



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**CAUSE NO. 1923 OF 2011**  
**TIMOTHY NJONJO NYAMBURA..... CLAIMANT**  
*VERSUS*  
**KABETE DIARY CO-OP LTD ..... RESPONDENT**

**JUDGMENT**

**Claimant in Person**

**Mr Kithinji Thiongo for Respondent**

1. The Claimant was employed on 17<sup>th</sup> January 2007 by the Respondent as an Accounts Assistant. He was promoted to Audit Assistant. He worked until 30<sup>th</sup> August 2010 when he was called by the secretary and told his contract has been terminated by the Board and that he should go on leave and wait for the letter. The letter was given on 5<sup>th</sup> October 2010. The claimant was accused of intimidating staff members.

2. The Claimant reported the matter to the Labour office and was subsequently paid terminal benefits as follows;

- i. salary for August 2010 Kshs.37,583.30;
- ii. one (1) month salary in lieu of notice Kshs.17,500.00;
- iii. leave travelling allowance Kshs.850.00;
- iv. payment in lieu of Annual leave Kshs.24,498.60.

Total Kshs.58,745.30.

This was vide a cheque dated 25.3.2011.

3. The Claimant filed this claim on 15<sup>th</sup> November 2011 seeking payment of Kshs.168,604.70 comprising of;

- i. thirteen (13) days salary for August 2010;
- ii. forty two (42) annual leave days for the year 2009 and 2010;

- iii. payment for thirty eight (38) public holiday and off days worked;
- iv. leave travelling allowance;
- v. three (3) months salary in lieu of notice;
- vi. three months severance pay;

**Total sum Kshs.228,350.00;**

**Less Kshs.59,745.30** already paid;

**Balance Kshs.168,604.70.**

4. A supplementary statement of Claimant dated 15<sup>th</sup> March 2011 was filed on 21<sup>st</sup> March 2012 seeking;
- a. Kshs.168,604.70 computed in the original claim;
  - b. twelve (12) months salary for wrongful dismissal;
  - c. Kshs.11,686.00 wrongly deducted from the payslip;
  - d. Kshs.24,000 being twelve (12) months telephone allowance.

5. The Court notes that the Claimant ought to have amended the memorandum of claim rather than filing a supplementary statement of claim a document which is unknown in terms of the Employment and Labour Relations (procedure) Rules 2010. This method of pleadings is untenable and the supplementary statement of claim is struck off as an abuse of the process of the Court.

### **Defence**

6. The Respondent filed a statement of defense dated 7<sup>th</sup> December 2011 on 14<sup>th</sup> December 2011.
7. The Respondent denies the claims made by the Claimant and states that the Claimant was summarily dismissed from employment for gross misconduct for;
- i. intimidating new staff members some of whom deserted their duties for fear of their lives;
  - ii. misappropriation of funds and theft of defendant's funds and when investigations were being carried he threatened the new employees from making any disclosure to the effect;
  - iii. gross insubordination;
  - iv. Failing to comply with instructions given to him by the management.
8. That the summary dismissal was lawful especially because the Claimant had received several warning letters.
9. That the Claimant was paid terminal benefits after the same were calculated and that the claimant acknowledged that the calculations were correct and that he had no further claims against the Respondent.
10. The Respondent attached documents marked Appendix 1 to 6 in support of the defence, comprising work appraisal dated 28<sup>th</sup> January 2007, warning dated 15<sup>th</sup> February 2010 for giving milk to customer on credit without authority. One dated 9<sup>th</sup> February 2010 for insubordination and queries on actual debt

status of the Respondent.

11. The Claimant filed various supplementary list of documents on 15<sup>th</sup> March 2012, 3<sup>rd</sup> September 2012 and 2<sup>nd</sup> November 2012.

### **Oral Testimony**

12. The Claimant testified in support of his case in which he denies the allegations made against him by the Respondent and stated that the summary dismissal was not justified in that no evidence was tendered to show that he intimidated staff and misappropriated Respondent's funds.

13. That he was not charged with any offence. Was not given notice to show cause letter and did not appear before the Board for disciplinary hearing.

14. The Respondent called Mr. Morris Nzioki a Manager of the Respondent. He told the court that he was versed with this case based on the record. He said the Claimant was employed on 18<sup>th</sup> January 2007 and was paid Kshs.240 per day.

15. On 10<sup>th</sup> January 2000, the Claimant was employed as an Accounts Assistant and on 12<sup>th</sup> March 2009 he was employed as an Accountant.

16. That on 28<sup>th</sup> July, 2010 he was employed as an Assistant Internal Auditor.

17. That the Claimant was summarily dismissed on 24<sup>th</sup> August 2010. The letter of dismissal provides the reasons for the dismissal.

18. That an Audit report dated 8<sup>th</sup> December 2011 was prepared after the Claimant had left the company which revealed books were not kept properly. There were complaints by customers on their debt status and many errors on the milk records. The account statements were not accurate.

19. RWI confirmed that the Claimant was paid Kshs.59,745.30 as full terminal benefits and had acknowledged that he was not owed any more money by the Respondent. That the Claimant was paid for all outstanding leave days.

### **Determination**

20. It is incumbent on the Claimant to prove the particulars of claim on a balance of probability. The Claimant filed a computation of his terminal benefits showing that he was owed 13 days salary for August 2010 in the sum of Kshs.10,833.00

21. That he was owed 21 days leave in 2009 and a further 21 days leave in 2010 totaling 42 days in the sum of Kshs.35,000.00

22. The claimant also seeks payment of severance pay calculated at 18 days for each completed year of service for 2007 to 2010. Severance pay is payable where the employee is entitled to the payment under the contract of employment or where the employee is not registered with NSSF and therefore no remittance in that respect was made by the employer.

23. Once the claim is made the onus shifts to the employer to show it had not such term in the employment contract or that it remitted NSSF contributions on behalf of the employee.

24. There is no evidence that the claimant was registered with NSSF nor that the employer had contributed NSSF dues on his behalf. The claimant has therefore established that he was entitled to severance pay for four years in the sum of Kshs.55,000.

25. The Claim for having worked during public holidays and off days without pay is unsubstantiated and the same is dismissed.

26. The claim for payment in lieu of three months' notice is equally unsubstantiated. Notice pay is based on the contract document or the provisions of the Employment Act. The Employment Act provides for a minimum of 1 month notice or payment of one month salary in lieu of notice upon termination of employment.

27. This is dependent on whether or not the employer had justification to summarily dismiss the employee as happened to the Claimant.

28. Upon analysis of the case the Court has come to the conclusion that the Respondent did not give the Claimant a statement of charge and a letter to showcause why his services ought not to be dismissed. The Claimant was neither given a hearing before the decision to summarily dismiss him was made by the Respondent. This violated Section 41, 43, 45 and 47 of the Employment Act. The summary dismissal was therefore not for a valid reason and the same was not effected in terms of a fair procedure.

29. The Claimant is therefore entitled to payment in lieu of one month's notice in the sum of Kshs.25,000. The Claimant is also entitled to compensation in terms of Section 49(4) of the Employment Act.

30. The claimant lost his employment abruptly. He does not appear to have had a clean record at work and his relationship with staff was not good. The Claimant however lost his job without adequate notice and without being accorded due process. The Court awards him four (4) months salary as compensation for the unlawful dismissal in the sum of Kshs.100,000/=.

31. The claim for leave travelling allowance is unsubstantiated and the same is dismissed.

32. In the final analysis the court awards the Claimant as against the Respondent as follows;

- i. Kshs.100,000 compensation for unfair dismissal (4 months salary);
- ii. One (1) month salary in lieu of notice Kshs.25,000;
- iii. thirteen (13) days salary for August 2010 Ksh.10,833;
- iv. payment in lieu of leave Kshs.35,000.

**Total award Kshs. 170,833.00.**

33. The Award is payable with interest at Court rates from date of the judgment till payment in full. The Respondent to pay costs of the suit.

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

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**