



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

**CAUSE NO 1802 OF 2013**

**SAMUEL SAWERE ANDALO ..... CLAIMANT**

**VERSUS**

**STAR ELECTRONICS LIMITED ..... RESPONDENT**

**JUDGEMENT**

Onesmus Githinji & Co Advocates for the Claimant

Onindo Onindo & Associates Advocates for the Respondent

1. The claimant Samuel Sawere Andalo filed his claim against the respondent for wrongful dismissal. The respondent filed their defence the respondent deny the claimant and note that the claimant absconded duty and hence the summary dismissal.
2. In the memorandum of claim, the claimant states that he was employed by the respondent as a Technician for over 4 years and based at Westlands in Nairobi but on 7<sup>th</sup> September 2013 he got an emergency call from his village of Kakamega informing him that his mother was critical sick which forced him to travel there. The claimant informed Brenda Moraa and Wendy Akinyi both employees of the respondent. He reported back on 9<sup>th</sup> September and was summoned by the respondent Director to explain his whereabouts for two days and was asked to apologise and he proceeded with his duties. On 23<sup>rd</sup> and 25<sup>th</sup> September the claimant was told to do his apology in writing and continued to report on duty but he was not allocated any work and or duties. On 1<sup>st</sup> October 2013 the claimant asked the respondent as to why he was not being allocated any duties and also asked for his November salary that had not been paid and the respondent replied and asked the claimant to put in an apology or face summary dismissal for disobedience and on 9<sup>th</sup> October 2013 the claimant was served with a letter of summary dismissal without notice or hearing of payment of his 15 days of leave and November salary.
3. The claimant is seeking payment of his terminal dues which include months' notice pay, severance pay for the 4 years he served and damages for wrongful dismissal. He is also seeking costs of the suit.
4. In evidence the claimant in support of his claim testified that he was employed by the respondent on 7<sup>th</sup> January 2010 and earned Kshs.22, 000.00 per month and was issued with a contract. On 7<sup>th</sup> September 2013 at 8.45 a.m. as he left his house for work he was called at home by his neighbour in Nairobi that his son had fainted and was forced to go back and take him to hospital in Kawangware Stage two. The son was attended to by a Doctor; he took the child home and went to work. He had left his phone at home and when he got it there were many calls from Wendy and Brenda and the claimant called back informing them that his child was sick and had just left the hospital. The director of the respondent also called and the claimant told him that he had already spoken to Wendy and Brenda about his absence from duty as

11.45a.m. The Director called him later and told him that he had been terminated and he was to go back after a month to collect his terminal dues.

5. The claimant also gave evidence that he decided to go to the office to demand that he be issued with a termination letter but the director told him to write an apology and then proceeded to work at a site on Ngong Road. He also applied for annual leave. He had only taken 5 days when he stayed at home waiting for election results after the National elections in March 2013. He wrote the apology and returned to work and before the annual leave could be approved the director told him to outline the pending work. The claimant needed one month to complete the pending project work and was not allowed to go on leave until he did an apology. He continued to report to work but no duties were allocated to him and when he asked the director he was told that the respondent was calculating his terminal dues and was told to resume on 17<sup>th</sup> September 2013 and the claimant decided to leave for home to see his sick mother.

6. On 23<sup>rd</sup> September the claimant reported to work and did another apology noting that his child had been sick and until 1<sup>st</sup> October, the claimant did report to work but no work was allocated to him. On 18<sup>th</sup> October the claimant was called and issued with a termination letter dated 9<sup>th</sup> October 2013. The summary dismissal was based on the reason that the claimant had been disobedient. He was to hand over all the property of the respondent before he could be paid any terminal dues. The claimant had 15 days of leave out of which he was absent for 5 days as he waited for election results and the remaining 6 were not paid for. He did not abscond duty as he had been away attending to a sick child and had called a fellow work mate about the reason he was away.

7. Upon cross-examination, the claimant confirmed that the respondent is involved in the business of networking and hardware for DSTV and CCTV and at the material time there was an ongoing project along Ngong Road and the claimant was in-charge of the site for cabling, data and voice for TV and other installations. There were pending 17 units to be attended to and depending on the urgency of each project, the claimant was required to attend to the project to meet contractual obligations for the client. On 7<sup>th</sup> September 2013 the claimant had an emergency with a sick child, the wife was away and had to take the child to hospital and later bought medicines after the doctor gave a prescription for malaria but these materials were not submitted to the respondent. In the claim the claimant stated that he was absent from work as the mother was unwell but this was not true, the mother became sick on 18<sup>th</sup> to 22<sup>nd</sup> September 2013 forcing the claimant to travel to Kakamega. The claimant was not able to give documents to support the assertion that the mother had been sick and admitted to hospital.

8. The claimant also stated that his supervisor was the director and not Wendy or Brenda as only the director understood the kind of work he was undertaking. When he needed to be absent it was the director who had to be informed. In this case he did not inform the director but called Wendy and Brenda.

9. In defence, the respondent stated that the claimant was their employee and was a habitual absentee as he was two previous warnings for being absent without informing the respondent or seeking prior authorisation and permission. When the claimant was absent on 7<sup>th</sup> September he gave different reasons as to why he was absent. The claimant had initially lied that he had proceeded to the project site but later admitted that he was absent, he did not write any apology and Brenda and Wendy are not the claimant supervisors to give him permission to be absent and as a result he was not allocated any work after he failed to turn up for work. The claimant was given notice to put an apology in writing failure to which he was to be dismissed. He was to do so by 4<sup>th</sup> October 2013 and upon failure to do so; on 9<sup>th</sup> October the respondent was forced to take action of summary dismissal against the claimant. There was no leave due as the claimant only worked for 7 days in September 2013 and was paid for the full month. The claimant cannot claim for November salary as he was not at work in November 2013. There is no severance pay that is due to the claimant or compensation as there was no wrongful dismissal.

10. In evidence the respondent called Benjamin Ndambuki as their witness who stated that he is the Human Resource officer of the respondent. That the respondent is involved in networking data for CCTV and DSTV for different clients. On 7<sup>th</sup> September 2013, the claimant was to report to a project site in Riverside Ngong as he was responsible for 7 other persons working on the project. The claimant was to

report at 9a.m at the office or go directly to the site but he never reported. The director called the witness to find out where the claimant was, the director tried calling the claimant as well as the witness, Wendy and Brenda also tried to call but none got a response. The next day the claimant said he had a sick child but had not communicated to anyone. He was told to apologise and given details as to why he was absent which he failed to do and the apology given was not accepted as it had no details. Details of the sick child were not attached as proof. The claimant was supervised by the director and never communicated with him about his sick child to enable him make alternative arrangements for pending work.

11. That the respondent has leave application forms but the claimant refused to use them to seek permission to be absent. He never stated that his mother was sick at any time or attach any details. When the claimant failed to given any details as to why he was absent, he was paid his September salary and dismissed. The respondent needed the claimant's service but could not keep as he kept absconding without good reason.

12. Upon cross-examination the witness stated that the claimant was terminated for three (3) reasons;

The claimant lied to the director of the respondent that he had been on duty on 7<sup>th</sup> September 2013 when he was not;

The claimant lied to the two of the respondent's employees of the reasons he was absent; and

The claimant lied to the respondent that he had a sick child and his mother but failed to give details.

13. The claimant was asked to give an apology and details; which was very lenient but he refused to give such details and did not make any efforts as a senior employee. That the claimant lied to management and failed to tell the truth even when he was given a chance to do so. Even when Brenda and Wendy sent text messages to the claimant seeking to know his whereabouts, he still failed to tell the truth to enable the respondent organise its work force and be able to attend to ongoing projects that remained incomplete. The respondent had a set procedure on how staff were to apply for annual leave that the claimant refused to use.

14. That the claimant was given verbal warning but the record was never kept.

15. The respondent admits that the claimant was summarily dismissed for absenteeism, dishonesty and failure to give proper account of his absenteeism and dishonesty. Even when the claimant was given time to put in an apology with details and attaching records that would have exonerated him, he still failed to attend further exacerbating the situation and leading to his summary dismissal. Section 44 (4) of the Employment Act has laid out clearly the matters which if Committed by an employee would attract summary dismissal. Of relevance to the issue at hand is Section 44(4) (a) and (e) which provides that an employee may be dismissed summarily if:

*Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.*

16. Under section 44(4)(e);

*an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*

17. However, before invoking the provisions of Section 44(4) of the Employment Act, an Employer is under a statutory obligation pursuant to Section 41(2) to give an Audience to the employee who is subject to the dismissal so that the employee can Make representations and which representations the employer should consider before making a decision to dismiss the employee. These are the tenets of fair procedures in fair labour practices regime now articulated under the Employment Act and enshrined under Article 41 of the Constitution.

18. Before any termination or dismissal notice and hearing are a prerequisite. Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct.

19. In this case, the claimant being aware of his work responsibilities went ahead and absented himself from work without good cause, lied to his employer about his whereabouts as evidenced by his statement of claim where he states that on 7<sup>th</sup> September he got a call to attend to his sick mother while in evidence he changed this and stated that on 7<sup>th</sup> September he was called to attend to his sick child and since he had left his phone at home, he failed to respond to several calls from the respondent officers and when he was asked to explain his whereabouts still went on and failed to be honest about his whereabouts. However despite these very serious allegations facing the claimant, the duty rested on the respondent to follow what is outlined under section 41(2) of the Employment Act. This court was not afforded such material and Mr Ndambuki confirmed that there was no record of the various warning issued to the claimant nor was there a documented notice or hearing of the claimant's defence however weak it may have been. This is found as unfair labour practice.

20. On the claimants, the claimant stated that when he continued to report to work in September and was not allocated any work he left for home and was paid for September but goes on to claim for November salary. Where the claimant was justified to be paid for September 2013, he did not work in November 2013 and should not receive any pay as demanded. This will be declined. Notice pay is however due as there is no record of any termination notice. This will be one month pay. The claimant earned 22,000.00 per month and will be awarded this amount.

21. The claimant said that he was owed 15 days of leave. Out of these days, he said that he was away in March 2013 for 5 days while he waited for election results and for 3 days when he travelled to see his ailing mother in Kakamega and the 7<sup>th</sup> September 2013 when he was absent without notice or permission all being 9 days. This will be deducted from the totals leave days earned and the remainder is 6 day amounting to Kshs.4, 400.00 and this amount will be granted.

22. On the finding that there was unfair termination, compensation is due. This will be granted at one month's salary amounting to Kshs.22, 000.00.

**Judgement is hereby entered for the claimant against the respondent in the following terms;**

- a. **The claimant was unfairly terminated**
- b. **Compensation awarded at one month's salary at Kshs.22, 000.00;**
- c. **Notice pay at Kshs.22, 000.00; and**
- d. **Leave pay at Kshs.4, 400.00.**
- e. **Each party to bear their own costs.**

Delivered in open Court at Nairobi and dated this 4th Day of June 2014

**Mbaru**

**JUDGE**

In the presence of

Court Assistant: Lilian Njenga

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