



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

**CAUSE NO. 1084 OF 2010**

**HAM OTIENO BUSILI ..... CLAIMANT**

**VERSUS**

**NATIONAL ENVIRONMENTAL AUTHORITY..... RESPONDENT**

**Mrs Ameka for Claimant**

**Mr. Ojiambo for the Respondent**

**JUDGMENT**

1. This suit was commenced on 17<sup>th</sup> September, 2010 vide a statement of claim dated 15<sup>th</sup> September, 2010.

The Claimant seeks payment of terminal dues comprising of:

- i. payment of 29 months salary in the sum of Kshs.2,405,202/= and general damages for the unlawful dismissal.
- ii. 90 days untaken leave in the sum of Kshs.168,314/=;
- iii. gratuity for 36 months calculated at 31% of the salary in the sum of Kshs.67,528/=;
- iv. one month salary in lieu of leave in the sum of Kshs.54,438/=;
- v. salary for June 2008 which has not been paid to date in the sum of Kshs.82,938/=;
- vi. airtime (untaxed) Kshs. 174,000/=.

Total claim Kshs. 3,492,420/=.

The Claimant further seeks 12 months maximum compensation for the wrongful dismissal.

In the alternative, the Claimant seeks reinstatement to his previous employment with full pay from date of termination to date.

The Claimant further seeks interest on the award and costs.

4. **Premises of the Claim**

The claim is founded on allegations contained in the pleadings, witness statements, relevant documentations annexed to the pleadings and final submissions filed by the Claimant that may be summarized as follows:

5. The Claimant was employed as an Administrative Assistant/Accountant Job Group E7 tenable at the EU/NEMA programme at Kisumu Community Development for Environmental Management Programme (CDEMP) on 8<sup>th</sup> August 2007. The recruitment was initially for a period of three (3) years contract subject to renewal on mutual agreement.

6. The Claimant's remuneration was as follows;

- a. basic salary of Kshs.54,438/=;
- b. medical allowance Kshs.2,500/=;
- c. house allowance Kshs.22,000/=;
- d. commuting allowance Kshs.4,000/=

Gross pay Kshs.82,938,000/=.

The employment was subject to the National as well the normal standards of professional accounting practice.

#### 7. **Suspension**

The Director General **Dr. A. M. Mwinzi**, wrote a letter suspending the Claimant from employment on 17/6/2008. He referred to **"your temporary contract with NEMA"** which he suspended thereof with immediate effect until further notice.

The Claimant was not paid a salary for the period he was under suspension. The letter of suspension is marked "HOB2."

#### 8. **Termination**

On 8<sup>th</sup> June 2009 about one year from the date of suspension, the Claimant received a letter of termination of employment with effect from 16<sup>th</sup> June 2009 marked "HOB3".

The letter of termination reads thus:

**"This is to inform you that it has been decided that your contractual employment with DDEMP be terminated effective 16<sup>th</sup> June 2009. You will be paid one (1) month salary in lieu of notice effective 3<sup>rd</sup> June 2009. You will also receive your gratuity covering the period 15<sup>th</sup> October 2007 and 2<sup>nd</sup> June 2009 calculated at 30% of your basic salary, payable to you at the earliest convenience as will be mutually agreed.**

**Please arrange to fill the clearance forms as required under Section 2 sub-section 2.15 of the terms you signed.**

**Dr. A. Muusya Mwinzi, Director General."**

9. It is the Claimant's case that the termination was effected maliciously and without any due regard to the Terms and Conditions of Service governing the employment at the Respondent's establishment and particulars of malice are outlined in paragraph 7(a) –(i) to include:

- a. failure to give the Claimant any notice of the intended suspension;
- b. failure to give the Claimant full documentation in support of allegations raised against him;

- c. failure to communicate to the Claimant the outcome of the deliberations and proceedings of the Disciplinary Advisory Committee, contrary to the Terms and Conditions of Service;
- d. failing to give the Claimant a fair hearing or at all;
- e. failing to give the Claimant any notice of intended termination of his employment;
- f. humiliating the Claimant by making false accusations against him without giving him adequate opportunity to defend himself;
- g. terminating the services of the Claimant without any basis or justification for doing so;
- h. refusing to facilitate the claimant's clearance by the various departments;
- i. refusing and failing to pay the Claimant his dues.

The Claimant states that, a consequence of the malicious conduct by the Respondent he has suffered great financial loss and damage and claims payments as outlined earlier.

#### 10. **Response**

The Respondent filed a Reply to the statement of claim on 24<sup>th</sup> January 2011.

The Respondent admitted the following;

- (i) particulars of employment except the salary of Kshs.82,938/=;
- (ii) the fact of suspension and termination;

11. The Respondent however denies all the allegations of unlawful termination and malice and alleges the following;

- a. The Claimant was guilty of dereliction of duty, neglect, and misappropriation of public funds which occasioned the Respondent financial loss.
- b. That the Claimant was charged with the said misconduct and was summoned before the Disciplinary Committee on the 23<sup>rd</sup> September 2008 and was accorded a hearing upon which the following conclusions were arrived at;
  - i. that the Claimant failed to keep proper books of accounts;
  - ii. that budget allocation was exceeded without explanation;
  - iii. that the Claimant was not paying attention to returns submitted to him;
  - iv. that the Claimant never raised challenges he faced with relevant authorities;and
  - v. the disciplinary Committee recommended severe reprimand against the claimant.

12. It is alleged in paragraph 16 of the Reply that by a letter dated 8<sup>th</sup> September 2008, to the Respondent, the Claimant admitted his gross misconduct and authorized the Respondent to deduct a total of Kshs. 287,196/= from his terminal dues in settlement of the imprest balance and indicated that the matter was to be marked settled amicably.

13. However, a perusal of the letter shows quite to the contrary that, the Claimant did not admit any misconduct by himself during the tenure of his employment.

Indeed the letter was written long after the termination, in an attempt to get the Respondent to pay him the terminal benefits that were long overdue. That the letter coming long after the termination cannot be used, after the fact, as the reason why the termination took place.

14. At best, the letter comes across as an attempt at negotiated settlement provided the Respondent paid the terminal dues upon deduction of Kshs.287,196/= which he was reluctantly willing to forego.

The Respondent did not make any payments in terms of this proposal and the matter was therefore not settled.

15. This was followed by a demand letter dated 29<sup>th</sup> April 2010 from Ameka & Co. Advocates, from which it is clear that Claimant's effort to make clearance to enable payment of his terminal dues never materialized and he blamed this on the conduct of certain officers of the Respondent and in particular **Mr. Ondimu**, the Director, Research and planning. **Mr. Cheruiyot**, Finance Director and **Mr. Misike**, project Accountant.

The officers stated that the Respondent owed no benefits at all to the Claimant.

#### 16. Analysis and Conclusion

It is clear from the payslips submitted by the Claimant that as at the time of his termination, his basic salary was Kshs.54,434/= and the gross pay was Kshs.82,938/=.

That as per the *Terms and Conditions of Service manual*, the Claimant was entitled to one month's salary in lieu of notice upon termination; that suspension would not exceed three (3) months within which period disciplinary process leading to termination of service should be concluded; that during the three months suspension, the employee would not be entitled to a salary but would receive house allowance and medical allowance.

That should the suspension be lifted, the employee will be entitled to the whole or part of any salary withheld less the amount of surcharge, if any as the case may be determined.

This is per *Clause 3.11.5* of the *terms and conditions of service manual*.

17. By a letter dated 12<sup>th</sup> March 2010, the Respondent admits not paying the terminal dues of the Claimant because of his failure to clear with the Respondent.

18. The Court is of the view from the totality of evidence that the Respondent was simply reluctant to pay terminal dues owed to the Claimant including those he was entitled to as of right by fact of his employment under the pretext of failure to clear.

#### 19. Conclusion

The Internal Memo dated 17<sup>th</sup> March 2009 by the Legal Officer **Mr. Keya Opondo** to the Director, Finance and Administration contradicts the case by the Respondent as alleged in the statement of Reply completely in the following respects;

- i. the legal Officer states that NEMA Disciplinary Committee exonerated the Claimant wholly from allegations of impropriety and requested a written decision of the committee to that effect;
- ii. he advised that the Claimant be recalled from suspension forthwith as there was no evidence on the allegations made against him;
- iii. that upon lifting of the suspension he be given a month's written notice of termination;

- iv. that he be paid all his outstanding dues including half salary and allowances withheld during suspension;
- v. pay him gratuity on prorated basis for the duration he had worked; and
- vi. that he signs the clearance indicating that he had no further claims against the Respondent.

20. The Respondent partly followed the advice by its legal officer as follows;

- i. by a letter dated 8<sup>th</sup> June 2009, it lifted the suspension of the Claimant with effect from 15<sup>th</sup> June 2009;
- ii. in terms of the letter by the Director General;

**“the lifting of this suspension clears you of all allegations of misappropriation of funds as earlier charged” and he was to be paid “all the allowances and salary during the period of your suspension.”**

The Director ended by stating **“I take this opportunity to welcome you back.”**

21. However, on the same date, the Claimant received the letter terminating his employment. In view of the above, the Respondent had no justification at all to terminate the employment of the Claimant by a letter of the same date, 8<sup>th</sup> June 2009 assigning no reason at all for the said termination.

22. The Director clearly followed the flawed advice from his Legal officer and proceeded to terminate the employment of the Claimant on the one hand and on the other absolving him from any wrong doing at all.

These two letters completely discredit any averments in the memorandum of reply to the contrary.

23. The Claimant has on a balance of probability discharged his onus in terms of **Section 37(5)** of the **Employment Act**, that his services were terminated wrongfully, whereas on the other hand the Respondent has through its own documentation shown that it had no justification whatsoever to terminate the employment of the Claimant.

The particulars of malice, unlawful and unfair conduct have been fully proved by the Claimant.

24. The attempt by the Respondent to make averments which are clearly contrary to the position taken in the various correspondence of the Director General of the Respondent indicate mere mischief and telling of blatant untruths to a Court of law.

The Court admonishes this kind of conduct by a statutory employer who is enjoined to adhere to the code of conduct under **Chapter 10** of the **Constitution of Kenya 2010**.

#### 24. **Remedies**

- i. The evidence by the Claimant that he never took leave calculated at 90 days remains uncontroverted and the Court awards him Kshs.168,314/= in lieu of leave days not taken.
- ii. The Respondent in its correspondence admits it owed the Claimant Gratuity calculated at 31% in the period served of 36 months calculated at the basic salary of Kshs.54,438/= and the court proceeds to award accordingly in the sum of Kshs.607,528/=.
- iii. The Claimant also has established that he was not paid one month salary in lieu of notice in the sum of Kshs.82,938/= which the Court awards accordingly.

The Court notes that notice is payable on the basis of gross salary and not basic.

- iv. The Claimant has established also that he was not paid the salary for June 2008, and awards Kshs.82,938/= in respect thereof.
- v. The Court also finds that the Claimant was entitled to the full gross salary of Kshs.82,938/= for the 12 months he was unlawfully under suspension and awards the full amount Kshs.995,256/=.

25. **Compensation**

With respect to the claim for compensation and/or damages for the unlawful, unfair and malicious termination of employment, the Court having considered the entire circumstances outlined in this judgment, including the complete exoneration of the Claimant by the Respondent of any wrong doing in the letter of 8<sup>th</sup> June 2009, and simultaneous termination of the employment in another letter of the same date, exposes a most callous behavior by the Respondent in total disregard of the rights of the Claimant.

This occasioned the Claimant immense loss in a most unjustified manner.

26. This is a case where the Court should award maximum compensation for the unlawful and unfair termination in terms of **Section 49(i)(c)** of the **Employment Act**, of 12 months gross salary in the sum of Kshs.995,256/=.

The total award payable to the Claimant by the Respondent is Kshs.2,932,230/=.

The award is payable with interest at Court rates from the date of termination on 8<sup>th</sup> June 2009 to payment in full.

The Respondent is also to pay the costs of the suit.

**Dated and Delivered at Nairobi this 9<sup>th</sup> day of May, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**