



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

**CAUSE NO 2525 OF 2012**

**ABISALOM AJUSA MAGOMERE.....CLAIMANT**

**VS**

**KENYA NUT COMPANY LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 29<sup>th</sup> November 2012 and filed in Court on 18<sup>th</sup> December 2012, the Claimant sued the Respondent for unlawful and wrongful dismissal. The Respondent filed a Response to Claim on 21<sup>st</sup> March 2013 and the Claimant filed a Reply to Response to Claim on 12<sup>th</sup> April 2013. The Claimant testified on 18<sup>th</sup> February 2014 and the Respondent did not call any witnesses. Both parties filed written submissions.

**The Claimant's Case**

2. According to the Claimant, he was employed by the Respondent on 15<sup>th</sup> September 1981 initially as a general worker. He was subsequently promoted to the position of Senior Security Officer effective 1<sup>st</sup> January 2003, a position he held until he was summarily dismissed on 4<sup>th</sup> March 2011. The Claimant's monthly salary as at the time he left the Respondent's employment was Kshs. 10,366.

3. It was the Claimant's case that the termination of his employment by way of summary dismissal was unjustifiable and that he was not given an opportunity to defend himself. The Claimant further pleaded that after termination of his employment he was not paid his terminal benefits.

4. The Claimant seeks the following reliefs:

- a. A declaration that the termination of his employment was unlawful
- b. 3 months' salary in lieu of notice.....Kshs. 31,098.00
- c. 12 off days (Sundays & public holidays).....Kshs. 4,784.30
- d. Traveling allowance for 2 months.....Kshs. 1,600.00
- e. 52 days leave not taken.....Kshs. 20,732.00
- f. Service pay.....Kshs. 310,980.00
- g. 7 days worked in March 2011.....Kshs. 2,790.85
- h. Damages for wrongful termination
- i. Costs and interest
- j. Any other relief the Court may deem just to grant

## **The Respondent's Case**

5. In the Response to Claim filed on 21<sup>st</sup> March 2013, the Respondent admitted the Claimant's employment status as pleaded in the Memorandum of Claim. The Respondent however denied the Claimant's claim that he had a clean employment record and averred that the Claimant breached the terms of employment by failing to report irregularities observed in the course of his duties. According to the Respondent, this amounted to gross misconduct rendering the Claimant liable to summary dismissal. Upon termination, the Claimant was given an opportunity to collect his dues from the Respondent's Finance Office after handing over of company properties.

## **Findings and Determination**

6. There are two issues for determination in this case namely:

- a. Whether the termination of the Claimant's employment by way of summary dismissal was substantively and procedurally fair;
- b. Whether the Claimant is entitled to the reliefs sought.

7. Section 43 of the Employment Act, 2007 provides that:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

8. Section 45 (2) of the Act goes on to provide that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) That the reason for the termination is valid;***

***(b) That the reason for the termination is a fair reason-***

***(i) related to the employees conduct, capacity or compatibility;or***

***(ii) based on the operational requirements of the employer and***

***That;***

***(c) That the employment was terminated in accordance with fair***

***procedure.***

9. The letter of termination dated 4<sup>th</sup> March 2011 which the Claimant claims to have received on 7<sup>th</sup> March 2011 states *inter alia*:

***“You are the Senior Security Supervisor at Kiboko farm. You are expected to protect the company's properties against abuse. On various instances among others 20th February 2011 a lorry KUT 154 was out of the farm and returned at odd hours. You confirmed that you have information that it was ferrying materials at Landless. In January 2011 a tree was fallen in the farm and timber carried out of the farm (sic). The company tractor has been used to plough personal pieces of land inside the farm. When all these were happening you were inside the farm and did not find it necessary to report to***

*someone in authority who could stop the irregularities. As Senior Management we have our expectation from the Senior Security Supervisor which we are missing in you. Therefore you have rendered yourself unemployable. You are relieved of your duties immediately.*

**MBUGUA NGUGI**

***Managing Director***

10. According to this letter, the Claimant was accused of failure to report some irregularities within the Respondent's operations. The Claimant told the Court that as Senior Security Supervisor, he was not in charge of motor vehicles and had no mandate to regulate the movement of motor vehicles once approved by the Respondent's managers. The Respondent did not produce the Claimant's job description to show the extent of his responsibilities in this regard.

11. Further, no particulars of the irregularities complained of and the Claimant's role in preventing them were provided. It seems to me therefore that the Respondent, being faced with malpractices involving its managers chose to sacrifice the Claimant's job. For this reason, the Court finds that the Respondent failed to establish a valid reason for termination of the Claimant's employment as required by law.

15. With regard to the procedure adopted by the Respondent in terminating the Claimant's employment, the Claimant testified that he was summoned by his bosses on 4<sup>th</sup> March 2011 and asked questions about motor vehicle registration number KUT 154 which had left the Respondent's premises to pick hay from the farm and tractor registration number KSS 069 which was alleged to have ploughed a private farm. He was also asked about a tree that had been cut and timber ferried from the Respondent's premises.

16. The procedure for terminating employment of an employee on grounds of misconduct, poor performance or physical incapacity is contained in Section 41 of the Employment Act, 2007 which provides as follows:

***41. (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 the 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.***

17. Additionally, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in dealing with staff disciplinary cases. As held by **Ongaya J** in the case of **Shankar Saklani Vs DHL Forwarding (K) Limited [2012] eKLR** even in cases of summary dismissal a hearing and notification as envisaged under Section 41 of the Employment Act, 2007 is mandatory and necessary.

18. From the evidence on record, the Respondent did not comply with the procedural fairness requirements set out in Section 41 and the Court therefore finds that apart from failing to prove a valid reason for the termination of the Claimant's employment, the procedure followed fell below the threshold set out in law. Overall, I have arrived at the conclusion that the termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness.

19. With regard to the second issue before this Court being the reliefs available to the Claimant, Counsel for the Respondent referred the Court to authorities to the effect that compensation payable to Claimants is limited to the notice period. These authorities are however distinguishable since they are based on the law prior to enactment of the new labour laws and the Constitution of Kenya, 2010.

20. I therefore proceed to award the Claimant 12 months' salary in compensation. In making this award, I have taken into account the length of the Claimant's service with the Respondent. I further award the Claimant 1 month's salary in lieu of notice.

21. The Respondent did not provide any leave records to counteract the Claimant's claim for leave pay and this claim is therefore also allowed. In similar vein, there was no evidence that the Claimant was a member of the National Social Security Fund (NSSF) or a registered pension or provident fund or a gratuity or service pay scheme under any collective agreement. I therefore award him service pay at the rate of 15 days' pay for every year of service. The Claimant is further entitled to his salary for 7 days worked in March 2011. The claims for off days and traveling allowance were however not proved and are dismissed.

22. In the final analysis I make an award in favour of the Claimant in the following terms:

- a) 12 months' salary for unfair termination.....Kshs. 124,392
- b) 1 month's salary in lieu of notice.....Kshs. 10,366
- c) Leave pay (10,366/30x52).....Kshs. 17,968
- d) Service pay (@ 15 days' pay for 29 years).....Kshs. 150,000
- e) Salary for 7 days worked in March 2011.....Kshs. 2,419

**Total... ..Kshs. 305,145**

23. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

24. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY 2014**

**LINNET NDOLO**

**JUDGE**

***In the Presence of:***

.....***Claimant***

.....***Respondent***