



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

**CAUSE NO. 1245 OF 2010**

**MAURICE OUMA OMOLLO.....CLAIMANT**

**VS**

**GOTHIC INVESTMENTS LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. This matter has traveled a long journey having been filed on 11<sup>th</sup> October 2010 and the Claimant heard *ex parte* on 1<sup>st</sup> October 2012. When the matter came up for mention on 25<sup>th</sup> October 2012 for the purpose of confirming filing of the Claimant's final submissions, the Respondent had filed an application for stay of proceedings to allow them to participate in the trial.
2. The Respondent's application was eventually allowed by consent of the parties subject to the Respondent paying to the Claimant the sum of Kshs. 8,000 in thrown away costs. On 22<sup>nd</sup> January 2013, the firm of Njugi & Company Advocates ceased acting for the Respondent. Following several court appearances at which the Respondent failed to attend, this Court directed the Claimant to file his final submissions.

**The Claimant's Case**

3. According to the Claimant, he worked for the Respondent on two separate occasions; first between July 2004 and January 2006 and secondly beginning 16<sup>th</sup> September 2009 when he was issued with a formal contract of employment (Appendix 1 of the Claimant's documents). The Claimant worked in the position of Supervisor at a net consolidated monthly salary of Kshs. 30,000. He was subsequently confirmed in his appointment by the Respondent's letter dated 23<sup>rd</sup> November 2009 in which letter the Respondent commended the Claimant's performance (Appendix 2 of the Claimant's documents).
4. Upon confirmation, the Claimant's salary was raised to Kshs. 40,000 per month. In addition the Claimant was to be paid 1% commission on total wine sales whenever the sales exceeded Kshs. 2,000,000 per month. The Claimant was also entitled to a travel allowance of Kshs. 500 when on night duty.
5. The Claimant stated that on 6<sup>th</sup> August 2010, the Respondent terminated his services without notice allegedly because two bottles of wine had gone missing on 5<sup>th</sup> August 2010. The Claimant further told the Court that he had on the same date gone to see his Director to inquire about his outstanding salary balance for the month of July 2010 as well as earned incentive payment.

6. The Claimant averred that he received the termination letter on 4<sup>th</sup> October 2010 although he had left employment on 6<sup>th</sup> August 2010. He added that prior to the termination of his employment he had not been issued with any warning letter. The Claimant further stated that at the time of termination of his employment, he was earning a monthly salary of Kshs. 60,000.

7. The Claimant's claims the following:

- a) A declaration that his employment with the Respondent was terminated wrongfully and/or unfairly
- b) Unpaid salary balance for the month of July 2010....Kshs. 25,000
- c) Unpaid salary for the month of August 2010 .....Kshs. 60,000
- d) One month's salary in lieu of notice.....Kshs.60,000
- e) Unpaid leave days (28 days x 1.75 days wages).....Kshs. 98,000
- f) Damages equivalent to 12 months' salary.....Kshs. 720,000
- g) Reinstatement to his former position without loss of benefits and/or seniority
- h) Costs of the suit
- i) Any other relief that the Court may deem fit and just to grant

#### **The Respondent's Case**

8. In its reply filed on 13<sup>th</sup> July 2011, the Respondent states that “*the Claimant's dismissal was as a result of habitual theft by him, of exotic wine bottles at the Respondent's premises, and the irregular and illegal sale thereof to the Respondent's peril.*”

#### **Findings and Determination**

9. The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment was substantively and procedurally fair;
- b. Whether the Claimant is entitled to the reliefs sought.

#### **Termination of Employment**

10. Section 43 (1) of the Employment Act, 2007 provides that:

***(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***

11. Section 45 (2) of the Act provides that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason 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*

*(c) That the employment was terminated in accordance with fair procedure*

12. According to the Respondent's reply, the termination of the Claimant's employment was as a result of habitual theft by the Claimant, of exotic wine bottles. The letter of termination (Appendix 3 in the Claimant's documents) states that theft of two wine bottles had been reported on 5<sup>th</sup> August 2010 and that the evidence had proved that the Claimant was involved in the theft.

13. These are serious allegations of a criminal nature. A reasonable man would therefore have expected that the Claimant would have been given an opportunity to defend himself against the said allegations. Since this was not done, the allegations were not proved.

14. Section 41 of the Employment Act, 2007 provides that:

***(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 reason 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 the 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 subsection (1) make***

15. From the evidence on record, the Claimant was not heard prior to termination of his employment. I therefore find that the termination of his employment was unfair within the meaning of Section 45 of the Employment Act, 2007.

**Reliefs**

16. Having found the termination of the Claimant's employment unfair, I now turn to the reliefs sought. The Claimant prayed for reinstatement to his former position without loss of benefits and/or seniority.

17. Reinstatement is one of the remedies uniquely available to the Industrial Court by dint of Sections 49 and 50 of the Employment Act, 2007. However, Section 49(4)(d) of the Act enjoins the Court to take into account:

***(d) the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.***

18. In this respect, I am persuaded by the decision in *Muleya Vs. COMESA and Another [2003] 2 EA 623* where the Court held that:

***“the general rule that damages are the generally accepted remedy for redressing breaches of contracts of service is too established to be overthrown by side wind.”***

19. I have considered this case against this general principle and have come to the conclusion that an order for specific performance is not merited. I therefore decline to grant the prayer for reinstatement.

20. Before determining the level of compensatory damages payable to the Claimant, I need to resolve the issue of the exact salary payable to him as at the time of his leaving employment. The Claimant stated that at the time he left employment, he was earning a monthly salary of Kshs. 60,000.

21. He however did not adduce any evidence to show how his salary had moved from Kshs. 40,000 as

at 23<sup>rd</sup> November 2009 to Kshs 60,000 as at the time of his leaving employment. I have therefore adopted the figure of Kshs. 40,000 as the Claimant's last monthly salary and award him the equivalent of 6 months salary as compensation for unfair termination. I also award him 1 month's salary in lieu of notice. The Respondent did not provide leave records to prove that the Claimant had taken his leave. I therefore award him leave pay for 10 completed months of employment.

22. The Claimant claimed Kshs. 25,000 being unpaid salary balance for the month of July 2010 and Kshs. 60,000 being unpaid salary for the month of August 2010. In paragraph 11 of the Statement of Claim as well as in his sworn evidence, the Claimant stated that his employment was terminated on 6<sup>th</sup> August 2010 which was the same date on the termination letter. He could therefore not have been on duty beyond 6<sup>th</sup> August 2010. I therefore award him salary for 6 days in August 2010. The claim for Kshs. 25,000 salary balance for July 2010 was not proved and is dismissed.

23. Ultimately, I make an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation for  
unfair termination.....Kshs. 240,000
- b) One month's salary in lieu if notice.....Kshs. 40,000
- c) Leave pay (40,000/30x1.75x10).....Kshs. 23,333
- Total.....Kshs. 303,333**

24. I award the costs of this case to the Claimant and order the Respondent to issue him with a Certificate of Service. The award amount will attract interest at court rates from the date hereof until payment in full.

Orders accordingly

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimant

No appearance for the Respondent