



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 1245 OF 2012**  
**BETWEEN**  
**JOSHUA LIHANDA.....CLAIMANT**  
**VERSUS**  
**OUTDOOR OCCASIONS LIMITED.....RESPONDENT**

*Rika J*

CC. Mr. Kidemi

*Claimant Joshua Lihanda appearing in Person*

*Mr. Njuguna instructed by Wainaina Ileri & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. The Claimant commenced proceedings against his former Employer by way of a Statement of Claim filed on 23<sup>rd</sup> July 2012. The Respondent replied through a Statement of Response filed on 17<sup>th</sup> August 2012. The Claimant gave evidence on 6<sup>th</sup> December 2012, and called one Witness Charles Boge Otiyo who is a former colleague at the Respondent Firm. Otiyo gave evidence on 24<sup>th</sup> July 2013 when the Claimant closed his case. The Respondent called two Witnesses Concepta Kemunto and Anne Wanjiru Mutinda who gave evidence on 24<sup>th</sup> September 2013 when the Respondent's case closed. The dispute was last mentioned on 5<sup>th</sup> December 2012 when the Court advised the Parties Award would be read on notice.

2. The Claimant testified that the Respondent is involved in the business of providing tents to the public, for various occasions. He was employed by the Respondent as a Tent Constructor sometime in August 2004, at a monthly salary of Kshs. 11,500. His role was to assemble tents for the Respondent's customers. He rose to become the Foreman. Employment was through word of mouth. His contract was terminated unfairly and unlawfully by the Respondent in September 2011. He was not given reason for termination. He was told by the Respondent he had become an Inciter. This was because the Claimant made demand for payment of night shift allowance. He sought the assistance of Kituo Cha Sheria [Legal Aid Centre],

who advised the Claimant to file this Claim. He did not get notice of the termination. He claims from the Respondent:-

- a. Severance pay at Kshs. 40,250;
- b. One month salary in lieu of notice at Kshs. 11,500;
- c. House allowance for the period worked at Kshs. 100,800; and
- d. Compensation at twelve months' salary for unfair termination at Kshs. 138,000

Total..... Kshs. 334,650

3. Cross-examined, the Claimant testified he worked from 2004; he was not a Casual Employee. He signed the Leave Application Form dated 4<sup>th</sup> July 2009. The date of employment was shown as 1<sup>st</sup> August 2008. This is the date shown in all the Forms. He became a Supervisor in 2008. He was the link between his Employer and the other Employees. The Claimant conceded he had received a warning letter. There was an incident where the Respondent lost its fairy lights, on 30<sup>th</sup> April 2010, at the Netherlands Embassy Site. Earlier on 7<sup>th</sup> January 2010, the Claimant was issued a warning letter for providing a Customer at the Intercontinental Hotel Nairobi, with the wrong tents. He was said to have failed to organize for the opening of the gutters and the top canvas of the tents after the function. The Claimant agreed that it was the Employer who sourced Customers, and would know what the Customer required. Lihanda had an obligation to respect the instructions of his Employer.

4. There was a problem with salary advance at the Respondent's business. It is not true that on 15<sup>th</sup> July 2011, the Claimant told his Co-employees that without salary advance, there would be no work. He asked the Employees to go to work and they resisted. On 30<sup>th</sup> August 2011, there was a wedding reception at Karura, Westlands and Tigon. The Employees were to assemble the tents after the occasion. They did so out of their own free will, not upon persuasion by the Respondent. They did not stage a go-slow, demanding for salary advances. He did not incite the Employees.

5. He received the letter of summary dismissal. In 2008, the Parties agreed the Claimant would be paid Kshs. 10,000 per month. He was not advised this was consolidated pay. He had the choice to take it or leave it. He did not demand to be paid house rent allowance because he apprehended he would be accused of incitement of his colleagues. Termination was for no reason. He was not given any chance to explain himself.

6. Charles Boge Otiyo testified he works for KAPA Oil Refineries. He previously worked with the Claimant at the Respondent Firm. He left the Claimant in employment at the Respondent in 2004. The Employees were paid Kshs. 200 per day at the time. In cross-examination the Witness stated he worked for the Respondent for about two months. He left in September 2004, having started in June 2004. The Respondent's Director was Anne Mutinda, and the Head Office was at the Director's residence at Golf Estate, Nairobi. Otiyo did not know how the Claimant left employment, or how much he earned on termination. The Claimant prays the Court to uphold his Claim.

7. The Respondent's position is that the Claimant was employed by the Respondent on 1<sup>st</sup> August 2008, as attested by his series of Leave Application Forms, exhibited in the Statement of Response. He earned a consolidated salary of Kshs. 10,000 per month. He was summarily dismissed on 1<sup>st</sup> September 2011 for incitement of fellow Employees, insubordination and negligence. Fair procedure was adopted in summarily dismissing the Claimant. He was paid, received, and acknowledged payment and receipt of, terminal benefits.

8. He was rude to his Superiors on 15<sup>th</sup> July 2011 and 30<sup>th</sup> August 2011. He failed to perform his duties, and incited the other Employees under his supervision not to do their duties. He was negligent on certain occasions, causing the Respondent loss of its items. He was warned in writing and verbally severally before dismissal, but never changed. On 15<sup>th</sup> July 2011 and 30<sup>th</sup> August 2011 he was called for a meeting with the Respondent's Representative and asked to show cause why disciplinary action should not be taken against him for insubordination and incitement of Employees. He made submissions at the meeting,

which were found to be unsatisfactory, paving way for his dismissal on 1<sup>st</sup> September 2011. He is not entitled to any of the prayers.

9. Concepta Kemunto testified she worked as a Cleaner for the Respondent. She recalled that on 15<sup>th</sup> July 2011, the Claimant who was her Supervisor asked for salary advance. It was not availed to him. Those under him did not report to work the following day. She told the Court on cross-examination that it was true she was an Employee of the Respondent, and supervisee of the Claimant, at the time the Claimant was employed by the Respondent. One of her colleagues was a lady named Josephine. Concepta washed the materials used in the Respondent's business.

10. Anne Wanjiru Mutinda confirmed that her Firm employed the Claimant on 1<sup>st</sup> August 2008. He was a Supervisor. The date of employment is shown in the Leave Application Forms which the Claimant signed. His salary was consolidated at Kshs. 10,000 per month. He trained Employees and was the bridge between them, and the Respondent.

11. The Respondent rents out chairs and tents for all manner of events. It was the Claimant's job to compile the orders, and move the equipment to and from the site. In 2010, he was warned after failing to open gutters. The customer's flower pot was broken. The Claimant did not change. He was rude and refused to take his superior's instructions. In July 2011, he applied for salary advance. There was no cash. He got annoyed and incited other Employees not to work. Some Employees refused to work, while others worked. Anne called a meeting with the Claimant and the Managing Director in which the Claimant was explained to, that payment of salary advance is not mandatory. In the following month of August 2011, he incited Employees claiming they had not received overtime pay. He was given to overstated, extortionist, overtime claims. He summoned Employees and they refused to go to the site at Valley Arcade. The Respondent was compelled to hire casuals. The work was done late and the Customer was quite unhappy.

12. The Respondent expressed its dissatisfaction with the Claimant and called him again to a meeting. He was asked why he was inciting Employees on overtime. Some of the Employees agreed with the Respondent and told the Claimant '*hatutaki pesa ya haramu,*' [*Kiswahili for- we do not need money which is not legitimate*]. The Respondent advised the Claimant disciplinary action would be instigated against him. Dismissal letter was issued on 1<sup>st</sup> September 2011. The Claimant did not communicate well with the Employees and the Management. He shouted and abused the Employees. The Respondent was losing heavily as a result of this misconduct on the part of the Claimant. It was clear what was paid to him was consolidated salary. Dismissal was justified and followed fair procedure. He was paid his final dues.

13. Questioned by Lihanda, Anne testified the Respondent interviewed the Claimant before engaging him in 2008. He informed the Respondent that he had experience in outdoor catering. He was not in employment the first time the Respondent was engaged by the Japanese Embassy. He would close the store even at late hours. Many warnings issued against the Claimant. The warning issued against the Claimant in 2010 was still valid at the time of dismissal. The Claimant refused to work because he was not paid salary advance. The Driver who was moving materials to the site had not demanded to be paid salary advance. Redirected, the Witness testified that salary was paid at the end of the month. Overtime was paid weekly. Lihanda left employment on 1<sup>st</sup> September 2011, and was not working in December 2011. The Respondent prays the Court to dismiss the Claim.

#### *The Court Finds and Awards:-*

14. The Respondent is an Outdoor Catering Firm, providing chairs and tents to various Customers, for diverse occasions. There is common evidence that the Respondent employed the Claimant as its Supervisor, overseeing other Employees in the assemblage of tents and transportation of tents and chairs to and from the various sites. The Claimant was not sure about the date of employment, averring he was employed on or about August 2004. He in the course of his employment filled various Leave Application Forms, which were introduced to the proceedings as appendix 1, of the Statement of Response.

15. These Forms consistently gave the date of employment as 1<sup>st</sup> August 2008. The Claimant did not dispute the authenticity, or authorship of the Forms. He signed them, and the employment date indicated in writing, cannot be varied by the Claimant's word of mouth. The Court agrees with the evidence of the Respondent that the Claimant was employed on 1<sup>st</sup> August 2008.

16. He was summarily dismissed on 1<sup>st</sup> September 2011. There were 4 grounds stated by the Respondent in justifying its decision. One, the Claimant incited workers not to carry out their duties. Notably on 15<sup>th</sup> July 2011, the Claimant refused to go do a set up for a Client and incited other workers not to work. And once again, he incited workers on 30<sup>th</sup> August 2011. Two, the Claimant had poor communication with the Management. Three, he was rude and un-cooperative to the Management on several occasions which amounted to insubordination. Fourthly, he was guilty of irresponsible behaviour and negligence, of which a warning letter issued.

17. The first question that the Court must answer is whether these grounds amount to valid reasons justifying dismissal as required under Sections 43 and 45 of the Employment Act 2007? The Claim for incitement of fellow Employees was well substantiated by the Director Anne Mutinda in her comprehensive statement on oath. The Court found her evidence truthful and believable. It is clear from this evidence, as corroborated by that of Concepta Kemunto, that the Claimant applied for salary advance, and demanded for overtime, and when these were not forthcoming, called on the Employees placed under his supervision to avoid work. In his own evidence, the Claimant attributed his dismissal to his demand to the Respondent, for payment of night shift allowance. Cross-examined, he answered that he asked the Employees to work, but they resisted. The Court's reading of this evidence is that the Claimant led Employees in demanding for salary advances and overtime payments. When told there was no money, he marshalled the Employees to withdraw their Labour, and the Respondent was left desperately searching for Casual Labourers. The first ground given in the letter of summary dismissal amounted to gross misconduct on the part of the Claimant under Section 44 [4] [a] [c] [d] and [e] of the Employment Act 2007. It formed valid reasons for summary dismissal

18. It was established by the Respondent that the Claimant was rude to the Management and not a useful bridge between the Management and the Employees. He was a Supervisor, and entrusted training of the Employees in outdoor services. He did not live up to his Employer's expectation, inciting Employees and showing utmost disrespect to the Management. On 6<sup>th</sup> November 2010 he for instance writes to the Director referring to her as 'Anne.' His language in this letter shows little regard for the Director. He writes, "*I negotiated with you about that issue on Saturday and it is just because you could not get satisfied to my expression and decide to go to the site before consulting me. You claim you called me, but sincerely my phone was with me until 1.00 a.m.*" This is not the way an Employee should address his Employer. Even when fairy lights were lost under his watch, he wrote to the Management insisting the lights were probably not lost in his hands or those of his Supervisees. The language and attitude shown by the Claimant supports the explanation given in the letter of dismissal that he was rude and un-cooperative. The reason for termination under this explanation was a fair reason. The Claimant's conduct, capacity and compatibility were in issue. These are fair termination reasons under Section 45 [2] [b] [i] of the Employment Act 2007.

19. There was sufficient evidence led by the Respondent to show the Respondent had valid reason to justify dismissal. On this count the dismissal was substantively justifiable, and therefore fair.

20. Was the procedure fair? Although the Respondent raised a multiplicity of charges against the Claimant, there is nowhere in the records provided to the Court, to show any formal hearing was accorded to the Claimant in the manner intended under Section 41 of the Employment Act 2007. The letter of dismissal has serialized reasons for the Employer's decision. There are no serialized charges placed before the Claimant, leading to the decision. There was no letter calling on him to defend any of the allegations. There was no disciplinary panel convened. No hearing took place. Anne testified, "*we told him we would take disciplinary action. Dismissal [letter] issued on 1<sup>st</sup> September 2011.*" The Claimant was not heard in the presence of a Co-Employee or Trade Union Representative as intended under Section 41. The Respondent appeared to think that because there was an expired warning letter in the

Claimant's file, there would be no need to hear the Claimant. The law requires an Employee to be heard, no matter the gravity of an offence, or the clarity of the prima facie evidence that an employment offence has taken place. The procedural protections must be honoured. In this dispute there was no adherence to the fair procedure law. On this score, dismissal was unfair.

21. The Claimant seeks severance pay of seven years. He did not leave employment through redundancy to bring into play severance pay which is payable under Section 40 of the Employment Act. The claim for severance pay is not supported in law and fact and is hereby rejected.

22. The Claimant was summarily dismissed on valid grounds. He does not merit notice pay. The prayer for notice pay is declined.

23. Section 31 of the Employment Act requires an Employer at all times, at his own expense, to provide reasonable housing accommodation for each of his Employees, either at or near the place of employment, or pay the Employee such sufficient sum as rent, in addition to the wages or salary of the Employee as will enable the Employee to obtain reasonable accommodation.

24. This law is not applicable to an Employee whose contract of employment contains a provision which consolidates as part of the basic wage or salary of the Employee, an element intended to be used by the Employee as rent, or which otherwise is intended to enable the Employee to provide himself with housing accommodation. It also does not apply to an Employee who is covered under a Collective Bargaining Agreement consolidating the Employee's wage or salary.

25. The Respondent had the obligation to provide the Claimant a written contract of service under Section 9 of the Employment Act. There was no written contract given to the Claimant. Section 9[2] requires the Employer to state the particulars of the contract, which read with Section 31 [2] of the Act, would include the provision which consolidates the Claimant's basic wage or salary with the rent. It cannot be for the Claimant to demonstrate that what was paid to him was not consolidated wage or salary; the law places the obligation of proof of the consolidation provision on the Employer.

26. In this dispute the Parties agree the Claimant was paid Kshs. 10,000 per month. The Claimant argues this did not take into account house rent allowance, while the Respondent argues this was consolidated. The law tilts the argument in favour of the Claimant. It was for the Employer to show that the salary was consolidated. Consolidation would have to be captured in a provision contained in the written contract of employment. The Claimant was a Supervisor and even taking into account the basic minimum wages for 2011 under the Regulation of Wages [General] [Amendment] Legal Notice No. 64 of 2011, Kshs. 10,000 per month as a consolidated wage or salary would be a gross underpayment. ***The Claimant is allowed 15% of the Kshs. 10,000 basic salary paid to him, as house rent allowance, with effect from 1<sup>st</sup> August 2008 to 1<sup>st</sup> September 2011- a period of 37 months, amounting to Kshs. 55,500.***

25. Lastly the Court is satisfied dismissal failed on account of fairness of the procedure, and the

***Claimant is allowed four months' gross salary at Kshs. 46,000 in compensation.***

26. In sum-:

***[a] The Claimant's dismissal was based on valid grounds, but carried out in breach of fair procedure;***

***[b] The Claimant is granted 4 months' gross salary in compensation at Kshs. 46,000 and arrears of house rent allowance of 37 months at Kshs. 55,000- total Kshs. 101,500 to be paid by the Respondent within 30 days of the delivery of this Award; and***

***[c] No order on the costs and interest.***

Dated and delivered at Nairobi this 13<sup>th</sup> day of March 2014

James Rika

Judge