



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 384 OF 2012**

**BETWEEN**

**WILSON RUGWIRI MWANGALE .....CLAIMANT**

**VERSUS**

**UNIGHIR LIMITED ..... RESPONDENT**

*Rika J*

**CCs. Elizabeth Anyango and Edward Kidemi**

***Mr. Mwang'ombe instructed by Mwakio, Kirwa & Company Advocates for the Claimant***

***Mr. Kimathi instructed by LJA Associates, Advocates for the Respondent***

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. This Claim was initiated by way of a Statement of Claim filed by the Claimant on 9<sup>th</sup> March 2012. He states he was employed by the Respondent Company as a Polisher in March 2010, at a total monthly salary of Kshs. 17,480. His contract was terminated by the Respondent on 1<sup>st</sup> February 2011, in circumstances he deems to have been unfair and unlawful. He seeks the following Orders:-

- a. 1 month salary in lieu of notice at Kshs. 17,480.
- b. 26 days of Annual Leave at Kshs. 15,149.
- c. Service pay at Kshs. 192,280.
- d. 12 months' salary in compensation for unfair termination at Kshs. 209,760.

He also prays for Costs, Interest and Certificate of Service.

2. The Respondent filed a Statement of Response dated 15<sup>th</sup> August 2012, which was amended on 25<sup>th</sup> April 2013. It states the Claimant was employed for a period of 9 months, between April and December 2010. He was paid a gross monthly salary of Kshs. 15,200. He was afterwards engaged on renewable monthly contracts. He took all leave days; and all N.S.S.F contributions deducted from his salary were remitted to the N.S.S.F. He was caught red handed having stolen the Respondent's property, and was summarily dismissed under Section 44[4] [g] of the Employment Act 2007. He is not entitled to service

pay by virtue of being subscribed to the N.S.S.F. He was a Member of the Kenya Engineering Workers' Union, which had a CBA with the Respondent's Minor Engineering Group of the Federation of Kenya Employers. Termination was fair and lawful, and the Respondent urges the Court to dismiss the Claim.

3. The Claimant testified, and rested his case on 15<sup>th</sup> October 2012. The Respondent's case was scheduled with the consent of the Advocates, to 20<sup>th</sup> June 2013. The Respondent did not attend Court and proceedings were marked as closed, and the Parties granted 7 days to file their Closing Submissions. The Parties agreed on 22<sup>nd</sup> August 2013, to have the Respondent allowed to make its Response, upon payment of Kshs. 5,000 in costs to the Claimant. The dispute was then scheduled before Hon. Justice Nzioki wa Makau for hearing on 17<sup>th</sup> September 2013, who dismissed the Claim as the Parties and their Advocates did not attend Court. The Orders for dismissal of the Claim were reversed by Justice Nzioki wa Makau on 16<sup>th</sup> January 2014 on being moved by the Claimant. Finally the Parties appeared before the Trial Court on 6<sup>th</sup> March 2014, when the Director of the Respondent Tajinder Singh Surinder alias Teddy and the Workshop Manager Joseph Kinuthia Njoroge testified, and the Respondent closed its case. The Parties confirmed the filing of their Closing Submissions at the last mention on 15<sup>th</sup> July 2014, and were advised the Award would be delivered on 24<sup>th</sup> October 2014. The delivery of the Award has been brought forward as the undersigned Trial Judge has been transferred to Mombasa.

4. Mr. Mwangale testified he worked for a company known as Desboard Engineering Company at the time of the giving of his evidence. He polished Stainless Steel Kitchen Equipment. Before joining Desboard, he worked at the Respondent in the same role of a Polisher. He started actual work for the Respondent in March 2010. The letter of appointment given to him by the Respondent indicated the starting date would be 1<sup>st</sup> April 2010, ending after 9 months, on 31<sup>st</sup> December 2010. He worked before the letter of appointment issued. In all he testified he did about 11 months. He was summarily dismissed on the allegation of stealing. He did not steal anything from the Respondent; the decision was unfair; and he had been head-hunted from the previous Employer by the Respondent.

5. He testified on cross-examination that he was employed by Desboard in the year 2012. He worked for the Respondent from March 2010, although the letter of appointment stated April 2010. He did not have a letter or pay slip indicating he was working in March 2010. He was stopped at the gate by a Guard named Nyongesa on the day of termination. He was working overtime. He was searched in the presence of the Director Singh and the Manager Kinuthia. The contract was for 1 year. It stated 9 months, not 1 year. Clause 6 stated the contract could be terminated without notice, based on the reasons listed under the Clause

6. Mwangale explained that he continued to work up to February 2011, although the contract gave the end date of the contract, as 31<sup>st</sup> December 2010. He similarly worked before the letter of appointment issued. He was not found to have any item on being searched, and was not taken to any Police Station. The Company ordinarily paid Employees service pay, based on its Policy.

7. Singh testified that the Security Guard informed him that during a routine search, he had found the Claimant hiding some consumables. These were wires and hacksaw blade, which were strapped to the Claimant's belt. The Guard and the Manager asked Singh to intervene. Singh confronted the Claimant who kept saying "please forgive me." The Claimant did not deny having stolen the items. Items had been missing from the Business frequently. The Respondent decided to terminate the Claimant's contract of employment. He was not summarily dismissed on the same day. Summary dismissal took place on 3<sup>rd</sup> February 2011. The pay slip of April 2010 shows he was paid Kshs. 15,200 which was subjected to statutory deductions. He asked to join the Respondent Welfare Plan on 15<sup>th</sup> June 2010. He was deducted contributions from June 2010. The letter from the Respondent dated 22<sup>nd</sup> December 2010 showed the Claimant did not have any balance of annual leave days. There was no other contract, other than the one for April to December 2010. He continued to work on monthly basis after the end of the contract. Singh's Father suffered cancer. He was the Chairman of the Company and when he sought treatment in the UK, there was a lapse in the management, allowing the Claimant to continue working month to month, after the contract had lapsed.

8. Cross-examined, the Director told the Court the Claimant stole consumables. The Director was called by the Manager and the Security Guard, and found the items placed on a table, not in the person of the Claimant. The Guard said he had found the items on the Claimant. The Claimant asked for forgiveness. On 1<sup>st</sup> February 2011, he worked as he normally did, up to 5.00 p.m. The Respondent did not deem it necessary to report the Claimant to the Police as that would have punished the Claimant more. He was asked to explain himself. He was all alone. It was late, after the close of the day's business. He was given enough opportunity to explain himself. The Director and the Manager asked the Claimant to explain himself. The CBA in place allowed the Respondent to summarily dismiss the Claimant, without notice. N.S.S.F contributions were deducted and remitted. The letter from the Respondent showed he did not have any outstanding leave. Singh however, did not have the Leave Forms. It was not true that the Claimant started working in March 2010. He worked from 1<sup>st</sup> April 2010 as shown in the contract. The Claimant was not given a written contract, after working without one from March 2010. There was no written contract after December 2010. He was not advised on the renewal of his contract after December 2010. It is an Employer's obligation to issue an Employee with a contract of employment. The Claimant worked for more than 3 months without a written contract. He earned a total of Kshs. 17,480 per month.

9. The Director closed his evidence on redirection with the evidence that the Claimant was granted an opportunity to explain himself before termination. The Claimant confessed he stole the Respondent's items. The Respondent does not report Employees to the Police every time they are suspected of stealing items.

10. Joseph Kinuthia Njoroge told the Court he was informed by the Security Guard Nyongesa that, that the Claimant was found to have hidden the Respondent's blades and filler wires in his clothes. Njoroge asked the Claimant if this was so. The Claimant agreed it was. The Claimant asked for forgiveness. The Respondent had been losing its consumables frequently. Njoroge asked the Guard to call one of the Directors Singh. When Singh came, the Claimant once again conceded having stolen and asked for forgiveness. The Claimant was asked to leave and collect his terminal dues the following day.

11. Njoroge testified on cross-examination that he had himself, worked for the Respondent for over 30 years. The Claimant worked as a Casual Employee, before the 1<sup>st</sup> April 2010. It was not true that the search on the Claimant yielded nothing. It was true he picked the letter of dismissal the following day. He was not heard in the presence of another Employee. He confessed that he stole the items. Njoroge did not know whether the Guard who arrested the Claimant was available to give evidence. The Guard's whereabouts was not known. The Claimant was not set up by anyone. He was given adequate opportunity to explain himself. Njoroge stated on redirection that the Claimant did not request the company of another Employee to the disciplinary hearing. The Respondent prays for dismissal of the Claim with costs to the Respondent.

#### *The Court Finds and Awards:-*

12. The Claimant was formally employed by the Respondent through a contract dated 1<sup>st</sup> April 2010. The contract was for 9 months, beginning 1<sup>st</sup> April 2010, ending 31<sup>st</sup> December 2010. There is evidence from Njoroge and from Singh however, that the Claimant worked beyond the dates given in the contract.

13. Njoroge informed the Court that the Claimant worked for the Respondent as a Casual Employee, before 1<sup>st</sup> April 2010. This would support the Claimant's position that he worked from 1<sup>st</sup> March 2010 without the written contract, and was already in employment, at the time to contract issued on 1<sup>st</sup> April 2010.

14. The Director Singh confirmed the Claimant left employment in February 2011, although his contract was supposed to lapse in December 2010. There was clear evidence that the contract extended beyond the 9 months contained in the written document, running from March 2010, to February 2011, a period of 11 months, as stated by the Claimant.

15. It was confirmed by the Director that the Claimant earned a total of Kshs. 17,480 as at the date of

termination.

16. Termination was on 1<sup>st</sup> February 2011. In justifying its decision as required under Section 43 and 45 of the Employment Act 2007, the Respondent explained that the Claimant was found by the Security Guard Nyongesa, having concealed the Respondent's filler wires and hacksaw blade in his trousers. The Claimant was alleged to have conceded to the offence, pleading with the Guard, the Manager and the Director, to forgive him.

17. The Court has no reason to doubt the evidence of the Director and the Manager that the Claimant was found to have taken and concealed these items. The decision by the Respondent was based on sufficient and reasonable suspicion that the Claimant had committed an offence against the person or property of his Employer. Under Section 44 [4] of the Employment Act 2007, the Respondent had valid reason to warrant the summary dismissal of the Claimant. There was persuasive evidence from the Witnesses for the Respondent that indeed the Claimant agreed he had stolen these items and sought forgiveness from the Respondent. The Respondent was not required to report the offence to the Police under the Employment Act, and took a decision at the employment place, based on its managerial discretion. In terms of substantive justification, the termination was fair, and based on fair and valid reason.

18. In terms of procedure, the Respondent did not observe the mandatory protections granted to the Employee under Section 41 and 45 of the Employment Act 2007. The Employee was not shown the charges against him. He was not accompanied to the alleged hearing by a Colleague, or Trade Union Representative at Shop Floor level. Njoroge testified that the Claimant did not request to be accompanied by anyone to the hearing. An Employee does not have to make such a request; this is a matter of right, granted by the law, and it is the duty of the Employer to advise the Employee of such right. It was not clear if there was a hearing of any sort. The Guard simply arrested the Claimant, brought him before the Manager and the Director, and with the confession in place, the Claimant was asked to leave and collect his dues the following day. This was not a proper hearing. ***The Claimant is granted a minimal compensation the equivalent of 3 months' salary for breach of fair procedure, at Kshs. 52,440.***

19. The Claimant is not entitled to receive notice pay, termination of the contract having been precipitated by the Claimant's act of gross misconduct. His contract allowed the Respondent to terminate without notice if the Claimant was engaged in gross misconduct. The Claim for 1 month salary in lieu of notice is declined.

20. He prays for 26 days of annual leave. The Claimant had completed 11 months in employment. The CBA governing the employment relationship would entitle the Claimant to 26 days of annual leave with full pay, after completion of 12 months' continuous service. Furthermore the Respondent wrote to the Claimant on 22<sup>nd</sup> December 2010, advising him that he did not have any outstanding leave days, a letter the Claimant does not seem to have responded to or in any way challenged. The prayer for annual leave pay is rejected.

21. The Claimant prays for service pay of Kshs. 192,280, alleging this was granted under the Respondent's policy. The contract given to the Claimant alluded to 12 days' salary for each completed year of service. Clause 28 of the CBA granted Employees gratuity after completion of 1 year on graduated scales, depending on the number of years completed in service. The individual contract indicated service was not payable in cases of Employees leaving employment for gross misconduct.

22. The Claimant did not show to the Court any Employment Policy justifying receipt of service pay. The CBA and the individual contract required him to have completed at least 1 year in employment to be eligible for service pay. He had served for 11 months. The individual contract barred Employees who were summarily dismissed for gross misconduct, from receiving service pay or gratuity. The Claimant left employment on the ground of gross misconduct. He was enlisted under the National Social Security Fund, and would not have been entitled to receive service pay under Section 35 [6] of the Employment Act 2007. Section 35 also requires that service pay is based on 'every year worked,' suggesting the Claimant would have to have completed at least a year, to qualify for service pay. The prayer for service pay is rejected. IT IS ORDERED:-

***[a] Termination was based on fair and valid reason, but carried out unfairly.***

***[b] The Respondent shall pay to the Claimant 3 months' gross salary in compensation at Kshs. 52,440, within 30 days of the delivery of this Award.***

***[c] The Respondent to release to the Claimant his certificate of service forthwith.***

***[d] No order on the costs and interest***

Dated and delivered at Nairobi this 19<sup>th</sup> day of September 2014

James Rika

Judge