



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

**AT MOMBASA**

**CAUSE NO. 430 OF 2013**

**DISHON ONKOBA.....CLAIMANT**

**=VERSUS=**

**FACTORY GUARDS (MSA) LIMITED.....RESPONDENT**

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

**INTRODUCTION**

1. The Claim herein is for Kshs.337,148.00 being employment benefits plus compensation for unfair and unjust termination of the Claimant's employment by the Respondent. The Claimant avers that his services of 14 years to the Respondent was summarily terminated by a summary dismissal on 30<sup>th</sup> June 2011 without any just cause and without adherence to due process.
2. The Respondent has denied liability and averred that the dismissal of the Claimant was due to his gross misconduct and was done in adherence to due process.
3. The suit was heard on 29<sup>th</sup> May 2014 and 1<sup>st</sup> July 2014 when the Claimant testified as CW1 and the Respondent called Mr. Emanuel Angore and Mary Kambi as RW1 and RW2 respectively. On the said 29<sup>th</sup> May 2014 the parties agreed to have all the documents filed in support of their respective cases to be deemed as duly produced exhibits.

**CLAIMANT'S CASE**

4. CW1 explained that he was employed by the Respondent on 27<sup>th</sup> August 1997 as a Security Guard on casual basis vide letter dated the same date. He was never issued with any letter for permanent service but he worked continuously until 30<sup>th</sup> June 2011 when he was summarily dismissed. He however used to get his payslip and his last salary was Kshs.13,600.00
5. His problems with his employer started on 8<sup>th</sup> June 2011, when the manager of Cargil (the premises where he was assigned to guard), instructed him to allow a truck loaded with wooden pallets to leave without a gate pass. According to him it was a normal procedure for the said pallets to be released without a gate pass because they were only being taken for retreat. A few minutes after the lorry left, it came back followed by the Overall Manager of Cargil and RW1. Another guard was brought to relieve CW1 who thereafter was taken to the Respondent's office where he recorded a statement and then send on suspension verbally. On 15<sup>th</sup> June 2011 he was served with a suspension letter citing the reason as colluding with the Managers of Cargil to steal. The period of suspension was 10 days but when he

returned after the suspension period he found a letter for summary dismissal dated 5<sup>th</sup> July 2011. The letter stated that investigations had revealed that CW1 had colluded with Cargil Managers to steal. He was however never shown the investigations report.

6. CW1 denied the truth and validity of the alleged reason for the dismissal. He denied the alleged collusion and averred that what he did on the material date was a regular exercise which did not require gate pass because the pallets were always taken out for retreat and then be returned. CW1 further contended that he was never given a chance to defend himself. He appealed against the dismissal but the appeal was never heard and he was never served with any reply to the said appeal. According to him, the Respondent has a disciplinary process which entitles an employee to hearing in the presence of the management and union representatives. In this case, CW1 contended that he was not accorded the said disciplinary process and as such his dismissal was unfair.

7. He prayed for Kshs.13,654.00 being salary for June 2011, Kshs.13,654.00 being one month salary in lieu of notice, and Kshs.13,654.00 for leave days outstanding. He also prayed for gratuity at the rate of 18 days pay per year of service as provided for by the regulations governing the security industry. He also prayed for compensation for unfair termination plus Certificate of Service.

8. CW1 denied owing any loan to the Respondent. According to him the only loan he had was for Kshs.100,000.00 from Alarms Sacco of which he paid Kshs.80,000.00 and the balance of Kshs.20,000.00 was recovered from his guarantors with whom he had agreed to pay them by monthly instalments.

9. On cross examination by the defence counsel, CW1 admitted that he recorded a statement before RW1 who wrote down and ordered him (CW1) to sign on every page without reading it. CW1 admitted that in the statement he admitted that he let the lorry to leave without a gate pass and contended that it was normal. He admitted that in 2005 he absconded duty after agreeing with a colleague to hold his brief while he rushed to the hospital to see his patient. He further admitted that he was dismissed for that offence but on appeal he was reinstated but warned. According to CW1 the warning lapsed after he completed one year without repeating the offence. He denied ever receiving the warning letter dated 20<sup>th</sup> July 2011.

10. He denied having any outstanding loan with Alarms Sacco and contended that he repaid the Sacco loan through his bank account.

11. Regarding the Claim for gratuities CW1 maintained that all workers dismissed by the Respondent used to be paid gratuity at the rate of 18 days pay per year of service as per the 1998 Security Law.

12. On re-examination CW1 clarified that gratuity is paid to the officers with normal termination. He maintained that the investigating officer wrote the statement and demanded that CW1 signed it without first reading it to him.

### **DEFENCE CASE**

13. RW1 is the Investigating Officer for the Respondent for over 20 years. He confirmed that CW1 was employed by the Respondent as a Security Guard but was dismissed in June 2011. The reason for CW1's dismissal was theft at Respondent's Client's warehouse where he was guarding on 14<sup>th</sup> June 2011. The report of the theft was made to RW1 by the Cargil Manager by phone.

14. RW1 went to the scene accompanied by Mr. John Mokaya, Respondent's Operations Manager. They were shown a truck loaded with wooden pallets packed outside the warehouse which they were told by Mr. Kinyanjui (Warehouse Manager) that CW1 had allowed the truck to take away the cargo without a gate pass on directions from a Mr. Mwabili (Assistant Warehouse Manager). RW1 contended that CW1 was not supposed to let anything go out without valid gate pass prepared by the Warehouse Officer and without recording the details in the gate register. According to RW1, CW1 had worked at the said warehouse for 2 months and as such he was aware of the said procedure.

15. RW1 took CW1 to the Respondent's Nyali office and recorded a statement from him on 14<sup>th</sup> June 2011 at 4.20 p.m. After taking the Statement RW1 recommended for CW1's dismissal for gross misconduct. RW1 contended that CW1 had a case of absconding duty for which he was dismissed but was reinstated after an appeal.

16. On cross examination by the Claimant's counsel, RW1 stated that CW1 was dismissed for his involvement in theft of wooden pallets through collusion with Cargil workers. RW1 maintained that CW1 had the authority to object to the release of the cargo without documentation. RW1 did not take any statement from Mr. Mwabili admitting the offence and tendering an apology. RW1 admitted that he neither gave CW1 the investigation report nor did allow him to respond to it before serving him with the dismissal letter. RW1 also admitted that after the dismissal, CW1 appealed to the Human Resource Manager but the Claimant was never heard on the appeal.

17. On re-examination RW1 maintained that CW1 was never heard before dismissal.

18. RW2 is the Human "Resource Manager for the Respondent. She confirmed that CW1 was formerly employed by the Respondent as a Security Guard until 30<sup>th</sup> June 2011. The reason for the dismissal was that he colluded with the Cargil (client) employees to take out 150 wooden pallets while CW1 was on duty. She stated that RW1 investigated the matter and found CW1 guilty and as a result CW1 was dismissed. On 8<sup>th</sup> July 2011 CW1 appealed against the dismissal disputing the reason for the dismissal but because of his previous record his appeal was not heard. The record showed that in 2005, CW1 absconded duty and was dismissed but on appeal he was reinstated but given a final warning on 5<sup>th</sup> May 2005. According to her, CW1 was fairly dismissed.

19. RW1 confirmed that CW1 was earning Kshs.13,654.40 per month and an annual leave of 26 days and as such she contended that after his dismissal CW1 was entitled to salary for June 2011 being Kshs.13,654.00 plus pay in lieu of 26 leave days totalling to Kshs.20,988.40. According to RW2, however CW1 had a loan balance of Kshs.50,698 for Sacco and had a Salary Advance of Kshs.1,500. In addition to the said debt, RW2 contended that CW1 never returned uniform valued at Kshs.5,460 making the debt owed by CW1 to be Kshs.59,283.00. RW2 therefore stated that after reducing the said debt of Kshs.59,283.00 by Kshs.20,988.40 payable to the CW1, there still remained an outstanding Sacco loan balance of Kshs.38,294. The foregoing information according to RW2 is contained in the Clearance and Discharge Checklist (Doc. 8 for the defence).

20. On cross examination by Claimant's counsel, RW2 confirmed that in 2011, the Human Resource Manager was MR. Atudo who dealt with dismissal of CW1 and as such she was not involved except in calculating the terminal dues. She confirmed that CW1 was never heard before dismissal and on his appeal because of his previous records. She however confirmed that the appeal raised genuine grounds. She further confirmed that the Respondent has disciplinary mechanism which entitled an employee to be heard by a panel where the union Shop Stewards are called to attend but in this case CW1 was not given that hearing because of his previous records.

21. RW2 admitted that the Sacco loan was not money for the Respondent but contended that it was recoverable through salary deductions. She could not however show any loan deductions from the CW1's payslip. She could also not show any evidence to prove that CW1 owed any loan to the Sacco. She however confirmed that defaulters of Sacco loan is normally recovered from guarantors. She further confirmed that she had not received any complaint from any guarantors that money for CW1's Sacco loan had been recovered from them. According to RW2, if CW1 had been on a normal termination, he would have been paid gratuity at the rate of 18 days pay per year of service. She however contended that gratuity was on *ex gratia* payment.

22. After the close of the hearing both parties filed written submissions, of which the court has carefully considered herein.

## **ANALYSIS AND DETERMINATION**

23. It is not disputed that the Claimant worked for Respondent from 18<sup>th</sup> June 1997 to 30<sup>th</sup> June 2011. It is also in dispute that his salary per month was Kshs.13,654.00 and that he was also entitled to an annual leave of 26 days. It is further not disputed that in case of a normal termination, CW1 was entitled to one month notice and gratuity at the rate of 18 days pay per year of service. It is also common knowledge that CW1 was dismissed on 30<sup>th</sup> June 2011 for gross misconduct without being accorded a hearing as provided for under the Respondent's disciplinary rules. It is also a fact that CW1 appealed against the dismissal but the appeal was also not heard as required under the Respondent's said disciplinary rules. Lastly It is also not in dispute that the reason for not giving CW1 a hearing was because of his previous record showing that on 5<sup>th</sup> May 2005 he was given a last warning for absconding from duty.

24. The issues for determination are whether the summary dismissal of the Claimant from employment was unfair and whether the reliefs sought ought to issue.

### **Unfair dismissal**

25. Under Section 45 of the Employment Act, dismissal of an employee is deemed unfair unless the employer proves that the dismissal was founded on a valid and fair reason and that it was reached after a fair procedure. In this case the court is satisfied that there was a valid and fair reason for dismissing the Claimant because he allowed the truck to take away wooden pallets without proper documentation. It was not disputed by CW1 that he had no instructions from the Respondent not to allow Client's goods to be removed without a valid gate pass and without recording the details on the gate register. What CW1 stated is that he was instructed by Mwabili and Mr. Kyalo, who were not the overall manager of the Client's warehouse, to let the truck ferry away the wooden pallets because they were only going for retreat and then be returned to the warehouse. That was not good reason to prevent documenting the movement of the goods. The Claimant should have objected and if the manager insisted on not writing a gate pass, CW1 should have consulted his seniors. In any event, nothing prevented CW1 from at least recording on the gate register the details of the truck, its driver, the quantity of pallets and the officer of the client who authorized the release of the goods. The Respondent was therefore entitled to summarily dismiss the Claimant under Section 44 of the Employment Act.

26. The said right to summary dismissal is however subject to Section 41 and 45 of the said Act which provide in mandatory terms that an employer must accord his employee an oral hearing before dismissing him for misconduct, poor performance or incapacity. The said right to hearing before dismissal was also provided under the Respondent's Disciplinary Rules as admitted by the RW2.

27. In this case both RW1 and RW2 admitted on oath that CW1 was never accorded any hearing on the charges leading to his dismissal and also on his appeal. The reason given for the denial of such important hearing is that CW1 had previous record of misconduct whereof he was given a last warning on 5<sup>th</sup> May 2005. The court is however not persuaded by such explanation by the defence. The obligation to hear an employee before dismissal on the said ground of misconduct, poor performance or incapacity is binding on all employers by virtue of Section 41 of the Employment Act. Even if the contract of employment provided that no hearing shall be accorded after service of a last warning, that clause of the contract would lack legal validity because parties cannot enter into a contract to amend or defeat a written law. Consequently, the court finds that the dismissal of the claimant by the Respondent was procedurally unfair within the meaning of Section 45 of the Employment Act.

### **Reliefs**

28. Under Section 49 of the said Act an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits and compensation for unfair termination. The Claimant is awarded Kshs.13,654.00 being one month salary in lieu of notice, Kshs.11,853.46 for 26 leave days not utilized plus Kshs.13,654.00 being salary for June 2011. He is also awarded gratuity for the 14 years served at the rate of 18 days salary per year of service which works to Kshs.114,693.60. Lastly the Claimant is awarded 3 months salary as compensation for unfair termination. The reason for not awarding the maximum 12 months' salary is that the employer only breached procedural fairness and also the fact that CW1's salary was such that he could easily secure an alternative employment for the same if not better

pay.

29. In conclusion the court has dismissed the Respondent's allegation that she was entitled to make deductions on the Claimant's terminal due on grounds that the same was not proved on a balance of probability. In addition, the Respondent did not file any Counter Claim and as such that allegation lacked any legal basis. Except for Government taxes, an employer has no right to deduct employees decretal sum by simply invoking Section 19 of the Employment Act. Once the dispute on terminal dues is filed in court, the employer who alleges any debt against his employees must file a Counter Claim and prove it.

### **DISPOSITION**

30. For the reasons and the findings above, judgment is entered for the Claimant for Kshs.154,855.10 plus interest from 30<sup>th</sup> June 2011. The Claimant will also be issued with a Certificate of Service. The Claimant will also have costs of the suit plus interest.

Orders accordingly.

**Dated Signed and delivered this 17<sup>th</sup> October 2014.**

**O.N. Makau**

**Judge**