



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE No. 2147 Of 2012**

1. BENJAMIN MWANZIA MUSYOKA
2. GEORGE OTIENO OBODI
3. CHARLES WAMBUA KIMEU
4. BERNARD ODUOR JUMA
5. WILBERFORCE NJOMBA SHUNGULA .....CLAIMANTS
6. JULIUS ENONDA
7. GEORGE MUSYOKA KIMEU
8. EDWIN LIBOYIO GULEHO
9. SAMUEL NDERI MBUTHIA
  
10. WALTER UBUGA

**-VERSUS-**

**COSMOS LIMITED ..... RESPONDENT**

**Mr. Owang for Claimants**

**Mr. Abonge for Respondents**

**JUDGMENT**

1. The ten (10) Plaintiffs brought this suit by way of memorandum of claim dated 18<sup>th</sup> October 2012 supported by verifying affidavit from each of the Claimants.

The Claimants seek;

1. Damages for each of the Claimants for wrongful and unfair termination of employment.
2. Payment in respect of allowances or salaries not paid during the period when some of the Claimants were promoted to the position of acting supervisors.
3. Damages for emotional and psychological trauma and /or of reputation occasioned by the unlawful dismissal.
4. An order compelling the Respondent to redraft their letters of recommendation clearing their names of any wrong doing in connection with alleged thefts.

**2. Facts of the case**

The Claimants were employed on diverse dates by the Respondent as follows:

1. 1<sup>st</sup> Claimant on 18<sup>th</sup> march 2002 as a storekeeper / dispenser on a casual basis, later converted to a

- six months contract renewable from 1<sup>st</sup> July 2010. He was earning Kshs. 13,453 per month at the time of his termination on 16<sup>th</sup> December, 2010.
2. 2<sup>nd</sup> Claimant was employed on 2<sup>nd</sup> February 1998, as a general worker and trained in-house to take samples of raw materials at the audit control laboratory. At the time of termination he was earning Kshs.18,135/= per month and house allowance of Kshs. 2,934/= on 16/12/2010.
  3. The third Claimant was a machine attendant from 1<sup>st</sup> January 1994 and was later promoted to the position of an acting supervisor from 1<sup>st</sup> January 2006 to 16<sup>th</sup> December, 2010, when his services were terminated. He earned Kshs. 22,722/= per month plus Kshs. 1,912 house allowance.
  4. The fourth Claimant was employed as a lab assistant on 2<sup>nd</sup> May 2003 and his work entailed sampling of raw materials and forwarding the same for analysis. At the time of termination on 16/12/2010, he earned a monthly salary of Kshs. 9,434/= and a house allowance of Kshs. 1,541/=.
  5. The fifth Claimant was employed on 1<sup>st</sup> September 2002 as a store attendant / storekeeper. At the time of termination on 16/12/2010 he earned a monthly salary of Kshs. 24,217/= plus a house allowance of 16%.
  6. The sixth Claimant was employed on 22<sup>nd</sup> March 2004 as a store attendant initially as a casual which was converted to a six months renewable contract from 1<sup>st</sup> July 2010. He earned a gross salary of Kshs. 11,597/= per month.
  7. The seventh Claimant was employed by the Respondent as a general worker in 2003, which was converted to a six months renewable contract on or 1<sup>st</sup> July 2010. He was now an assistant machine operator in production / raw materials store. He earned a salary of Kshs.5,500/= per month and a house allowance of Ksh.976/= at the time of termination on 16/12/2010.
  8. The eighth Claimant was also employed as a casual in 2003 which was in 2007. The employment was converted to a six months renewable contract. He was now a stores assistant earning Kshs.11,597/= per month gross salary.
  9. The ninth Claimant was employed as a casual in 1995 and was subsequently employed as store attendant in the year 2002 in the raw materials department. On 18<sup>th</sup> October 2007, he was promoted to a stores supervisor. He earned a salary of Kshs. 34,483/= per month plus a house allowance of Kshs.2,902.20 at the time of termination on 16/12/2012.
  10. The tenth Claimant was employed as a store attendant on casual basis and was confirmed in a permanent position on 1<sup>st</sup> September 2002 in that position. At the time of termination on 16<sup>th</sup> December, 2010, he earned a gross salary of Kshs. 24,225/= per month.

### **3. Termination**

All the ten (10) Claimants' employment was terminated on 16/12/2010, following four night break-in to the raw material stores on diverse dates in the year 2010, the last break-in occurring on the night of 25/26 October 2010. On all occasions there was theft of;

- i. Pseudoephedrine HCL and
- ii. Ephedrine HCL USP.

There was also a fifth failed attempt.

No one was arrested for the break-ins notwithstanding that an outsourced security company guarded the premises.

The entries did not involve use of the keys but entrance was gained from various points being broken.

4. At the time of the break-ins, the Claimants and other employees were not at work leaving behind the security guards.

The employer suspected complicity of its employees in the thefts which targeted these chemicals

used in processing narcotics and therefore very expensive. There was no direct evidence however linking any one of them to the thefts.

When the last occurrence took place on the night of 25<sup>th</sup>/26<sup>th</sup> October 2010, the Respondent wrote to the Claimants a standard letter requiring each one of them to volunteer information that could lead to identification of the culprits.

5. The Respondent demanded written explanation not later than Tuesday, 23<sup>rd</sup> November 2010 at 12.30, failing which the employees would be deemed uncooperative in assisting and action would be taken against them without any further reference.

Upon receipt of the responses from the Claimants wherein they all stated they had no knowledge of who was involved in the daring break-ins to the premises of the Respondent, on 26<sup>th</sup> November 2010, all the Claimants were served with letters of suspension for two weeks with effect from 10<sup>th</sup> December 2010.

They were required to co-operate with the Respondent in the investigations and obey instructions while on suspension. They were invited again to forward any useful information to the management.

They were required to report to the Human Resource Manager, **James K. Muguzu**, the author of the letter on 14/12/2010 which letter was also signed by the Security Supervisor **Mr. Charles Nyabera** and **Safiq M. Iqbal**, the Production Manager.

6. On 16<sup>th</sup> December 2010 all the Claimants on short term contracts received a letter of termination of contract with effect from the same date.

They were offered 7 days salary in lieu of notice, salary up to the last day of work and payment in lieu of any unutilized leave and no service gratuity.

No reason was provided in the letter for the termination of employment given to the employees on 6 months contract and all were paid 7 days salary in lieu of notice.

They were also given a certificate of service dated 17<sup>th</sup>/12/2010 which gives the reasons for termination as **“services not required.”**

7. With respect to George Otieno Obodi, Bernard O. Juma, Charles Wambua Kimeu, Wilberforce Mjomba, Samuel Ndehi Mbuthia, who were on permanent terms, they were paid two months in lieu of notice and service gratuity calculated at 19 days salary for each completed year of service.

Their letters of termination were also different and contained more details regarding the diverse dates when the premises of the Respondent were broken into on the nights of 30/31/7/2009; 23/24/September, 2009; 6<sup>th</sup>/7<sup>th</sup> July 2010 (unsuccessful); 26<sup>th</sup>/27<sup>th</sup> July 2010 and 25<sup>th</sup>/26<sup>th</sup> October 2010.

8. They were told that the continued incidents of theft in the stores and their general conduct had led to the company losing trust in them to discharge their duties satisfactorily especially being persons who had access to the stores.

The employees had responded to the request for information on the thefts but did not finger any culprit, hence the suspicion. All the letters were produced as evidence and are attached to the memorandum of claim.

## 9. Response

The Respondent filed a memorandum of defence dated 25<sup>th</sup> February, 2013 in which it has disputed the particulars of employment of the 10 Claimants and stated what it regards as the correct dates of employment, salaries earned and house allowances and other terms of service applicable to each of the Claimants.

**10.** The Respondent states that the break-ins and thefts that took place happened with complacency of some workers in the stores. That the Claimants when called upon to name the culprits were not co-operative.

The particulars of suspension and termination are admitted and in particular, that the Claimants refused to co-operate with the investigation hence the termination.

**11.** It is common cause that the Claimants were paid terminal benefits outlined in the annexures to the memorandum of defence and the amounts paid are stated in the memorandum itself.

That the Respondent emphasizes that it had lost trust in the Claimants hence could no longer keep them in employment.

## **12. Analysis of facts**

As at the time of hearing this case, no person had been arrested with regard to the break-in-cases that occurred on stated dates.

It is common cause that none of the employees including the Claimants were taken to the police with respect to the said break-ins.

That none of the employees including the Claimants were caught with the stolen items on each occasion.

That the entry was not gained using keys but the buildings were forcefully broken into.

That there were night guards from a reputable company guarding the Respondent's premises, during each of the thefts and they did not arrest anyone.

That none of the Claimants were at work during the thefts.

That the employees had worked for the Respondent for various lengthy periods and none had a record of stealing in the course of employment.

That no evidence was produced in Court to show that any of the Claimants participated or facilitated the thefts that took place.

**13.** It is clear that the Claimants employment was terminated on mere suspicion due to failure by the Respondent to find the thieves and/or get the security officers and the police to arrest the culprits and/or stop the continuous break-ins.

**14.** The 9<sup>th</sup> Claimant who was the supervisor of the rest of the Claimants gave a candid testimony of the events that led to their termination largely in terms of the summary aforesaid.

In sum, he said the Claimants were collectively punished for matters they did not have knowledge of.

**15.** What was required was for the Respondent to beef up its security including use of CCTV cameras so as to get the culprits.

That the collective punishment was akin to mob justice and therefore the termination was

not for a valid reason and the facts clearly show that the termination was not in accordance with a fair procedure.

**16.** On the issue of having signed a letter discharging the Respondent from any further liability, he told the Court that payment of their terminal benefits was conditional upon signing the discharge. That the Claimants were coerced to compromise their right to bring further suit against the Respondent as they proceeded to do. In any event the purpose of the discharge was not explained to them in the manner the Respondent wishes the Court to believe.

**17.** The Respondent called the Human Resource Manager of the Respondent Mr. James K. Mugusu. He supported the averments of the Respondent in the memorandum of defence and concludes that these claims are unfounded and without basis and same should be dismissed.

He did not offer concrete reasons as to why the Claimants were terminated other than mere suspicion because the thieves were elusive and had not been caught upto the time of the hearing of this matter.

**18.** The security officer **Mr. Charles Nyabera** did not offer any better insight into the matter in his sworn testimony. He had been employed to strengthen the security after the theft took place and told the Court that no further theft had taken place since his takeover on 29<sup>th</sup> October 2010. He said he had replaced the CCTV cameras, installed floodlights and an electric fence. He had also reinforced the strongroom. Before there was no security officer then. But things had now changed.

His evidence largely vindicates the Claimants if anything.

## **19. Conclusion**

In terms of *Section 47(5)*, once an employee establishes as in the present case a prima facie case that a wrongful or unfair termination has occurred, the burden of justifying the grounds for the termination rests with the employer. The Respondent has failed in this respect and the Court finds that the termination of the 10 Claimants was in violation of *Section 45(1)* of the Act which reads:

*“No employer shall terminate the employment of an employee unfairly.”*

**20.** Furthermore, the termination offends the requirements of *Section 45(2)* which reads:

*“a termination of employment by an employer is unfair if the employer fails to prove -*

- a. *that the reason for termination is valid and;*
- b. *that the reason for the termination is a fair reason -*
  - i. *related to the employees conduct, capacity or compatibility; and*
- c. *that the employment was terminated in accordance with fair procedure.”*

The Respondent has failed in all the above respects and the Claimants are entitled to compensation for wrongful and unfair termination in terms of *Section 49(1)(c) of the Employment Act*.

**21.** The circumstances of the termination are similar. The Claimants had served the Respondent diligently for relatively long periods. They have no previous records of misconduct or incapacity. They were collectively punished in clear disregard of law and rules of fairness contrary to *Section 41* of the *Employment Act*. They were wrongfully branded thieves and are entitled therefore to substantial awards equivalent to ten (10) months salary each.

They are also entitled to costs of the suit.

22. The Respondent is to give them a proper certificate of service recognizing the entire periods each one of them had served the Respondent and acknowledging their good conduct during the period of service. The reference in the letter that their services were not required is demeaning and meant to reduce their chances of getting alternative employment. The replacement certificates are to be issued within 14 days from the date of this judgment.

23. In the final analysis the award to each of the Claimants is as follows:

1. 1<sup>st</sup> Claimant 117,825/=
2. 2<sup>nd</sup> Claimant 40,000/=
3. 3<sup>rd</sup> Claimant 230,628/=
4. 4<sup>th</sup> Claimant 75,384/=
5. 5<sup>th</sup> Claimant 223,672/=
6. 6<sup>th</sup> Claimant 117,825/=
7. 7<sup>th</sup> Claimant 59,885/=
8. 8<sup>th</sup> Claimant 117,709/=
9. 9<sup>th</sup> Claimant 358,363/=
10. 10<sup>th</sup> Claimant 223,672/=

The decretal amount is to be paid with interest at Court's rates from the date of this judgment and costs of the suit to be paid by the Respondent.

***Dated and delivered at Nairobi this 21<sup>st</sup> day of March, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**