



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1359 OF 2010**

**JOB MBALUKA.....CLAIMANT**

**VERSUS**

**PEGRUME LIMITED.....RESPONDENT**

**JUDGMENT**

By a memorandum of claim dated 2<sup>nd</sup> September 2011 and filed in court on 7<sup>th</sup> September, 2010 the claimant alleges that he was employed by the respondent on 1<sup>st</sup> February, 2006 as a technician at a gross monthly salary of Kshs.7,500/= which was gradually increased to Kshs.20,000/= by 7<sup>th</sup> July 2010 when he alleges that the respondent wrongfully terminated his employment. He prays for judgment in the sum of Kshs.161,849/= and a further kshs.240,000/= made up as follows:

- a. 7 days salary for July 2010 at Kshs.4,516/=
- b. Salary in lieu of three months' notice at Kshs.60,000/=.
- c. Severance pay for 4 years at Kshs.40,000/=.
- d. Pay in lieu of 86 leave days at Kshs.57,333/=.
- e. 12 months' salary compensation at Kshs.240,000/=.

The Respondent filed a reply to the claim on 6<sup>th</sup> October, 2010 in which it denies the claim and avers that the claimant was summarily dismissed for laxity, neglect and dereliction of duty, underperformance, being abusive, using insulting language and willfully disobeying lawful instructions from the respondent. The respondent prays for dismissal of the claim with costs.

The case was heard on 20<sup>th</sup> September, 2013. Mr. Musili appeared for the claimant while Mr. Midwa appeared for the respondent. The claimant testified on his behalf while the respondent relied on the witness statements of AZHAR CHAUDRY, the Respondent's Executive Director, PHILIP MUTUNGA and DANIEL MUSYOKA MUTUA both of whom are employees of the respondent. The respondents witnesses did not testify in court.

In his testimony the claimant stated that he started working with the respondent in 2005 as an intern and was absorbed into permanent employment on 1<sup>st</sup> February, 2006. His starting salary was kshs.7,500/= which was increased periodically. His last salary was Kshs.20,000/=. The letter of appointment provided for 3 months termination notice. On 7<sup>th</sup> July, 2010 he received a text message on his phone from the Managing Director Azhar Chaudry directing him to go to the office to collect a letter. At that time he was working at a site at Milimani Court. He went to the office and met Mr. Amit Shukla the Technical Manager who told him that the office had been told that he was not reporting at the site. The claimant asked who made the report to the office but Mr. Shukla did not reply. The claimant explained that he had been given instructions to report to the site directly. Mr. Shukla said he remembered the instructions.

Later on the same day he was issued the letter of dismissal through a delivery book. He was not paid for the 7 days worked in July, 2010. He was not given notice. He was not paid service for years worked. He was not paid for 86 outstanding leave days. He was also not issued a certificate of service. He urged the court to order the respondent to pay him for days worked, leave, notice and issue a certificate of service. He further prayed for severance pay and 12 months' salary compensation.

Under cross examination the claimant stated that his posting to Milimani from UN was normal as his employer did not inform him of reasons why he was moved. His work at UN was installing telephones and networking and a different company was installing electric power. He admitted that there was money which got lost while he was working at UN and he was questioned by the UN Security who also searched his pockets but did not find the stolen money on the claimant. They found kshs.2,000/= in his wallet. That he was aware the person who lost the money alleged that the claimant had stolen it. He denied that his posting to Milimani was done pending investigations. He further denied that he was expelled from UN. He denied writing the statement attributed to him and attached to the Respondent's bundle of documents at pages 1, 2 and 3. He denied that his photo was taken. He Stated that if he had stolen the money he would have been arrested. He said he did not appeal after his dismissal as he was ordered to vacate the premises.

In the witness statement filed by the Respondent, Mr. Azhar Chaudry the Respondents Executive Director stated that the claimant was expelled from UN where he was working on grounds of theft, that the claimant was informed that he was being relieved of his duties on grounds of misconduct and dishonesty which brought the company to disrepute. The statements of Philip Muthonga and Daniel Musyoka which are similar, are based on information received from unidentified staff of UN and are therefore hearsay and of no evidential value to this case.

I have carefully considered the pleadings, the documents filed by both parties, the testimony of the claimant and the written statement of the respondent's witnesses. I have also considered the written submissions filed by the parties. In my opinion the issues for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the prayers sought.

### **1. Was the termination of Claimant employment fair?**

The letter of summary dismissal states that the reasons for dismissal had been communicated to the claimant.

In the Reply to the claim, the reasons for dismissal are pleaded as "laxity, neglect and direction of duty, under performance, being abusive and using (insulting) language and willfully disobeying lawful instructions from the Respondent.

However in the witness statements it is stated that the Claimant was dismissed due to the fact that he was declared a persona *non grata* by UN where he was stationed.

In the letter of dismissal it is stated that he was aware about the reasons for his dismissal.

There is no evidence that the Claimant was ever informed about the reasons for his dismissal or given an opportunity to defence himself. The dismissal was therefore in breach of the provisions of section 41 and 45 of the Employment Act which provide for the procedure and reasons for termination of employment respectively. I therefore find that the dismissal of the claimant was unfair for failure to give reasons as well as follow the procedure laid down by law.

### **2. Is the Claimant entitled to the remedies sought**

I will consider each of the remedies sought by the claimant separately.

#### **a. 7 days worked in July 2010.**

The Respondent has in the written submissions admitted that the claimant is entitled to salary for days worked.

I therefore award the claimant the sum of Shs.4,666.70 being salary for 7 days worked in July 2010.

**b. Salary in lieu of 3 months' notice**

The Claimants letter of appointment provides for 3 months termination notice by either party or pay in lieu thereof. Having found that the claimant was unfairly dismissed from employment, he is entitled to notice in terms of section 49(1) (a) of the Employment Act.

I therefore award him Kshs.60,000 being 3 months' salary in lieu of notice.

**c. Severance Pay**

The Claimant appears not to understand the difference between service pay and severance pay as the 2 remedies are used interchangeably by the Claimant. Just to correct the position severance pay is provided for in section 40(1) (g) while service pay is provided for in section 35(5) of the Employment Act.

The circumstances of the termination of the claimant's employment do not qualify for redundancy and he is therefore not entitled to severance pay as provided in section 40 (i) (g) of the Employment Act.

The Claimant has also not stated that his employment did not fall within the provisions of Section 35(6) of the Employment to qualify for payment of service pay as provided for in section 35(5) of the Act. He did not state that he was not a member of NSSF or any other retirement benefits or gratuity scheme.

I therefore find that the prayer for service pay has not been proved.

The claim is therefore dismissed.

**d. Pay in lieu of Leave Days.**

The Claimant has claimed pay in lieu of leave days. The respondent has in the final submissions stated that the Claimant's contract provided that no leave days were to be carried over except with approval.

I note that the days claimed are those that the Respondent is the one who confirmed to the Claimant in the letter dated 28<sup>th</sup> May 2009. The contents of this letter which is signed by Mr. S. Kiongo, the Group HR Manager have not been contested by the Respondent either in the defence or witness statements. The letter is at page 11 of the claimant's list of documents dated 23<sup>rd</sup> October 2012.

I therefore find that the claimant is entitled to leave of 86 days being leave for the period 2007, 2008 and 2009. Since he did not claim leave for 2010, I make no orders thereof.

I award the Claimant Kshs.57,333.30 being pay in lieu of 86 days' leave.

**e. 12 months compensation**

Having been unfairly dismissed the claimant is entitled to compensation in terms of Section 49 (1) (c) of the Employment Act. The Respondent has not contested this fact in the witness statements or in the defence. It has not even made any submissions on this issue in the written submissions.

Based on the fact that the prayer is not contested and taking into account the factors set out in Section 49(4) of the Employment Act specifically the Claimant's length of service and the manner in which he was dismissed, I award him 10 months' salary as compensation in the sum of Kshs.200,000/=.

**F costs**

The Respondent shall pay the claimant's costs for this claim.

Orders accordingly.

Delivered and signed in open court on **5<sup>th</sup>** day of **February** 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Mbaluka** Claimant in person

**No appearance** for Respondent