



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 344 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 2<sup>nd</sup> December, 2015)**

**GERALD OMULLO OKINYO.....CLAIMANT**

**VERSUS**

**SAFEPAK LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant herein filed his Statement of Claim on 7/3/2014 through the firm of Charles Gomba & Company Advocates claiming unfair and unlawful dismissal and damages for the same.
2. The Claimant's case is that he was employed by the Respondent on 27/2/2012 as a Machine Operator at a gross salary of Kshs.14,011/= per month inclusive of house allowance as per his Appendix 1. It is his case that he worked from Monday to Saturday including public holidays without compensation for overtime. He served the Respondent for 1 year, 10 months but he avers that he was never issued with a formal contract.
3. He avers that on 27/12/2013, he reported to work as usual but was informed that he was no longer under employment with the Respondent yet he still had 2 months running into his contract. It is the Claimant's position that he had always carried out his duties for which he was employed and that the dismissal was actuated by malice and in clear breach of the Respondents Statutory duty.
4. The Claimant avers that he was treated unfairly and was not given a chance to be heard for whichever mistake he may have committed. He wants this Court to order him compensated for unfair termination. He also wants to be paid 1 months salary in lieu of notice.
5. The Respondent on the other hand filed their response to the Statement of Claim on 24/3/2014 through the firm of Munene Wambugu & Kiplagat Advocates. They have denied the Claimant's case. They aver that the Claimant had executed a formal employment contract and was compensated for overtime work and work performed during public holidays and also was paid for leave not taken.
6. It is their position that the Claimant was summarily dismissed since he carelessly and improperly performed his duties and in so doing he fundamentally breached obligations that arose out of his contract of employment. In particular the Respondent avers that he deliberately absented himself from duty and neglected to perform tasks assigned to him.

7. They also aver that on several occasions, the Claimant failed to obey lawful and proper commands which had been issued by the Respondents supervisor and was using abusive language and insulting language towards his supervisor at his place of work. They contend that he had been issued with several warning letters but he declined to heed to the said warning and this led them to summarily dismiss him on 27<sup>th</sup> December 2013. The Respondents want the Claimant's case dismissed accordingly.

8. After considering the evidence of the parties, the issues for determination are as follows:

**1. Whether there were valid reasons to warrant dismissal of the Claimant.**

**2. Whether due process was followed.**

**3. What remedies if any can be awarded in the circumstance.**

9. On the 1<sup>st</sup> issue, the reasons given for Claimant's dismissal are that he deliberately refused to obey lawful and proper commands issued by Respondents supervisor and also used abusive language towards his supervisor at his place of work. They aver that he was also sleeping on duty and failed to do his duties. The Claimant previously had been issued with warning letters for reporting to work late and for using abusive language at work.

10. On the day of dismissal, the Respondents aver that the Claimant was sleeping on duty and failed to work on a machine. The reasons as they exist, may be good reasons to warrant termination but not dismissal.

11. In the process of dismissing the Claimant, the Respondents also failed to give him a hearing as envisaged under Section 41 of Employment Act 2007 which states as follows:

**“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”**

12. It is my finding that the dismissal was unfair and unwarranted and I convert it to a normal termination and award Claimant as follows:

**1. 12 months salary as compensation for unlawful and unfair termination =  $12 \times 14,011 = 168,132/=$**

**2. 1 month salary as notice = 14,011/=**

**TOTAL = 182,143/=**

13. The Claimant should also be issued with a Certificate of Service.

14. The Respondent will meet costs of this suit.

Read in open Court this 2<sup>nd</sup> day of December, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Musau holding brief for Mwongera for Respondent – Present

Gomba for Claimant – Present