



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

**CAUSE NO. 328 OF 2013**

**CALEB M. BASWETI**

**CLAIMANT**

**v**

**NAKURU LUCKY INVESTMENTS**

**RESPONDENT**

**JUDGMENT**

1. Caleb M. Basweti (Claimant) filed a Memorandum of Claim against Nakuru Lucky Investments alleging unlawful and unfair termination. The Respondent filed a Response on 14 November 2013, and the Cause was heard on 28 October 2014.

**Claimant's case**

2. Claimant's case is that he was employed by the Respondent on 21 May 2001 as a cleaner and rose to a machine operator, and that he was issued with an employment card on 16 June 2001.
3. On 29 March 2013, while on the day shift, he was called by the Respondent's director called Patrick Kariuki to the office and instructed to hand over the keys to the slot machine to a colleague, allegedly because he had been stealing from the Respondent. The director ordered him to leave.
4. The Claimant stated that he thereafter went to a Manager called Charles who advised him to take 3 days off he had requested for earlier. When he resumed duty, Charles informed him not to start work until he had seen the director.
5. He further stated that he did not manage to see Patrick until after about a month on 28 April 2013, when the director told him he had been dismissed. He was not given a termination letter. He was also not given notice of termination. When he asked for his dues, the director told him he would not be paid.
6. The Claimant confirmed he was getting pay slips and that his wages at time of termination was Kshs 6,522/- and house allowance of Kshs 978/- per month.
7. The Claimant denied absconding from work and said that he reported a dispute to the Ministry of Labour.
8. In cross examination, the Claimant stated that his evidence was consistent with his pleadings and that he collected March 2013 wages on 3 April 2013. He further reiterated that he was not issued with a written contract. He confirmed that he used to take his 30 days annual leave in January of every year.

## **Respondent's case**

9. The Respondent called its Accountant, Michael Kamuren Chebyegon to testify on its behalf.
10. The witness stated that a cleaner called Benard Nadet was caught stealing money in the form of tokens and that the Respondent's Director suspected the Claimant had left the machines unsecured.
11. He also stated that at the time of theft, the Claimant was off duty and that he never reported back on duty until he appeared one day and the Director instructed him to give the Claimant Kshs 2,000/-. He further stated the Claimant did not collect his March 2013 salary.
12. In cross examination, the witness stated that the Respondent had financial difficulties at the time and was paying wages in instalments. He also stated that he was not present when the Claimant met with the Respondent's Director.

## **Issues for determination**

13. Like any other complaint of unfair termination, two principal issues arise and these are, whether Claimant was terminated or absconded, if termination, whether the termination was unfair and if so, appropriate remedies.
14. In the present case, the exact job description of the Claimant is also contested.
15. The Court has considered the Claimant's written submissions filed in Court on 6 November 2014 (the submissions should have been filed before 3 November 2014 and no reason was given for the late filing even through a letter to the Deputy Registrar).

## ***Cleaner or Machine operator***

16. Pursuant to sections 9 and 10 of the Employment Act, 2007, an employer has a statutory obligation to issue an employee with a written contract. The contract should have certain prescribed particulars. The particulars include the job description of the employee.
17. The Respondent did not issue the Claimant with a written contract. In failing to issue a written contract, the Respondent was not only in breach of the law but had committed a criminal offence.
18. Pursuant to section 10(7) of the Employment Act, 2007, the Court makes a finding of fact that the Claimant was a machine operator and not a cleaner at time of separation.

## ***Whether termination or abscondment***

19. The Claimant testified that a named person called him to the office and directed him to hand over to a colleague and he proceeded on off duty having secured permission from a Manager, Charles. When he resumed, the said Charles informed him of instructions from the director not to commence work until he saw the director.
20. For the Respondent, it was contended that the Claimant never resumed duty after going on off.
21. The Respondent did not challenge or controvert the Claimant's version. Charles was not called to testify nor was there an explanation as to why he could not be called.
22. Weighing the two versions, the Court is satisfied that the Respondent's director, Mr. Patrick Kariuki informed the Claimant to leave and not resume work until further instructions.
23. The Court finds that the Claimant did not abscond but had his services terminated.

## **Whether termination was unfair**

### ***Procedural fairness***

24. By dint of section 41 of the Employment Act, 2007, it was incumbent upon the Respondent to demonstrate that it confronted the Claimant with the allegations against him and that it gave the Claimant an opportunity to make representations.
25. Even if the Claimant had absconded he would still have been entitled to a hearing. The Respondent did not discharge the statutory burden and the Court finds that the termination was procedurally unfair.
26. Section 41 of the Act protects employees from unprocedurally unfair termination. Having come to the conclusion the termination was procedurally unfair, it is not necessary for the Court to discuss whether the Respondent discharged the burden placed on it by sections 43 and 45 of the Employment Act, 2007.

### **Appropriate remedies**

#### ***Three months salary in lieu of notice***

27. The Claimant sought Kshs 21,420/- being the equivalent of three months wages as pay in lieu of notice. However, the Claimant did not lay any evidential, contractual or statutory basis for three months pay in lieu of notice.
28. The Claimant was being paid by the month. Pursuant to section 35(1)(c) of the Employment Act, 2007 he should have been given one month written notice or pay in lieu of notice.
29. The Court finds that the Claimant is entitled to one month pay in lieu of notice in the sum of Kshs 6,522/-.

#### ***Severance pay***

30. The case as presented was not one of termination through redundancy. Severance pay is therefore inapplicable.

#### ***Compensation***

31. This is one of the primary remedies for unfair termination. It is a discretionary remedy. The discretion of the Court is however fettered by the factors set out in section 49 of the Employment Act, 2007.
32. The Claimant served the Respondent for about 12 years. Considering the length of service, the Court would award him the equivalent of seven months gross wages as compensation. The compensation is assessed in the sum of Kshs 52,500/-.

#### ***Accrued leave***

33. The Claimant admitted he was going on 30 days annual leave every January. This head of claim is not merited.

### **Conclusion and Orders**

34. The Court finds that the Claimant did not abscond duty but was terminated and holds that the termination of services was procedurally unfair and awards the Claimant and orders the Respondent to pay him

