



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

**AT NAIROBI**

**CAUSE NUMBER 2150 OF 2012**

**JOHN GITONGA NGUNJIRI.....CLAIMANT**

**VERSUS**

**H. YOUNG & CO. E.A. LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant in this suit averred that he was employed by the respondent as a pick-up driver in April 2011 through an oral contract. He worked as such until 25<sup>th</sup> June, 2012 when the respondent summarily dismissed him without affording him an opportunity to be heard and giving him nature of termination. He therefore contended that his dismissal was unprocedural, unlawful and unfair and seeks an order for compensation from this Court.
2. The respondent on its part admitted that the claimant was its employee from April 2011 to 22<sup>nd</sup> June, 2012 when the respondent lawfully terminated his services for gross misconduct. According to the respondent, in June 2012 at Kedong Quarry site, the claimant was caught red-handed participating in illegal sale of 6 tonnes of ballest belonging to the respondent.
3. The respondent further averred that the claimant was consequently orally invited to make a defence on his own behalf with an employee of his choice present but the claimant declined to do so. In the circumstances the respondent averred that it was within its right to summarily dismiss the claimant.
4. The respondent further averred that upon summary dismissal the claimant was paid all his dues as by law required and that the claimant being a member of NSSF was not entitled to service pay.
5. In his oral evidence in Court, the claimant repeated most of the averments in his memorandum of claim. In cross examination he admitted that he was dismissed because he was accused of stealing ballest. He further admitted that he got paid and signed a discharge voucher but did not know whether the payment was for salary or terminal dues.
6. The respondent's witness Mr. Michael Muriuki stated that on 20<sup>th</sup> June, 2012 they received information that the respondents materials were being sold after office hours. They therefore laid a trap and nabbed the culprits. It was his evidence that they sued an informer who posed as a buyer and bought 6 tonnes for Kshs.15,000/=. The money was received by Mr. Boru with the intention of sharing. He further testified that the Mr. Boru, the claimant and PW2 were called to

record statements but only the security Officer PW2 recorded statements and confessed being part of the cartel. The claimant refused to record a statement. The claimants were later called to Nairobi to meet with the director.

7. The respondent's second witness Ms. Charity Nyakio stated that the claimant received his termination letter giving him reasons for termination. According to her, the claimant was paid his dues as set out in the termination letter and that the claimant signed a discharge voucher.

8. In cross-examination she admitted that the termination letter did not give reason for dismissal.

9. In his closing submissions before Court Mr. Munyangi for the claimant submitted that his clients did not steal the six tonnes of ballest as alleged. According to counsel, the respondent failed to adduce any evidence before the Court that indeed the claimant was guilty of theft.

10. Mr. Munyangi further contended that if indeed the claimant was the one to be accused of theft, he would have been the one to receive the money. According to him, the allegation that Mr. Boru took the money with intention of sharing was not proved. On the issue of wrongful termination, Counsel submitted that the respondent refused to issue the claimant with one month's notice or pay in lieu thereof as required by law. In conclusion counsel stated that the respondent did not provide any evidence to prove or show why the claimant was dismissed from employment. He therefore urged the Court to find for the claimant as prayed.

11. The respondent on the other hand submitted that under section 44(4) (g) of the Employment Act an employee who commits or is reasonably suspected of having committed a criminal offence against or to the sufficient detriment of his employer or his property can be summarily dismissed. According to counsel there was no doubt that the claimant and his colleagues were caught red-handed selling the respondent's ballest after working hours.

12. Regarding procedure during termination, Counsel submitted that section 41 of the Employment Act is silent on how an employer is to afford the affected employee a hearing. According to Counsel, there is no compulsion whatsoever in the section that the invitation be made in writing. The verbal invitation under the circumstances therefore sufficed.

13. Section 41 of the Employment Act enjoins an employer to explain to an employee the reason for which the employer is considering termination of such employee's services. Further before such termination is carried out, such employee must be given a chance to make representations in his defence against the charges personally or through a representative of his choice.

14. The Act is silent on the format the explanation should take. That is to say, it does not state whether the explanation and the representation should be oral or written. It therefore follows that both can be done orally or in writing but they must be done.

15. The claimant is alleged to have colluded with others to steal ballest from the respondent. He denied any involvement and refused to record a statement. They were later called to Nairobi to meet with the respondent's director. No evidence was led or adduced before the Court over what transpired at the meeting in Nairobi. The respondent's witness Ms. Nyakio only informed the Court that the claimant and his colleagues were issued with termination letters and paid their dues as per the letter. She did not say whether the claimants and his colleagues were told the reasons why their termination was being considered and offered a chance to defend themselves before dismissal letter or not. Further the dismissal does not give any reason why the claimant was being dismissed.

16. Dismissal from employment requires that an employer must have a valid and justifiable reason for dismissing an employee. Once this condition is met, an employee must be explained to the reason for which his dismissal is being considered and afforded an opportunity to make

representations in his defence.

17. In the case before me, it is not clear if these conditions were fulfilled. Under section 45(1) of the Employment Act, a termination of Employment will be deemed unfair if the employer fails to prove that the reasons for termination are valid and that termination was carried out in accordance with a fair procedure. It may well be true that the claimant and his colleagues were involved in theft of ballest hence a valid and justifiable reason for their dismissal however, there is no evidence that they were called upon to defend themselves at the Head Office prior to being handed their termination letters. In the circumstances the Court finds the dismissal of the claimant unfair and awards him four month's salary as compensation for unfair dismissal and one month's salary in lieu of notice. The claim for leave not taken is dismissed as the respondent reasonably proved that the claimant took leave.

18. There will be no order on costs.

19. It is so ordered.

Dated at Nairobi this 23<sup>rd</sup> day of October 2015

Abuodha J. N.

Judge

Delivered this 23<sup>rd</sup> day of October 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge