



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO 1051 OF 2011**

**GIPSON KIPLAGAT LANGAT.....CLAIMANT**

**VS**

**ALITEX ENTERPRISES LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Statement of Claim filed in Court on 5th July 2011 seeks compensation for wrongful dismissal and payment of terminal dues. The Respondent filed a Reply on 22nd July 2011 and the matter proceeded on 20th April 2015 with the Claimant testifying on his own behalf and the Respondent's General Manager, Thomas Mmanyisi testifying for the Respondent.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a taxi/cab driver from 28th August 2009. He was paid on commission which was pegged at 20% of net income. On 8th January 2010, the Claimant was suspended on allegations of theft by servant and on 1st November 2010, he was dismissed. It is the Claimant's case that his termination was without lawful cause and that prior to the termination he was not given an opportunity to be heard.

3. The Claimant seeks the following remedies:

- a. A declaration that the termination of his employment was wrongful
- b. One month's salary or commission in lieu of notice.....Kshs.19,914.00
- c. Commissions for October 2010.....Kshs.3,647.00
- d. Unlawful deductions in the months of January, April, May, August, September and October.....Kshs.22,060.00
- e. November 2010 deductions.....Kshs.5,000.00
- f. 12 months' salary in compensation for loss of employment.....Kshs.238,958.00
- g. Certificate of service

Costs and interest

### **The Respondent's Case**

4. In its Reply filed on 22nd July 2011, the Respondent denies terminating the Claimant's employment unlawfully and unfairly. The Respondent states that the Claimant had a negative employment record, citing incidents of misconduct ranging from theft, careless driving and negligence of duty. According to the Respondent, any money recovered from the Claimant's dues was duly owed by him to the Respondent.

### **Findings and Determination**

5. The issues for determination before the Court are as follows:

- a. Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b. Whether in effecting the termination the Respondent observed due procedure;
- c. Whether the Claimant is entitled to the remedies sought.

### **Reason for Termination**

6. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. The Claimant's termination letter dated 1st November 2010 states as follows:

*“Reference is made to the letter addressed to you dated January 08 2010.*

*Further to our meeting on Saturday 30/10/2010, I regretfully confirm that your employment with us is terminated with immediate effect.*

*This action is being considered with regards to your violation of the rules of this company regarding accidents and client care.*

*You shall be required to submit all the pending vouchers in your file and clear any variances and debts before your October commission is paid.*

*Yours Faithfully,*

*Thomas Mmanyisi.*

*General Manager.”*

7. The letter of 8th January 2010 which is referred to in the termination letter had sent the Claimant on suspension for two weeks. It states the following:

*“You have on several occasions abandoned our clients as you rush to take your own transfers.*

*On 25th December 2009 you took a client to the airport and indicated on the movement schedule as Mombasa Road and only remitted Kes. 600.00 to the office.*

*On the same day, you took a client from Thika town and indicated on your movement schedule as Kasarani and remitted only Kes.1,400.00.*

*On 4th January 2010, you picked a client from prestige to Kibera and abandoned him there and left with his luggage, you did not indicate this movement on your movement schedule.*

*Stealing by servant is punishable in a court of law. The company has been lenient enough and sent (sic) you on suspension for two weeks from the date hereof, you are to report back on duty on 22nd January 2010.*

*Your commission will only be processed after you have remitted the balances from the transfers you did not forward to this office.*

*Yours Faithfully,*

*Thomas Mmanyisi.*

*General Manager.”*

8. From the two letters, it would appear that the Respondent had issues with the Claimant's performance and conduct. The letter dated 8th January 2010 enumerates a litany of complaints against the Claimant for which he earned two weeks' suspension. Since the Claimant was paid on commission basis, it is logical to conclude that during the time of suspension, he did not earn any remuneration from the Respondent.

In *Rashid Jeneby v Prime Bank [2015] eKLR* this Court held as follows:

***“Ordinarily, suspension is not a disciplinary action nor does it fall within the stages of the disciplinary procedure. It is a neutral action to allow for unfettered investigations into allegations made against an employee and does not attract loss of benefits.”***

9. In the case now before the Court, it seems that in suspending the Claimant, the Respondent took disciplinary action without following due process. More significantly, the allegations made against the Claimant in the suspension letter are the same ones that led to the termination of his employment on 1st November 2010. The Claimant thus suffered double jeopardy in that he was punished at suspension and later dismissed for the same offences. The Court therefore finds that the Respondent had no valid reason for terminating the Claimant's employment and the termination was substantively unfair.

### **Termination Procedure**

10. The complaints made against the Claimant that led to the termination of his employment amount to misconduct. Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative.

11. There was no evidence of the Claimant having been taken through any of the procedures set under Section 41 and the termination of his employment was procedurally unfair as well.

### **Remedies**

12. Having found the termination of the Claimant's employment substantively and procedurally unfair I award him three (3) months' pay in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award him one (1) month's pay in lieu of notice.

13. Since the Claimant's monthly pay was not standard, the Court adopts his last commission for purposes of tabulating this claim.

14. The Claimant claims money deducted from his commission for the months of January, April, May, August, September, October and November 2010. While not denying the deductions, the Respondent justified its action by stating that the Claimant had occasioned losses to the Respondent. The action taken against the Claimant in this regard amounts to a surcharge.

15. In *Kenya National Library Services Board v Beatrice N. Ayoti [2014] eKLR* this Court held that surcharge, being a severe disciplinary action cannot be lawfully effected by an employer without affording the affected employee the right to be heard. In *Fred Makori Ondari v The Management Committee of the Ministry of Works Sports Club [2013] eKLR* the Court reversed an unjustified surcharge against an employee.

16. In the instant case, the Respondent appears to have taken a unilateral decision to surcharge the Claimant and the claim for refund of the amounts so deducted therefore succeeds and is allowed. The claim for commission for October 2010 was not proved and is dismissed.

17. Ultimately, I make an award in favour of the Claimant in the following terms:

- a) 3 months' pay in compensation for unfair termination.....Kshs.57,024.00
- b) 1 month's salary in lieu of notice.....Kshs.19,008.00
- c) Unlawful deductions.....Kshs.27,060.00

**Total.....Kshs.103,092.00**

18. The Respondent is further directed to issue the Claimant with a certificate of service as defined under Section 51 of the Employment Act, 2007.

19. I award the costs of this action to the Claimant. The award amount shall attract interest at court rates from the date of the award until payment in full.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF JULY 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimant

Mr. Kinoti for the Respondent