



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

**CAUSE NO. 22 OF 2014**

(Before Hon. Justice Hellen Wasilwa on 23<sup>rd</sup> July, 2014)

EVANS OWUOR ..... CLAIMANT

**-VERSUS-**

EQUATOR BOTTLERS LTD ..... RESPONDENTS

**JUDGMENT**

The claimant herein Evans Owuor filed his memo of claim dated 11.2.2014 on the same date through the firm of M. M. Omondi & Co. Advocates.

The claim of the claimant is that in 1988, he was employed by the respondents and served respondents with loyalty until 10.6.2013 when the respondents purported to dismiss him summarily without any justifiable cause as per **App 1**.

Apparently, the claimant had resigned from respondents employment on 5.5.2013 on personal reasons which resignation the respondents declined to accept vide a letter dated 6.5.2013.

On 20.5.2013, the respondents now served the claimant with a show cause letter stating that he had been altering and inflating figures on the fuel sheet. The claimant avers that at the time he was served with the show cause letter, he had ceased to be an employee of the respondents having resigned on 5.5.2013 and even wrote a letter to respondents dated 21.5.2013 maintaining that he ceased to be an employee of respondents on 5.5.2013.

The claimant reported the dispute to the Minister for Labour. A conciliator was appointed and he advised respondents to pay the claimant his dues. The respondents declined to pay as advised. At the time of resigning from respondents employment, claimant was earning Ksh 19,934.03 per month and he seeks to be paid his dues amounting to Ksh 531,574.13 less 1 month salary in lieu of notice.

It is further the claimant's case that in purporting to terminate his employment summarily the respondents never followed procedure laid down in S. 41 of Employment Act and further that they failed to give him valid reason for termination as envisaged under S. 45(2)(4-b) of Employment Act 2007.

The respondents filed their memo of defence on 18.3.2014 through the Federation of Kenya Employers. It is the respondent's case that the claimant was their employee with effect from 15.3.1988 and on 3.5.2013, he was transferred to another section to allow for investigation into his possible role in misappropriation of fuel allocation to motor vehicles by altering records. On 5.5.2013, the claimant tendered a resignation letter citing personal reasons. The resignation was rejected by the respondents who now served him with a show cause letter and further invited him for disciplinary hearing for which he

failed to attend. He was then summarily dismissed. It is the respondent's position that he was rightfully terminated under S.44(4)(c) of Employment Act for neglecting to perform his work and that they followed the right procedure in terminating him.

Upon hearing the evidence of both parties and upon considering their submissions, the issues for determination are:-

1. **Whether the decision by the respondents to reject claimant's resignation was justified.**
2. **Whether the decision of the respondents to submit claimant to disciplinary process after his resignation was justified.**
3. **Whether the claimant is entitled to prayers sought.**

On issue of resignation, the claimant wrote to the respondents on 5.5.2013 resigning from work. The respondents rejected this resignation stating that they wanted him to answer to certain issues. It is important to note that an employment contract is a social contract. It is governed by provisions of the Employment Act and Article 41 of the Constitution. Both have recognize that the contract can only be terminated using certain parameters of law including due process. Article 41 of the Constitution deals with rights in an employment relationship. The right include right to fair labour practices.

Article 36(2) of the Constitution states that “**A person shall not be compelled to join an association of any kind.**” To compel the claimant to remain an employee of the respondents after resigning is tantamount to compelling him to remain in the respondents association which is an infringement of his right as spelt out under Article 36(2) of the Constitution. I therefore find that the decision the respondents took to reject claimant's resignation is not justified. It therefore follows that by the time the respondents were subjecting the claimant to a disciplinary process writing show cause letters to him, he was no longer in their employment and therefore all action taken was null and void and I declare it so.

On last issue, I find that the claimant resigned from the respondents employment for his own reasons. All he needed to do was to give ample notice which he didn't. He is therefore only entitle to payment of his terminal dues less one month's salary which he should pay the respondents.

I therefore find for him and order that the respondents pay him his gratuity based on his salary as;

$$\underline{32 \text{ days} \times 19,038 \times 25 \text{ years}} = 507,680$$

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$$\text{Less 1 month salary} = 19,038$$

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$$\text{TOTAL} = 488,562$$

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All these is subject to tax deductions. The respondents will also pay costs of this case.

**HELLEN WASILWA**

**JUDGE**

**23/7/2014**

**Appearances:-**

Aketch h/b Omondi for claimant present

Respondents absent

CC. Wamache