



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 133 OF 2013**  
**(Originally Nairobi Cause No. 1586 of 2011)**

**JIMMY KYALO KIBUNGI.....CLAIMANT**

**v**

**S G S KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. Jimmy Kyalo Kibungi (Claimant) was employed by SGS Kenya Ltd (Respondent) in 1994 as a messenger. He was confirmed on 31 October 1994 after successfully completing probation. On 16 April 1997 the Respondent promoted him to the post of Filing Clerk. In 2001 the Respondent redeployed him as a night shift Telephone Operator/Receptionist.
2. On 22 December 2008 the Respondent issued the Claimant with a show cause letter. The letter charged the Claimant with allowing an ex girlfriend into the offices to sort out personal matters, not controlling the girlfriend's behaviour resulting in violent behaviour, causing unnecessary commotion and not reflecting the Respondent's image.
3. The Claimant replied to the show cause letter the same day but the Respondent was not satisfied with the explanations and on the same day, it dismissed the Claimant summarily. The letter of dismissal gave three reasons.
4. The Claimant was dissatisfied and on 22 September 2011 he lodged a Memorandum of Claim stating the issue in dispute as *wrongful dismissal, unpaid terminal benefits, unpaid salary in lieu of notice, unpaid dues and unpaid pension contribution*.
5. The Respondent was served and it filed a Response on 24 October 2011. On 23 December 2013, the Claimant filed an Amended Statement of Claim pursuant to leave granted on 16 December 2013. The Respondent was granted corresponding leave twice to amend its Response but it did not.
6. The Cause was heard on 30 June 2014 and the Respondent opted not to call any witnesses. Claimant filed submissions on 11 July 2014, four days after the agreed date. An explanation was offered in the submissions for the delay.

**Claimant's case**

7. The Claimant in his testimony stated that he was given a show cause letter on 22 December 2008 and he gave his explanations through letter of same date and was issued with a dismissal letter thereafter in the afternoon. But he was not called to a hearing.
8. In respect to the reasons for dismissal, the Claimant stated that a visitor friend of his came to the Respondent's premises without his knowledge and that they had a disagreement/shouting which

- led him to summon the security personnel to remove the visitor. He also stated that none of the Respondent's property was damaged and that there was no commotion.
9. In cross examination, the Claimant confirmed that the visitor friend had come into the Respondent's premises but there had been no commotion. There was no repeat offence.
  10. He also confirmed having been refunded pension scheme contributions and signing a discharge voucher accepting he had no further claims against the Respondent.
  11. He also stated he was seeking lost income upto 2031 when he would have retired though after dismissal he briefly worked with A.O. Bayusuf and now with Aga Khan Academy.
  12. The Claimant annexed to his pleadings several documents and also produced the Respondent's Employee Handbook.

### **Respondent's case**

13. The Respondent opted not to call any witness and stated that it would rely on the Response and record.
14. In the filed Response to Claim, the Respondent generally denied the Claimant's case as pleaded and contended that the Claimant was dismissed due to gross misconduct which dented its reputation and image and that the Claimant was paid all his final dues.

### **Issues for determination**

15. This being a complaint regarding unfair termination the issues arising are mainly two. Whether the termination was unfair and if the answer is in the positive, appropriate relief. The Court has considered the Claimant's submissions and authorities cited.

### **Whether the termination was unfair**

#### ***Procedural fairness***

16. The Claimant was issued with a show cause letter dated 22 December 2008. The letter informed him of the allegations against him and further asked him to respond by end of the day. The show cause letter was clear that the Respondent was contemplating taking disciplinary action.
17. The Claimant responded the same day after which he was dismissed.
18. The Claimant's grouse with the process followed was that he was not called to a hearing. It is now trite that a disciplinary process may well be conducted through correspondence and that such procedure would not be in violation of the procedural fairness safeguards of section 41 of the Employment Act, 2007, which is implicated in this case.
19. The Claimant did not suggest that he was not afforded reasonable time to state his case. The Court is satisfied that the process adopted by the Respondent was substantially in compliance with the statutory requirements of section 41 of the Employment Act, 2007. The Claimant knew the charges to confront, he was asked to respond and he did and he was informed that disciplinary action was contemplated.

#### ***Substantive fairness***

20. But an employer is also required to prove the reasons for dismissal and that the reasons are valid and fair.
21. The Respondent opted not to call any witnesses. However, it filed a Response and cross examined the Claimant. The Response was more of a bare denial and putting the Claimant to strict proof. Such an approach is risky in light of the statutory obligation imposed on employers by sections 43, 45 and 47 of the Employment Act, 2007.
22. The Claimant was not part of the Respondent's security personnel. The visitor who allegedly caused commotion must have been processed at the entrance and allowed to come in. It was not suggested that she came in at the invitation of the Claimant or that the Claimant could have reasonably foreseen she would cause trouble at the workplace.
23. Though the Court was not informed of the procedures for allowing visitors to access the

- Respondent's premises, it was informed that after the commotion, an alarm bell was pressed and security responded swiftly and removed the visitor.
24. The Respondent did not demonstrate that its image and property was put at risk or that there was unnecessary anxiety to management.
25. In the view of the Court, the incident of 22 December 2008 cannot amount to a fundamental breach of the terms of employment by the Claimant to justify summary dismissal. The Respondent has failed to prove that the reasons for dismissal were valid and fair reasons or that its action was in accord with equity and justice.

### **Appropriate relief**

#### ***Lost income to retirement/unpaid terminal benefits***

26. The Claimant sought Kshs 9,124,560/- under this head being the wages he would have earned for 276 months (23 years) until retirement. And for seeking this relief, the Claimant sought to rely on the retirement age which was set at 60 years in the Employees Handbook.
27. There is no guarantee or express provision in the Handbook that the Claimant would have worked for the Respondent till the age of 60 years.
28. Section 49 of the Employment Act, 2007 presupposes that employers may dismiss employees unfairly and the remedies provided for are set out in the said section.
29. Apart from the equivalent of twelve months gross wages compensation, the statute does not provide for lost income to retirement and the Claimant did not place sufficient material or precedential authority for this head of claim.
30. The head of claim is therefore declined and in exercise of its discretion the Court would award the Claimant the equivalent of 4 months gross wages as compensation for unfair termination. The compensation is assessed in the sum of Kshs 108,480/- based on the Kshs 27,120/- (basic salary and house allowance) the Claimant was earning at time of dismissal.

#### ***Pension/National Social Security Fund contributions***

31. The Claimant pleaded he was claiming Kshs 994,428/- as the monies he would have contributed to National Social Security Fund for the balance of 23 years until retirement.
32. In cross examination the Claimant admitted receiving pension contributions and abandoned the claim. No statutory or contractual foundation for the National Social Security Fund benefits/contributions was laid and these two heads of claim are dismissed.

#### ***Medical cover***

33. The Claimant sought again what he pleaded would have been medical cover up to retirement at 60 years. Equally the Claimant did not lay any basis for this head of relief. It is equally dismissed.

#### ***Unpaid share contribution***

34. Under this head the Claimant sought Kshs 110,400/-. No clarification was given in evidence of what this claim related to and it is dismissed.

### **Conclusion and Orders**

35. The Court finds and holds that though the Respondent substantially complied with the procedural fairness before taking the decision to dismiss the Claimant, the Respondent has failed to prove the reasons for dismissal and that the reasons were valid and fair. The dismissal was therefore unfair.
36. The Court awards the Claimant and orders the Respondent to pay him
- a. 4 months gross wages compensation Kshs 108,480/-
37. The claims for income up to retirement, National Social Security Fund benefits/pension

contributions and medical cover are dismissed.  
38.Claimant to have costs.

**Delivered, dated and signed in open Court in Mombasa on this 5<sup>th</sup> day of September 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Hayanga instructed by I A Hayanga & Associates

For Respondent Mr. Muchiri instructed by Obura J & Co. Advocates