



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

**CAUSE NO. 83/2013**

(Before Hon. Justice Hellen Wasilwa on 26<sup>th</sup> June, 2014)

WYCLIFFE CHITAYI MUHALYA ..... CLAIMANT

**-VERSUS-**

KENYA SEED COMPANY LTD ..... RESPONDENTS

**JUDGMENT**

The claimant herein filed his memo of claim on the 3.7.2012 through the firm of Wilfreda A. Osodo Advocates. His contention was that he was summarily dismissed without any justifiable cause.

The claimant's case is that, on 1.10.1996, he was employed by the respondents as an accountant. He exhibited his appointment letter as **App 1**. He was then confirmed in employment in February 1997 as per his **App 2** and was then given a letter showing his job description which included writing cash books, bank statements etc as per his **App 3**. He told court that he apparently did his work well and was even given a letter of appreciation for his good work in 1999 as per his **App 4**.

In 2001, he told court that he was informed by the secretary that the company had decided to sell shares by private placement and that he should open a new account with Barclays Bank for that purpose. He even gave him a cheque to start depositing in that account. He asked the secretary to give a list of the people who had paid in the cheque but he said it was not necessary but company will issue a certificate for those cheques.

The claimant then asked him they had permission from the Parastatal Reform Committee and he said Kenya Seed was not a parastatal so they only needed permission from the board which had already granted the permission. This was in March 2001. It is claimant's case that his reasoning about the respondents not being a parastatal landed him in trouble and in April 2001, he was summoned in a management meeting where the Managing Director, Mr. Tum, Company Secretary Mr. Cheruiyot, Human Resource Manager Allan Ruto, Finance Director Mr. Goyes and Chief Accountant Mr. Fonda were present. The Managing Director asked him to explain why he was walking around tarnishing the Managing Director's name, an assertion the claimant denied. After the meeting he was given a letter demoting him from Accountant to Accounts Assistant with more duties added to it (**App 5**). In September 2001, he was further suspended from duty on allegation of theft. He was asked to report to work daily before ten. He continued reporting until sometimes in October 2011 when the Managing Director asked him to go to the security officer. He was then led to police station where he was put in cells. He was then charged in court the following week with the offence of stealing by servant as per (**App 7**). When he was in police cells, he was served with a letter summarily dismissing him (**App 8**).

His last payslip was in November 2001 (**App 9**). Prior to this, he stated that he was not given any

warning letters. The case in court proceeded for 8 years (**App 10**) and he was acquitted under S. 210 of CPC. He then wrote a demand letter (**App 11**) to the respondents who replied in January 2011 (**Ap 12**). He also sought to bring the case against respondents out of time and was granted the same (**App 13**). It's claimant's case that he has suffered greatly since 2001 when he was dismissed and can't get another job and his family has suffered immensely.

He now seeks for compensation and payment of his salary from the time he was dismissed to time case ended and also his costs. He also prays for damages for loss of earning. In cross-examination, the claimant told court that he did not wish to be reinstated. He also told court that he was a pensionable employee.

The respondents on the other hand filed their defence on 13.9.2012 through the firm of George Masese Advocate. It is the respondents defence that the claimant was properly dismissed from service on account of theft by servant. The respondent denies malice on their part. It is further the respondents case that the claimant breached his contractual duties and failed to keep proper books of account. That further, the claimant failed to confirm to the staff rules and regulations and even committed a criminal offence to the detriment of his employers. They deny that the claimant is entitled to payment of general damages and ask court not to grant prayers sought.

The respondents also called one witness one Allan Ruto. He told court that he knew the claimant herein who was an accountant with the respondent company. Then, Allan was Human Resource Director and he told court that they had a disciplinary meeting for claimant who admitted to the witness that he committed the offence. Allan was then advised to dismiss him and he gave him a dismissal letter. In cross-examination the witness told court that he took disciplinary action against the claimant. He also told court that the Chief Accountant informed him of the loss and showed him documents in respect of the same. The said documents were however not produced in court. The minutes of the meeting – disciplinary committee meeting were also not produced as exhibit. He told court that claimant was never issued with a warning letter. He admitted that the claimant was served with a dismissal letter when he was in the cells.

The parties herein also filed their respective submissions. After considering the evidence tendered plus the respective submissions, the issues for determination are as follows:-

1. **Whether there were proper reasons to warrant claimant's dismissal.**
2. **Whether the correct procedures were followed in dismissing the claimant.**
3. **Whether the claimant is entitled to prayers he has sought.**

On the 1st issue, it is apparent from the claimants letter of appointment that, the claimant was employed as an accountant reporting to the Chief Accountant at a basic salary of Ksh 15,000 per month. He was also expected to join the company's Retirement Benefits Scheme at the end of the probationary period. He was confirmed in employment on 6th February 1997. He was further issued with a memo detailing his job description which forms part of his employment obligations. He was however demoted vide another memo which does not talk of demotion but relagates his position to Account Assistant.

His dismissal letter is dated 18.10.2001 and it states that his dismissal is because he admitted to have committed an offence of theft by servant. The admission however is not exhibited before court. Under S. 43 of Employment Act.

**“43(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.”**

The reasons for dismissal of an employee must be given to the employee and, must be real reasons which employer genuinely believed to exist. In the case of the claimant, the reasons of the theft by servant which even led claimant to be charged should be tangible. No investigation report or findings of any investigation to warrant this dismissal were put to claimant. He was indeed charged with the same charges but acquitted under S. 210 of CPC as there were no witnesses against him in court. The reason that the respondents therefore relies on needed to be proved or laid before claimant and even in court. The claimant had alluded to other preceding difficulties between him and respondents which may have caused his dismissal and in absence of proof the reason(s) that otherwise caused the dismissal, I find that there were no proper reasons to warrant claimant's dismissal.

The 2nd issue, is on the procedure before dismissal. It is apparent that the claimant never received any warning letter and he was never accorded any hearing as envisaged under S. 41 of Employment Act 2007 which states as follows:-

**“(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 reasons 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 this 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 sub – section (1) make.”**

The omission to grant a hearing to the claimant before his termination infringes on his rights and is tantamount to unfair labour practice. It therefore follows that the purported summary dismissal of the claimant was unfair. Section 45 of Employment Act defines what unfair termination is and under S. 45(2) includes where:-

**“The employer fails to prove -**

**(a) that the reasons for the termination is valid;**

**(b) that the reason for the termination is a fair reason—**

**(i) related to the employee’s conduct, capacity or compatibility; or**

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

**(iii) that the employment was terminated in accordance with fair procedure.**

It is therefore the finding of this court that claimant, was unfairly terminated and I convert his dismissal to normal termination.

What remedies he is then entitled to? I find he is entitled to the following remedies which I grant:-

- 1. 1 month salary in lieu of notice - Ksh 62,400/=**
- 2. 12 months salary as damage for unlawful termination - 62,400 X 12 = Ksh 748,800**

**plus interest at court rate less statutory deduction.**

- 3. He should be issued with a certificate of service.**
- 4. Respondents will pay costs of this suit.**

**HELLEN WASILWA**

**JUDGE**

**26/6/2014**

**Appearances:-**

Omboto for claimant present

N/A respondents

CC. Wamache