



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

**AT MOMBASA**

**CAUSE NO. 419 OF 2013**

**GIDEON MANDALE .....CLAIMANT**

**VERSUS**

**KARIBUNI RAFIKI LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

This is a claim for terminal dues plus compensation for unfair termination of employment. In total the claimant seeks to recover ksh.142000 as employment dues. In response the respondent has denied liability and averred that the claimant was dismissed for absents himself from duty without any lawful or reasonable cause and calling his juniors to sit in for him.

The suit was heard on 8/7/2014 when claimant testified as CW1 but the respondent called no witness to testify.

**CLAIMANT'S CASE**

CW1 was employed by the respondent as a security guard and worked up to 26<sup>th</sup> October 2012 when he was dismissed. His salary was ksh.12000 per month. The reason for the dismissal was gross misconduct namely absents himself from work without permission. CW1 denied the alleged absent from work without permission. He contended that on the dates he was absent he had permission from Mrs. Andrea. He explained that in September 2012, he attended the burial of his sister during his official 4 off days of which his boss Mrs. Andrea added him 2 more off days and even gave him ksh.500 to condole him.

On the second occasion in October 2012, he had a sick child and sought permission from his supervisor Mr. Salim who escorted him to Mrs. Andrea to seek permission from her. That Mrs. Andrea gave CW1 permission to attend to his child and changed his shift from day to night. When CW1 reported to work in the evening he found another guard on duty who told him that his work was discontinued. CW1 tried to talk to Mrs. Andrea several times but in vain.

On 26/10/12, CW1 met Mrs Andrea to discuss his dues but was paid nothing. Instead he was given a letter for summary dismissal. He reported the matter to the union and later served a demand letter through his lawyers. CW1 prayed for service pay, salary for October 2012, off duty, 25 holidays and notice pay. He contended that although NSSF was deducted from his salary, no remittance was done to the fund until CW1 was dismissed.

On cross examination by the defence counsel, CW1 maintained that he was given 2 days off being Friday and Saturday to attend his sisters burial. On the second occasion CW1 maintained that when his supervisor Mr. Salim denied him permission to take his sick child to hospital, CW1 secured permission from his boss personally. He denied ever being served with any warning letter.

CW1 confirmed from NSSF statement filed by the defence that NSSF dues had been remitted from July 2006 to October 2012. He further confirmed that he owed the respondent a loan of ksh.5000 and accepted to the same be deducted from his final dues. He maintained that he never went for any holiday during his service to the respondent. He concluded by denying the alleged gross misconduct.

### **DEFENCE CASE**

The defence never called any witness but relied on the written statement of Markus Lange and the documents filed. According to the said statement, CW1 was employed by the respondent as a security guard from October 2006 till October 2012 for absencing himself from duty or extending his off days without permission. Mr. Lange further accused CW1 of calling his juniors to sit in for him and thereby posing a security risk to the respondent. As a result of his habit of absencing himself from work, CW1 was summarily dismissed.

By letter of termination and financial statement dated 25/1/2013, the respondent offered to pay the CW1 half salary for September 2012 being ksh.6000 plus Ksh.11000 for holidays not taken less ksh.5000 being loan advanced to the CW1. The net pay offered was ksh.12000. No evidence of any actual payment was produced. The respondent also filed NSSF statement showing remittances for the claimant from July 2006 to October 2012.

### **ANALYSIS AND DETERMINATION**

After carefully reading the pleadings and considering the evidence on record the following issues arose for determination:

- 1. whether the summary dismissal of the claimant amounted to unfair termination of employment.**
- 2. Whether the claimant is entitled to the remedies sought.**

### **Unfair Termination**

Under Section 45 of the Employment Act, termination of employment is deemed unfair if the employer fails to prove that the reason for the termination was valid and fair and that the procedure followed in reaching the decision to terminate was fair.

In the present case, the reason for dismissal was absence from duty without permission. The respondent did not call any witness to rebut the claimant's evidence that he had permission from Mrs. Andrea Lange on the two occasions he was accused of being absent without permission. In addition, the defence is self contradicting when the respondent's statement says that CW1 disappeared without a word and only resurfaced after some days yet, the defence and the dismissal letter alleged that CW1 used to call his juniors to sit in for him during his absence. To that extent the court finds that the reason for the dismissal was not valid.

In addition, the court finds that the reason for the dismissal was not fair because it has not been denied that CW1 did not lose his sister in September 2012, and that he did not have a sick child in October 2012. Without any testimony from Mrs. Andrea Lange and Mr. Salim the claimant's supervisor, the claimant's evidence that he was bereaved in September 2012 and that he has sick child in October 2012 remains uncontested. It is therefore unfair to grant an employee an off in such circumstances and later dismiss him on ground that he has developed a habit of absenteeism. The blame should go to whoever gave him the permission to be absent.

Lastly, the court finds that the summary dismissal was done unfairly and in breach of the procedural fairness prescribed under Section 41 of the Employment Act. The said provision of the law require in mandatory terms that before any employer dismissed an employee on ground of misconduct he shall first accord the employee a disciplinary hearing in the presence of another employee of his choice. That was not done in this case and as such the summary dismissal of the claimant on ground of gross misconduct was unfair.

### **REMEDY**

Section 49 of the Employment Act entitled an employee who is unfairly discharged to a pay in lieu of notice, accrued employment benefits plus compensation for unfair termination. In the present case, the contract of employment was not in writing. The claimant prayed and is granted one month salary in lieu of notice being ksh.12000. He is also awarded ksh.12000 being salary for October 2012.

The prayer for service pay is dismissed for the reason that a statement of NSSF remittances was filed by the defence to prove that CW1 is disqualified from claiming service pay under Section 35(6) of the Employment Act. The prayer for 25 off days is granted. The dismissal letter offered to pay the claimant for all his of days and holidays worked. No records were produced by the defence to dispute the claim for 25 off days. The court will therefore award the normal pay for the 25 off days on the presumption that the claimant had been paid for the said off days at normal rate. He will therefore get  $ksh. 12000 \times 25/30 = 10,000/$ .

CW1 prayed for 70 public holidays with no particulars. The respondent in her letter of termination and financial statement dated 25/1/2013 offered to pay ksh.11000 for holidays worked. The court will therefore award the said Ksh.11000/ for the holidays worked. In addition and in view of the finding that the dismissal was unfair, Cw1 is awarded 6 months salary being ksh.72000 as compensation for unfair termination.

The claimant will also get certificate of service as promised under the dismissal letter.

### **DISPOSITION**

For all the reasons stated above, judgment is entered for the claimant for ksh. 115,400/ plus costs and interest. Claimant will also get certificate of service.

**Dated signed and delivered this 5<sup>th</sup> September 2014**

**O. N. Makau**

**Judge**