



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

**CAUSE NO 2534 OF 2012**

**BOTTOMLEY MUSAMALI JUMBA.....CLAIMANT**

**VS**

**DEFENCE FORCES CANTEEN ORGANIZATION.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant, Bottomley Musamali Jumba was an employee of Defence Forces Canteen Organization, the Respondent herein for a considerably long period of time spanning between 1991 and 2012. The Claimant's employment was terminated on 8<sup>th</sup> August 2012 on allegations of negligence of duty. He therefore brought a claim by way of Memorandum of Claim dated 19<sup>th</sup> December 2012 and filed in Court on even date.
2. The Respondent filed a Reply and Counterclaim on 10<sup>th</sup> March 2013 and the matter was heard on 10<sup>th</sup> February and 7<sup>th</sup> April 2014. The Claimant testified on his own behalf while Clatus Hedson Wesinikha Lyambila and Patrick Mureithi Ngare testified for the Respondent.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 26<sup>th</sup> August 1991 in the position of Accounts Clerk. He rose through the ranks to the position of Manager to which he was appointed in 2005. His monthly salary at the time he left the Respondent's employment was Kshs. 46,747.
4. On 14<sup>th</sup> May 2012, the Claimant was suspended without pay on grounds that there were pending investigations relating to purchase of goods made over a weekend. The Claimant contends that in suspending him, the Respondent contravened its own terms and conditions of service which prohibit suspension for a period exceeding thirty (30) days.
5. On 28<sup>th</sup> June 2012, the Respondent framed charges against the Claimant and upon hearing the Claimant's case on 17<sup>th</sup> July 2012, the Respondent's Disciplinary Board recommended further investigations.
6. Notwithstanding the decision of the Disciplinary Board, the Respondent's Chief Personnel and Administration Officer, acting for the Managing Director went ahead to dismiss the Claimant on 8<sup>th</sup> August 2012. The Claimant's dismissal was backdated to 15<sup>th</sup> May 2012.

7. It is the Claimant's case that he was not afforded a hearing nor an explanation for his dismissal which came well after investigations and the decision of the Board. The Respondent did not respond to the Claimant's appeal.

8. The Claimant therefore claims the following:

- a. A declaration that his dismissal was unlawful and unfair
- b. One month's salary in lieu of notice.....Kshs. 46,747
- c. Salary for the months of May, June and July 2012.....Kshs. 140,241
- d. Salary for 8 days worked in August 2012.....Kshs. 12,465
- e. Pay in lieu of leave for 2010, 2011 and 2012.....Kshs. 140,241
- f. 12 months' salary in compensation for unfair termination.....Kshs. 560,364
- g. Costs plus interest

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

9. In its Reply and Counterclaim filed on 1<sup>st</sup> March 2013, the Respondent admits having employed the Claimant on 26<sup>th</sup> August 1991. The Respondent however contends that the Claimant was lawfully suspended and subsequently dismissed in accordance with his terms and conditions of employment.

10. The Respondent's first witness, Clatus Hedson Wesinikha Lyambila testified that the Claimant was suspended on 14<sup>th</sup> May 2012 and upon completion of investigations, he was invited to appear before the Disciplinary Board on 27<sup>th</sup> June 2012. It is the Respondent's case that its Disciplinary Board found the Claimant guilty of negligence in the performance of his duties leading to loss of goods worth Kshs. 4,109,975.78 which the Respondent claims in its Counterclaim.

### **Findings and Determination**

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

- a. Whether the Claimant's suspension was lawful;
- b. Whether the Claimant's dismissal was justifiable and fair;
- c. Whether the Claimant is entitled to the reliefs sought;
- d. Whether the Respondent has proved its Counterclaim against the Claimant.

### **The Claimant's Suspension**

12. The Claimant was suspended by letter dated 14<sup>th</sup> May 2012 which states *inter alia*:

***“This is to inform you that you have been suspended from duty without pay with effect from 15th May 2012 pending investigations on the allegations of purchases made over the weekend at AFCO/RNO 001'S between January and April 2012, while stationed at AFCO R/NO 001'S as a Manager.*”**

**CEW LYAMBILA**

***Chief Personnel/Admin Officer***

***For: Managing Director”***

13. The Claimant told the Court that he stayed on suspension without pay for a period of three months contrary to Clause 51(b) of the Respondent's Terms and Conditions of Service which

provides as follows:

***“b. No suspension shall exceed thirty (30) consecutive days except where investigations are still being handled by the Police or the case is pending before a court of law.”***

14. It is not in dispute that the Claimant's case was neither handled by the Police nor was it referred to a court of law. Lyambila admitted in cross examination that the Claimant's suspension was in contravention of Clause 51(b) of the Respondent's Terms and Conditions of Service. This Court therefore finds that the Claimant's suspension was irregular since in effecting it the Respondent flouted its own Terms and Conditions of Service.

### **The Claimant's Dismissal**

15. The procedure for handling employee disciplinary cases is found in Section 41 of the Employment Act, 2007 which requires the following:

(a) The employer to explain to the employee in a language the employee understands the reasons why termination is being considered;

b) The employer to allow a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) The employer to hear and consider any explanations by the employee or their representative;

16. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

17. While on suspension, the Claimant was invited to appear before the Respondent's Disciplinary Board on 27<sup>th</sup> June 2012. The Respondent's second witness, Patrick Mureithi Ngare told the Court that he served the Claimant with the charge sheet on the same day he was to appear before the Disciplinary Board.

18. According to the charge sheet, the Claimant faced seven (7) counts ranging from performing duty negligently to conduct to the prejudice of good order and discipline. Ngare testified that the Claimant did not complain of the short notice given to him.

19. In the case of ***Rebecca Ann Maina and 2 Others Vs Jomo Kenyatta University of Agriculture and Technology[2014] eKLR*** this Court held that:

***“In order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”***

20. An employer who requires an employee to respond to seven charges on the same day the charges are served cannot be said to have afforded that employee the right to be heard as contemplated under Section 41 of the Employment Act and it matters not that the employee does not raise an objection or fails to ask for extension of time. I therefore find that the disciplinary proceedings held on 27<sup>th</sup> June 2012 did not meet the required procedural fairness standards set out in law.

21. At the culmination of the disciplinary proceedings, the Disciplinary Board made the following recommendations:

a) Full investigations to be conducted at R/No. 001's and especially on transactions involving move orders and inter organizational transfers in order to determine the loss incurred.

b) Total overhaul of members of staff at the said shop since some of them have been in the shop for too long and are the root causes of the problem there.

c) The accused to be demoted to JG. 8 due to the poor management skills he applied in R/No. 001's as a manager.

d) To be posted out.

22. The Respondent's Managing Director disagreed with the recommendations made by the Disciplinary Board making the following final remarks:

***“Mr. Musamali has failed the total integrity and leadership test and should not be retained in the organisation. His services are to be terminated with immediate effect.”***

23. Pursuant to this, the Claimant was summarily dismissed by letter dated 8<sup>th</sup> August 2012 stating in part:

***“In accordance with Terms and Conditions of Service as set out in the letter of appointment (Ref: DEFCO/Pers/1318 para 8 as read together with the Employment Act, 2007 section 44 para 4(c), it is regretted that your services are terminated with effect from 15th May 2012 for gross misconduct.***

**CEW LYAMBILA**

***For: Managing Director”***

24. The Respondent's Managing Director did not offer any explanation as to why he differed from the recommendations of the Disciplinary Board and as was held by **Radido J** in the case of ***Ismail Hassan Abdullahi Vs Kenya Ports Authority [2013] eKLR*** where an employer dismisses an employee contrary to the recommendations of its own disciplinary panel without any basis, then the dismissal cannot be said to be in accordance with justice and equity pursuant to Section 45(4)(b) of the Employment Act.

25. For the foregoing reasons, the Court finds that the termination of the Claimant's employment was unfair for want of due process.

## **Reliefs**

26. I will now deal with reliefs sought by the Claimant. In light of my finding that the Claimant's suspension was irregular, I award him full salary for the months of May, June and July 2012. Further, having found that his dismissal was unfair for want of due process, I award him twelve (12) months' salary in compensation. I also award him one (1) month's salary in lieu of notice.

27. The claim for salary for 8 days worked in August 2012 also succeeds and is allowed. Since the Respondent did not provide any leave records to counter the Claimant's claim for leave pay, I award the Claimant full leave pay for 2010 and 2011 as well as prorata leave pay for 2012.

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

a) Salary for May, June and July 2012.....Kshs. 140,241

- b) 12 months' salary in compensation for unfair termination.....Kshs. 560,964
  - c) One month's salary in lieu of notice.....Kshs. 46,747
  - d) Salary for 8 days worked in August 2012.....Kshs. 12,466
  - e) Leave pay (42 days for 2010 and 2011+12 days for 2012).....Kshs. 84,145
- Total.....Kshs. 844,563**

**Counterclaim**

29. The Respondent did not adduce any evidence to support its Counterclaim against the Claimant and it is therefore dismissed in its entirety.

**Costs and Interest**

30. The Respondent will pay the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**3<sup>RD</sup> DAY OF JULY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Makokha for the Claimant

Mr. Ocharo for the Respondent