



**REPUBLIC OF KENYA**

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

**(BIMA TOWERS)**

**CAUSE NO.127 OF 2013**

**(Originally Nairobi Cause No. 2024 of 2012)**

**JOSEPH D. BARAZA.....CLAIMANT**

**v**

**UNITED (EA) WAREHOUSE LIMITED.....RESPONDENT**

**JUDGMENT**

1. Joseph D. Baraza (Claimant) was employed by United (EA) Warehouse Limited (Respondent) on 18 January 2001 as an Accountant. In the course of time the Respondent reviewed the Claimant's remuneration upwards.
2. On 28 April 2012 the Respondent suspended the Claimant from duty without pay on account of negligence and unacceptable behaviour. On 2 July 2012 the Respondent wrote again to the Claimant to give him a warning because of his continued unbecoming behaviour and stating that he would be summarily dismissed if the behaviour persisted.
3. On 17 July 2012 the Respondent wrote to the Claimant to inform him that he had summarily been dismissed due to general performance and gross negligence of duty which had caused the Respondent heavy financial loss.
4. The Claimant was dissatisfied with the dismissal and on 7 August 2012 his legal advisors made a demand of the Respondent. On 23 August 2012 the Respondent's legal advisors wrote to the Claimant's Advocate on a without prejudice basis that it was ready to pay unpaid leave allowances, salary for May and June 2012, salary for 17 days in July 2012 and one month pay in lieu of notice totalling Kshs 411,668/-. The Claimant did not accept the offer and on 8 October 2012 a Statement of Claim was lodged in Court stating the nature of dispute as *compensation for wrongful summary dismissal*.
5. The Respondent filed its Memorandum of Response on 14 November 2012.
6. On 4 July 2013, the Claimant filed an Amended Statement of Claim after the Court granted it leave. The Claimant later sought and was granted leave to file a Further Amended Statement of Claim. The same was filed on 6 November 2013. Although the Respondent was granted corresponding leave to file an Amended Response if necessary, it did not.

**Claimant's case**

7. The Claimant pleaded that the Respondent wrongfully suspended him on 28 April 2012 over false and unfounded allegations and further gave him a warning on 2 July 2012 culminating in his unfair, unlawful and wrongful summary dismissal on 17 July 2012.
8. According to the Claimant, the dismissal was actuated by malice and that his certificate of service

- indicated he was an Accountant and not Senior Accountant because the downgrading jeopardised his prospects of future employment. The Claimant also pleaded the dismissal was without lawful cause and that the Respondent failed to pay his terminal dues.
9. The Claimant testified. On the reasons for the dismissal, the Claimant stated that he was suspended on 28 April 2012 on the allegation that he had not renewed an insurance cover for theft in respect of Respondent's godowns in Mwatate and Chagamwe. A theft of fertilizer had apparently occurred on 26 April 2012.
  10. According to the Claimant, he had already secured an insurance cover (no. 040/102/1/011114/2012/04) of Kshs 5,000,000/- for burglary and (no. 040/040/1/011113/2012/04) for fire.
  11. In the same breath, the Claimant stated that there was a delay in procuring the insurance covers because the godowns had been leased by the Respondent's Operations Manager and Business Development Manager and the lease documents which were necessary to get the covers were given to him only on 24 April 2012 by the Business Development Manager.
  12. In regard to the process followed before the dismissal, the Claimant testified that he was issued with suspension letter(s) and that he wrote a letter explaining the delays on 3 May 2012 but that after the letter of explanation he was not called to an oral hearing/disciplinary hearing.
  13. In cross examination, the Claimant stated that he had been tasked about a week before the theft to take the insurance covers and that the rent had not yet been paid in respect of the two new godowns because the lease(s) had not yet been signed.
  14. He confirmed that the fertilizer which was stolen was worth about Kshs 15,000,000/- and that at the time of the theft there was a cover note raised on 28 April 2012. He further stated that he was given the lease documents on 24 April 2012 and he raised cheques for the insurance premiums the same day.
  15. The Claimant denied that he apologized for his negligence in his letter of 3 May 2012 and further stated that the suspension letter was served upon him on 2 May 2012 though it was date 28 April 2012.
  16. The Claimant seeks a total of Kshs 2,629,271/50 made up of unpaid salaries for May, June and July 2012, unpaid leave allowances for 83 days, damages for wrongful dismissal, damages for unfair termination, one month salary in lieu of notice and severance pay.

### **Respondent's case**

17. The Respondent pleaded that the Claimant was dismissed for gross misconduct and neglect of duty for failing to take insurance covers for the Respondent's Chagamwe and Mwatate warehouses and thus exposing it to a loss after theft of fertiliser worth over Kshs 15,221,428/-. The dismissal, it was pleaded was not wrongful.
18. The Respondent further pleaded that the Claimant could not rely on without prejudice communication exchanged while attempting to settle the dispute out of Court.
19. The Respondent denied the Claimant was entitled to the reliefs sought and contended that it had offered to pay the Claimant Kshs 411,668/- in settlement of final dues.
20. The Respondent called its General Manager, Edward Asena to testify on its behalf.
21. The witness stated that the services of the Claimant were terminated because he had failed to pay for burglary and fire insurance policies on time despite a cheque being written a week before the theft of fertiliser worth Kshs 15,000,00/- owned by Mea Fertilisers Ltd on 26 April 2012.
22. Regarding the process leading to dismissal the witness stated that the Claimant had been served with a warning on 2 July 2012 and that he gave a written explanation before his dismissal. According to the witness, the Claimant admitted he was negligent, apologised and sought leniency.
23. The witness further stated that the Respondent was ready to pay the Claimant three months compensation in addition to unpaid salaries for May to July 2012 and unpaid leave allowance.
24. In cross examination, the witness stated that the Claimant was not issued with a show cause letter and was not called to a disciplinary hearing.

## **Issues for determination**

25. The dispute before Court is about unfair termination and therefore two key issues arise for determination. These are whether the summary dismissal was unfair and if the answer is positive, appropriate relief. The Court has considered the parties written submissions and the authorities cited therein.

## **Whether the summary dismissal was unfair**

### ***Procedural fairness***

26. The Claimant's letter of dismissal gave the grounds/reasons for the dismissal as general performance and gross negligence of duty causing the Respondent heavy financial loss.
27. Section 41 of the Employment Act, 2007 is therefore implicated. The section requires an employer to comply with certain procedural safeguards referred to as procedural fairness in employment law before taking the decision to terminate the services of an employee.
28. Under the section, an employer should inform the employee of the grounds/reasons it is considering to terminate the services of the employee and give the employee an opportunity to make any representations. If an oral hearing is held, the employee is entitled to bring along a fellow employee and if a member of a union, a shop floor union representative.
29. If the employer intends to summarily dismiss the employee, then it is under an obligation to hear and consider any explanations given by the employee.
30. In the case under consideration, the Claimant contested the process on the basis that he was not called to a disciplinary hearing. The emerging jurisprudence is that an oral hearing is not mandatory and that the process contemplated by section 41 of the Employment Act, 2007 could be conducted through correspondence.
31. The process herein was conducted through correspondence. The first issue therefore is whether the Claimant was informed of the charges he had to confront and that his termination was under consideration. The letter of 28 April 2012 suspending the Claimant made reference to a warning letter issued to the Claimant a week earlier. That letter was not produced in Court.
32. The suspension letter in its body informed the Claimant that the Respondent was concerned about his execution of duties particularly in regard to insurance policies for Mwatate and Changanwe warehouses. This letter did not inform the Claimant that his termination was under consideration.
33. The Respondent wrote another letter to the Claimant on 2 July 2012 raising concerns about his continued impudent behaviour. This letter made it clear that if the Claimant persisted in his behaviour, he would be dismissed.
34. On 3 July 2012 the Claimant wrote to the Respondent giving an explanation as to what had happened and defending himself.
35. An employee should be informed in clear and unambiguous language that the termination of services is under consideration and the reasons given and his response sought.
36. From the content of the correspondence exchanged between the parties, the Court is satisfied that the Respondent was substantially in compliance with the procedural fairness requirements of section 41 of the Employment Act, 2007.

### ***Substantive fairness***

37. Sections 43, 45 and 47 of the Employment Act, 2007 have created an onerous duty upon employers. It is the statutory duty of an employer to prove the reasons for terminating the services of an employee and that those reasons are valid and fair. This is unlike the normal legal principle that he who asserts must prove.
38. The summary dismissal letter made reference to general performance and gross negligence of duty. Evidence before Court is that the Claimant had failed to renew or take insurance cover for two godowns leased by the Respondent. A theft occurred in one of the godowns of fertiliser worth Kshs 15,000,000/-.
39. The Claimant in cross examination admitted that he had been instructed about a week before the theft to get insurance covers for the two warehouses. He further stated that the two warehouses

- were new and leases had not yet been signed though he had been given the leases on 24 April 2012 and raised cheques to pay insurance premiums on the same day but the cover notes were given on 28 April 2012. He gave the policy numbers in Court.
40. For the Respondent, it was testified that the cheque for the premiums was found lying in the Claimant's desk after the theft and there was no insurance policy in place for the two warehouses.
41. It is the responsibility of an employer to prove the reasons for termination, and that the reasons are valid and fair. In the instant case, the Claimant testified he had secured cover notes. Although the parties did not disclose the purpose of a cover note, it usually precedes the detailed insurance policy. The Claimant further gave the policy numbers.
42. The Respondent had custody of the cover notes and policy documents. It also must have had precise information as to when the cover notes/policies were paid for and took effect. This should have been disclosed to Court but was not.
43. Both parties were not forthcoming with pertinent information and evidence as to exactly what happened at the material time but based on the statutory burden placed upon an employer, the Court reaches the conclusion that the Respondent has failed in Court to prove the reasons for termination and that the reasons were valid and fair. The summary dismissal of the Claimant was therefore substantively unfair.

### **Appropriate relief**

#### ***Unpaid salary for May to July 2012***

44. The Claimant sought a sum of Kshs 188,330/- on account of salaries for the above mentioned period. The Claimant was on suspension during the period. The Respondent admitted the head of claim and the Court would award the Claimant the sum of Kshs 188,330/-.

#### ***Unpaid leave allowance for 83 days***

45. The Claimant sought Kshs 203,004/- on account of leave allowance. This head of claim was also admitted by the Respondent and the Claimant is awarded Kshs 203,004/- under this head.

#### ***Damages for wrongful dismissal***

46. The Claimant sought Kshs 880,500/- equivalent to 12 months' gross wages as damages for wrongful dismissal. This relief is declined because of the reasons stated in the next paragraph.

#### ***Damages for unfair termination***

47. Under this head, the Claimant sought the maximum of twelve months gross wages computed as Kshs 880,500/-. The Respondent's witness testified in court that it had offered to pay the equivalent of three months gross wages.
48. Pursuant to section 49(1)(c) of the Employment Act, 2007, compensation equivalent to not more than 12 months gross wages is one of the primary remedies where the Court finds a termination unfair.
49. The remedy is discretionary and the Court is enjoined to consider any, some or all of the thirteen factors outlined in section 49(4) of the Employment Act, 2007. Although the Claimant did not lead any direct evidence on which of the factors the Court ought to consider, the evidence before Court is that the Claimant served the Respondent for some 12 years.
50. The Claimant's chances as an Accountant to secure alternative employment are above average though he did not mention whether he had secured alternative employment. Further, in the view of the Court, it would not be practicable to order reinstatement and the Claimant did not seek reinstatement in any case.
51. Considering the stated factors, the Court would award the Claimant the equivalent of three months compensation assessed at Kshs 220,125/-.

#### ***One month salary in lieu of Notice***

52.The Court has reached the conclusion the dismissal was unfair. Pursuant to sections 35,36 and 49(1) of the Employment Act, 2007 the Claimant is entitled to one month pay in lieu of notice which is assessed at Kshs 75,375/-.

### ***Severance pay***

53.In the written submissions, the Claimant indicated that he was abandoning this head of claim. This head of claim applies in cases of redundancy and the Claimant did not suggest he was declared redundant.

### ***Certificate of Service***

54.The Claimant was issued with a certificate of service showing his position at separation as Accountant. But he seeks a certificate of service indicating he was a Senior Accountant. No evidence was produced in Court to show that the Claimant had been designated as Senior Accountant. This relief is declined.

### **Conclusion and Orders**

55.From the foregoing, the Court finds and holds that the summary dismissal of the Claimant was substantively unfair and awards him and orders the Respondent to pay him

a. Salary for May to July 2012	Kshs 188,330/-
b. Unpaid leave allowances	Kshs 203,004/-
c. 3 months compensation for unfair termination	Kshs 220,125/-
d. One month salary in lieu of Notice	Kshs 75,375/-

TOTAL **Kshs 686,834/-**

56.The claim for damages for wrongful dismissal and certificate of service are dismissed.

57.The Claimant to have costs of the Cause.

**Delivered, dated and signed in open court in Mombasa on this 29<sup>th</sup> day of August 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mrs. Nyange, instructed by Sherman Nyongesa & Co. Advocates

For Respondent Mr. Wafula instructed by Cootow & Associates, Advocates