



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 769 OF 2012**

**SIMON YOLLE KIMANTHI.....CLAIMANT**

**VERSUS**

**AFRICAN COTTON INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for the unlawful and unfair dismissal from employment with the Respondent and failure to pay full terminal benefits. The Claimant averred that he was employed as a general labourer on 2<sup>nd</sup> November 2006 a position held until promotion to a machine attendant in April 2009. He averred that he worked diligently and to the satisfaction of the Respondent. The Claimant was asked to leave the company on 15<sup>th</sup> October 2011 and the guards instructed not to allow him into the premises. The Claimant avers the Respondent's actions amounted to a summary dismissal and no charges were framed by the Respondent to warrant a dismissal in this manner. He thus sought a declaration that his termination was unlawful, unfair and inhumane and that he is entitled to the payment of one month's salary as notice, payment in lieu of leave days not taken, service for 4 years at the rate of 18 days for every completed year, compensatory damages, costs plus interest.
2. The Respondent filed a Memorandum of Response and averred that the Claimant was on 15<sup>th</sup> October 2011 found with 22 rolls of toilet papers belonging to the Respondent. The Claimant was asked why he was leaving the company premises with company property without permission and he did not have any explanation. He was given a show cause notice why disciplinary action should not be taken against him. The Claimant did not return for the disciplinary process the next day and he was not dismissed but left never to return.
3. The Claimant testified before the Court and reiterated his averments. He testified that the Respondent had no reason to terminate and that he was not given a letter of termination but asked to leave the premises. The Respondent called the Security Guard who is stated to have been at the Respondent's gate. The guard testified that the Claimant was found with 22 rolls of tissue wrapped around his body. The second defence witness was the HR manager of the Respondent who testified that he received a call from security guards at the gate and the Claimant was said to have been found with tissue taped to his body. The offence could attract summary dismissal and the Claimant was given a memo seeking an explanation but the Claimant did not do so.
4. Parties filed submissions. The Claimant submitted that the Respondent had a duty to confirm and prove to Court that the reasons for the termination and secondly that due process was followed in arriving at the decision to dismiss the Claimant. The Respondent submitted that the Claimant was not dismissed from employment but left and never returned to face a disciplinary process the next day. The Respondent relied on the unreported case of **Isaiah Makokha v Basco Products (K) Ltd Cause No. 206 of 2013**.
5. The issues for determination can be narrowed down to the following:-
  - i. Was the Claimant dismissed from employment?
  - ii. If so was the dismissal fair and lawful?

iii. If not, what damages are due?

6. The Claimant alleged in his Claim that he was dismissed by the Human Resources Manager of the Respondent on 15<sup>th</sup> October 2011. The Respondent on its part availed two witnesses who testified that the Claimant was found in possession of 22 rolls of tissue taped to his body and that the Claimant was asked for an explanation which he was to give the next day but failed to return.
7. The witnesses for the Respondent were consistent under cross-examination. In the case before me the Claimant was not dismissed from employment. The issue of unfairness in the process of dismissal is thus not due for determination. The Respondent's HR Manager testified that he asked the Claimant for an explanation and the Claimant was asked to give an explanation within 24 hours why disciplinary action would not be taken against him. The Claimant failed to prove dismissal and thus his claim fails.
8. The suit is dismissed but each party to bear their own costs.

Orders accordingly.

**Dated and Delivered at Nairobi this 30<sup>th</sup> day of June 2014.**

**Nzioki wa Makau**

**JUDGE**