



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**  
**CAUSE NO. 27 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 31<sup>st</sup> October, 2014)

**NELSON NYABUTO NYAMBASO ..... CLAIMANT**

**-VERSUS-**

**IRIANYI TEA SACCO ..... RESPONDENTS**

**JUDGMENT**

The claimant herein Nelson Nyabuto Nyambaso filed his Memo of Claim on 19.4.2013 through the firm of Nyabena Nyakundi & Co. Advocates. His claim is for unlawful dismissal from service. The claimant's case is that he was employed by the respondents on 3.8.2007 as a watchman and was later promoted to a clerk on 24.1.2011 at a salary of Kshs 14,287/= gross. On 4.7.2011 he was dismissed by respondents on allegation that he attempted to steal fuel from the respondents and also tampered with the CCTV Camera to prevent being detected. He was apparently summoned to a disciplinary hearing meeting on 4.7.2011 at 9.30 am and after the meeting he received the termination letter the following day though dated 4.7.2011. It is the claimant case that his termination was unfair and unjustified as the respondents didn't give him a proper hearing and didn't give him reasons for the dismissal. The claimant also avers that the respondents flouted their own terms and conditions of service Clause 32.0 and 32.1 because he was not given any warning. He was also entitled to 90 calender days notice before dismissal which he was never given. He also states that he was entitled to 25% of total salary as gratuity which he was never given. He prays he be paid the same plus moneys earned from overtime and holiday.

In cross examination he admitted that **App 7** is a letter he wrote seeking to be pardoned for what he committed on 31.5.2011 at Ogembo and also stating that he made good the mistake by paying 20 litres of petrol. He however explains that he was forced to write the letter by the respondents.

The respondents on the other hand filed their memo of response on 3.6.2013 through the firm of Nyatundo & Co. Advocates. It is their defence that the claimant was fairly dismissed for gross misconduct after he was implicated in an offence of theft where he was caught on CCTV Camera taking fuel from the respondents premises and also tampered with the said CCTV devise. It is also the respondents defence that they gave him a hearing before terminating him.

After considering evidence of both parties, the issues for determination are as follows:-

1. **Whether there were valid reasons to terminate the claimant's services.**
2. **Whether due process was followed before claimant's dismissal.**
3. **What remedies if any, the claimant is entitled to.**

On 1st issue, the reasons given by respondents for dismissing the claimant are having the intention to steal fuel from the respondents against Article 31.0 (iii) of the terms of service (ii) misuse of security system in place in view to obtaining unauthorized access to defraud the society amongst others. Article 31.0 (iii) was not exhibited in court by any of the parties and so it would be impossible for this court to read into the provision of that Article. The issue of misuse of security system of respondents is in relation to tampering with the CCTV Camera which claimant denied doing. The question then is whether these reasons were reasons that are valid and did exist at time of dismissal.

Under S. 43 of Employment Act 2004:-

**“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”**

These reasons must therefore be proved to be valid to warrant claimant's dismissal. From the letter written by claimant himself on 6.6.2011, he seems to admit he committed some offence and even made good the mistake. Though he later states that he was forced to write the letter, there is no proof that he was forced as the letter is admittedly written by him and in his own hand and a person is held to the words of his document. I therefore find that there were valid reasons which existed to warrant the dismissal of claimant.

Was due process followed? The claimant told court that on 4.7.2011 he received a letter at 8 am to attend a meeting at 9.30 am. The letter informed him to come and defend himself and show cause why disciplinary action could not be taken against him. Reasons for the disciplinary action were not stated and the length of time given for him to appear and defend himself was short and inadequate. The disciplinary hearing envisaged by law is the one provided for under S. 41 of Employment Act 2007 which states that:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

The claimant was therefore not accorded a proper hearing under the law. I therefore find that due process was not accorded to the claimant before he was dismissed. A right to a hearing is a fundamental right which is unalienable and despite there being proper and valid reasons that would have warranted a dismissal, failure to give the claimant a proper hearing, makes the dismissal unfair and wrongful and I find it so. What remedies is the claimant then entitled to?

I find claimant is entitled to the following remedies which I now grant:-

- |  |                  |    |              |
|--|------------------|----|--------------|
| 1. 1 month salary in lieu of notice        | = Kshs 13,170.00 |    |              |
| 2. Salary for 4 days worked in July        | = Ksh 1,756.00   |    |              |
| 3. Gratuity at rate of 25% of basic salary | = Ksh 154,747.50 |    |              |
| 4. 12 months salary                        |                  | as | compensation |

**for unlawful termination = 12 X 12,170 = Ksh 134,040.00**

**TOTAL = KSHS 303,713.5 Less statutory deductions.**

**5. Claimant be issued with a certificate of service.**

**Respondent will meet costs of this suit.**

**HELLEN S. WASILWA**

**JUDGE**

**31/10/2014**

**Appearances:-**

Claimant present

Omondi h/b Nyatundo for respondents present

CC. Wamache