007, sec 44, but the Office has exercised leniency and serves you first warning letter. The Office cautions you against impropriety performing your work....* " On the same date, the Claimant was summarily dismissed over the same offence. The double punishment was contrary to the law. He was not given a hearing in accordance with Section 41 of the Employment Act. His alleged Representative Mr. Kioko was actually a Co-accused. There were no representations made by Kioko on behalf of the Claimant. The Claimant submits his Claim is merited.

12. The Respondent submits the Claimant was heard on the 18<sup>th</sup> January 2013. He was accompanied by his Workmate Kioko. Summary dismissal followed investigations and hearing. The decision by the Respondent was based on Section 44 of the Employment Act. The Claimant performed his duty carelessly and improperly. There was valid reason justifying termination. He refused to report the incident to his Supervisor. He jeopardized the Respondent's Production system. The Statement of the N.S.S.F was provisional. Disparity in the Statement would have to be from the source. Such disparity has since been rectified. The Claimant is not entitled to the prayers sought. The Respondent urges the Court to reject the Claim.

#### *The Court Finds:-*

13. The Claimant was employed by the Respondent, an Outsourcing Company. He worked as a Welder/Fitter. He was outsourced to Mombasa Millers. He testified he earned Kshs. 21, 150 per month, or Kshs. 705 per day. The Respondent concedes it employed the Claimant in the said position. His salary however was Kshs. 18,330. The Respondent indicated the details of the salary payable to the Claimant in the Letter of Service dated 24<sup>th</sup> January 2013. The Claimant was not able to show that he indeed earned Kshs. 21,150 per month. The Court shall for purposes of this Award, adopt the rate of Kshs. 18,330 given in the Letter of Service, as the correct figure.

14. The Respondent had the obligation to show the Claimant's contract was terminated on valid ground, and the procedure leading to the decision fair as required under Section 41, 43 and 45 of the Employment Act 2007. In justification, the Respondent explained the Claimant dropped a spanner in one of the pipes in the milling machine. This was on 6<sup>th</sup> January 2013. He was advised to report the incident to his Supervisor. He did not do so, saying there was bad blood between him and the Supervisor. According to the Respondent's Witness, the Claimant did not register the incident in the occurrence book. . It was alleged the Claimant's act of dropping the spanner could have damaged the machine, but fortunately, it was not running.

14. The Claimant's version on the particular charge was that he dropped the spanner accidentally in the sifter pipes. He informed the Miller on duty and the Employees who were to report on the next shift. He looked for the spanner after it had dropped. He did this with Mr. Otieno. Otieno advised they continue the search in the morning. In the morning the Supervisor Mr. Mtangili did not wish the Claimant to explain. There was bad blood between the 2. The Claimant left for home. He was called from the workplace and informed the Supervisor had organized for the repair of the mortar. The spanner was retrieved, without damage to the mill. Cross-examined, the Claimant stated he asked his Colleagues to inform the Supervisor. He recorded the incident in the occurrence book, specifying the spanner fell in.

15. The second ground was that the Claimant absented himself from work from 11<sup>th</sup> January 2013 to 14<sup>th</sup> January 2013, without the leave of his Employer. In his explanation contained in the letter he wrote answering the letter to show cause, the Claimant stated he woke up having a stomachache on 11<sup>th</sup> January 2013. He bought medicines from a pharmacy, as he did not have enough money to visit a hospital. On 14<sup>th</sup> January 2013, his brother had been arrested, and arraigned in Court. The Claimant went to the Court to secure his brother's release.

16. A Disciplinary Panel convened to hear the Claimant heard these allegations on 18<sup>th</sup> January 2013. It concluded the Claimant was guilty, terming him as a 'chronic breaker of the Employment Act.' The Panel recommended the Director considers the appropriate action to be meted out on the Claimant. The Director wrote to the Claimant on 21<sup>st</sup> January 2013 summarily dismissing him. He cited Section 44 of the Employment Act in justification.

17. The Court is satisfied the reasons given by the Respondent in justifying termination were valid reasons. The Claimant was not forthright in explaining the spanner incident. It is true the spanner dropped in the machine by accident. It was the actions taken after this by the Claimant, which brought to doubt if he had performed his duty carefully and properly, as required under Section 44 [4] of the Employment Act 2007.

18. He alleged in his main evidence that when the Supervisor reported in the morning, the Supervisor did want to hear the Claimant. On cross-examination, it was that he asked his Colleagues, to inform the Supervisor. There was no evidence that the Claimant indeed registered the incident in the occurrence book. He did not even wait for the spanner to be traced. He left for home. This careless and improper performance of work could have resulted in the mill being damaged. It is of little help to the Claimant's cause, that the mill was not damaged.

19. The second ground on absence was equally valid. The Claimant did not deny he absented himself without the leave of the Respondent. He attempted to justify his absence on medical grounds, and on his brother's problems with the law. In either case, he gave no documents in support of his reasons for being away. He did not seek leave. While out there, he did not bother to call the Respondent and in any way excuse his absence. Dismissal on the ground of absence from work was valid.

20. Procedure was by and large in conformity with the law under Section 41 and 45 of the Employment Act. The Claimant was issued letter to show cause. He explained himself in his reply to this letter. He was invited to a Disciplinary Hearing. He was given specific charges. He answered the charges. A recommendation was made to the Director. The decision to summarily dismiss the Claimant was made.

21. He alleged in his Submissions that he was issued a first warning letter on the 21<sup>st</sup> January 2013, and similarly dismissed on this date, over the same offence. This is not borne out by the record. The Claimant was recommended for disciplinary sanction by the Director. His colleague Kioko was recommended for a first warning. The letter on record on first warning dated 21<sup>st</sup> January 2013 is on Kioko. The Claimant received his sanction from the Director as recommended by the Panel.

22. The Claimant nonetheless was not accompanied to the hearing by a workmate of his choice, or a trade union representative at the shop floor level. Kioko certainly did not qualify as either. He was a fellow accused person. He went before the Panel carrying his own cross, not the cross of others. There

was no support in the Respondent's explanation that the Claimant had indicated Kioko was his representative. If there was such an indication, the Respondent had the obligation to advise the Employee that he could be represented by a fellow accused person, as this would compromise the integrity of the procedure.

23. This minor flaw entitles the Claimant to compensation for unfair termination. ***He is allowed half-month salary at Kshs. 9,165 in compensation.***

24. The Claimant did not go on annual leave for the 3 years worked. The Respondent testified the Claimant did not apply for annual leave. The leave accrued, notwithstanding the Claimant's lack of application. The Respondent had the obligation to pay the accrued benefit. There was no suggestion that the days were to be forfeited. ***The Claimant is granted 63 days of annual leave at Kshs. 44,415.***

25. The Claimant was subscribed to the N.S.S.F. His prayer for service pay, which he terms severance pay, has no merit. The statement from the N.S.S.F was not clear as explained by the Respondent. It covered a period going beyond the date of the Claimant's dismissal. The Court was not able to see Statements with respect to the N.H.I.F showing there were no contributions made for the Claimant for 31 months. The Court is not able to order refund of statutory deductions.

26. The decision by the Respondent to summarily dismiss the Claimant was largely fair, in substance and procedure. He is not entitled to notice pay.

27. Parties to meet their costs of the Claim.

IN SUM, IT IS ORDERED:-

- a. ***Termination was slightly unfair, for which the Respondent shall pay to the Claimant half-month gross salary of Kshs. 9,165 in compensation.***
- b. ***The Respondent shall pay the Claimant annual leave pay at Kshs.44, 415.***
- c. ***Parties to meet their cost.***

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

**James Rika**

**Judge**