



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

**CAUSE NO. 318 OF 2014**

**AMOS KENNEDY KOWUOR..... CLAIMANT**

**v**

**SAFARICOM LTD.....RESPONDENT**

**JUDGMENT**

1. Amos Kennedy Kowuor, (Claimant) instituted legal proceedings against Safaricom Limited (Respondent) on 21 July 2014 alleging unlawful termination and seeking pay in lieu of notice, compensation, service pay, accrued leave and costs.
2. According to an affidavit of service sworn by Kenneth Waithaka and filed in Court on 18 September 2014, the Respondent was served and it acknowledged receipt of Notice of Summons and copy of Memorandum of Claim on 4 August 2014. The Respondent should have therefore filed a Response on or before 19 August 2014.
3. When the Cause was mentioned on 18 September 2014, Ongaya J ordered that the Cause proceed to hearing on 29 October 2014, and directed the Claimant to serve a hearing notice upon the Respondent.
4. The Claimant served a hearing notice upon the Respondent on 17 October 2014, and the same was acknowledged through an official stamp, according to an affidavit of service filed in Court on 28 October 2014.
5. The Respondent filed a Memorandum of Appearance on 29 October 2014 through the firm of Ongweny & Moibi Advocates. This was on the morning of the hearing.
6. Mr. Mugambi who held brief for Mr. Weya for the Respondent sought an adjournment on the ground that the firm of Ongweny & Moibi had just been instructed. The application for adjournment was opposed and the Court declined to adjourn the hearing for reasons which are on record.

**Claimant's case**

7. The Claimant testified. He stated that he was appointed by the Respondent as a Customer Experience Executive through a letter dated 17 September 2013 (Exh 1), and that prior to that he had been engaged by Sheer Logic Ltd as a Customer Experience Executive in 2010, and then deployed to the Respondent. He was based in Kitale.
8. On the separation, the Claimant stated that on 13 February 2014, while on off duty, he was called by his supervisor, Joseph Komen and instructed to go to the office. On reporting, he was given an air ticket and instructed to go to Nairobi and see a Mary Mugi.
9. The said Mary Mugi gave him a letter referenced *Notice of Non Confirmation* (Exh. 2), and when he consulted his Manager, a Mr. Kiprop (who was on leave), he advised him not to sign for it until he (Kiprop) consulted the Human Resource office. Mr. Kiprop later called to inform him the issue was for Human Resource and he did not want to get involved.

10. Later, the Claimant wrote an appeal, which he did through email (Exh 3) but there was no immediate response. Afterwards, Respondent's representative exchanged emails with him on 21 March 2014, 31 March 2014 and 17 April 2014 after which he commenced legal proceedings.
11. The Claimant stated that he was not accorded a hearing prior to dismissal and was also not paid any terminal dues, though he was issued with a Certificate of Service (Exh 6).
12. The Claimant stated he wished to be reinstated without loss of any salaries or benefits.
13. The Claimant made brief oral submissions after close of his case.

### **Issues for determination**

14. After considering the pleadings, testimony of the Claimant, documents presented and oral submissions, the Court has identified issues arising as, when relationship with Respondent began and who bears liability, whether the dismissal was unfair and if so, appropriate remedies.

### **Evaluation**

#### ***Commencement and liability***

15. The Certificate of Service issued to the Claimant indicated that he was an employee of the Respondent from 1<sup>st</sup> December 2010 to 14 February 2014.
16. In a letter dated 6 May 2014, and addressed to the Claimant's Advocate (Exh. 5), the Respondent asserted that it employed the Claimant effective 1 October 2013 and not in 2010 and that previously he was employed by Sheer Logic Ltd. It was contended that the certificate of service was issued in error.
17. In his testimony, the Claimant stated that the Respondent employed him through a letter dated 17 September 2013, and that previously he was employed by Sheer Logic Ltd. It appears that the Respondent had an outsourcing agreement with Sheer Logic Ltd.
18. The Claimant however did not disclose enough about his relationship with Sheer Logic Ltd and its the nexus with the Respondent. No material was presented before Court that the Respondent would assume any employment liabilities on the side of Sheer Logic Ltd. Similarly, no statutory backing for the assumption of the liability was laid.
19. On the strength of the appointment letter, the Court finds that the Claimant's formal employment relationship with the Respondent commenced on 1 October 2013.
20. The Respondent therefore cannot be liable for any dues prior to 1 October 2013.

### **Whether dismissal was unfair**

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

21. Section 41 of the Employment Act, 2007 protects employees from procedurally unfair termination of service. If the termination is on one of the grounds of *misconduct, poor performance or physical incapacity*, an employer is under a statutory obligation to inform the employee of the reasons for contemplated termination and to hear the representations made by the employee.
22. When an employee challenges the termination, an employer should satisfy the Court that it complied with the procedural fairness safeguards provided for in section 41 of the Employment Act, 2007.
23. There is nothing presented before Court to show that the Respondent complied with the section. The letter referenced *Notice of Non-Confirmation* did not make any reference to asking the Claimant to make any representations or show cause why disciplinary action should not be taken against him.
24. Further, the appointment letter provided for one month notice of termination though with an exception for summary dismissal for justified reasons.
25. Employers of more than 50 employees should also have disciplinary policies in place. It is not clear whether the Respondent had in place such policies and whether the policy was followed.
26. The Court finds that the summary dismissal of the Claimant was procedurally unfair. With this conclusion, it is not necessary for the Court to examine the reasons for the dismissal and whether



**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Odhiambo instructed by Cheptumo & Co. Advocates

For Respondent Ongweny & Moibi, Advocates (filed Appearance but no Response/did not participate in the hearing)