



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAKURU**  
**CAUSE NO. 228 OF 2013**  
**(Originally Nairobi Cause No. 1202 of 2010)**

**FREDRICK MANDE.....CLAIMANT**

**v**

**SPIN KNIT LIMITED.....RESPONDENT**

**JUDGMENT**

1. Fredrick Mande (Claimant) was offered employment by Spin Knit Ltd (Respondent) through a letter dated 1 November 1996, as a machine operator on a permanent appointment.
2. On 1 September 2009, the Respondent wrote to the Claimant informing him of his summary dismissal for declining to report for light duties and for disobeying lawful and proper commands from a person in authority, pursuant to section 44(4)(a) & (e) of the Employment Act, 2007.
3. On an unclear date in 2010, the Claimant commenced legal proceedings against the Respondent alleging unlawful termination. The Respondent filed a Response on 1 December 2011.
4. On 23 February 2011, Mukunya J (as he was then) ordered, after consent by the parties that this Cause be consolidated with Nairobi Cause No. 1265 of 2010, and the two be heard under Cause No. 1242 of 2010 on 18 March 2011.
5. On 18 March 2011, the Respondent was granted an adjournment to allow Mr. Muthanwa come on record for the Respondent. Hearing was fixed for 9 June 2011, but it never proceeded.
6. On 4 November 2011, the Court noted that this Cause had been consolidated with Cause No. 1265 of 2010 and directed they be heard together. The Claimant testified on that date and hearing was adjourned to 28 February 2012 for Respondent's case but it never took off.
7. The Respondent's case was fixed for 3 July 2012, but the hearing never materialised. On 9 July 2013, Nduma J ordered that the Cause be transferred to Nakuru.
8. On 5 August 2013, the firm of Simiyu & Co. Advocates came on record for the Claimant.
9. After several false starts, hearing commenced afresh before Ongaya J on 5 June 2013, when the Claimant made opening remarks. After the remarks, the Court directed the parties to attempt out of Court settlement on the basis of judgment in Nakuru Cause No. 60 of 2013, failure to which hearing was to

proceed on 15 July 2014.

10. On 15 July 2014, the Respondent sought and got leave to file an Amended Response and on 22 July 2014, the Respondent filed an Amended Response.

11. Eventually the Cause proceeded to hearing before me on 28 October 2014.

### **Claimant's case**

12. The Claimant's pleaded case is that he was employed by the Respondent on a casual basis in 1995, and in 1996 he was appointed on permanent terms.

13. It was also pleaded that the Respondent did not provide the Claimant with protective clothing as a result of which the Claimant contracted an occupational disease, forcing the Claimant to seek medical attention and that it was recommended that the Claimant be put on light duties. The Respondent ignored the advise and attempted to force the Claimant to undergo an HIV test but the Claimant refused.

14. As a result of disagreements arising from the medical recommendations, the Respondent unfairly terminated the services of the Claimant on 1 September 2009 without notice. The Claimant also alleged discrimination and redundancy.

15. During testimony, the Claimant gave an incoherent statement of the circumstances leading to the separation. The Court will try to make sense of the incoherent testimony and to narrate the circumstances as may be relevant for a complaint of unfair termination in a logical way.

16. The Claimant stated that on 15 August 2009, the Respondent sent him to its doctor, Dr. Bhatt. The doctor sent him for some tests and a report dated 19 August 2009 was issued to him (Claimant exh. 6) recommending light duties.

17. The Claimant went on to state that when he took the medical report to the Respondent, the Respondent insisted he consult its doctor and he went with the Respondent's nurse to see the doctor. When he returned, the security guard refused him entry insisting he must go for HIV testing.

18. On 21 August 2009, he was summoned to be examined by another doctor at the Respondent's premises but because other employees caused a commotion, the doctor did not examine him.

19. On 23 August 2009, a shop steward informed him to report to work at 11.00 am and when he reported the Respondent's Administration Manager and nurse coerced him to go to Nakuru Provincial General Hospital for an HIV test, but the staff at the clinic refused to test him.

20. The next day he was denied entry into the Respondent's premises and on 25 August 2009, his Union intervened without success.

21. On 1 September 2009, he was issued with a termination letter (Claimant's exh 8) and the reason given was that he had refused to report for light work.

22. According to the Claimant, the reason was not valid.

23. He further stated that he was not provided with protective clothing as a result of which he fell ill and got a Certificate of Redeployment on 18 August 2009 from the Department of Occupational Health and Safety (Claimant's Exh 3).

24. In cross examination, the Claimant stated that he was diagnosed with bronchitis in 2007.

25. Regarding circumstances surrounding separation, the Claimant stated that he never resumed work after 15 August 2009, because he was denied entry into the factory. On 19 September 2009, he took the

medical test results to the Administration Manager and nurse and that on both 20<sup>th</sup> and 29<sup>th</sup> August 2009, he was chased away by security guards.

26. The Claimant denied attending a meeting on either 28 August 2009 or on 2 September 2009, and stated that the show cause letter he was shown in court was not delivered to him through a shop steward, but sent to his home address and that he was given the dismissal letter by a guard at the gate.

27. The Claimant confirmed a dispute was reported to the Ministry of Labour, but stated no agreement was reached.

### **Respondent's case**

28. The Respondent's pleaded case was that the dismissal of the Claimant was lawful and was preceded by a show cause letter dated 29 August 2009, and that the Claimant only provided it with the Certificate of Redeployment on 2 September 2009, after the dismissal and was given a chance to undergo further medical evaluation but refused. It was also pleaded the Claimant was assigned light duties but declined.

29. The Respondent called two witnesses. The first, Kagua Kilondo was a supervisor of the Claimant. He stated that on 28 August 2009, a meeting was held between his co-supervisor, the nurse, Administration Manager and a shop steward regarding assigning the Claimant light duties as recommended by the doctor. Notes of the meeting were taken and were signed by those who attended. The Claimant however refused to sign (Resp. appendix 11).

30. The witness further stated that his department received a copy of the show cause letter dated 29 August 2009, but he did not see a copy of the Claimant's response. He stated the dismissal was lawful because the Claimant was absent from duty.

31. In cross examination, the witness stated he did not have the power to hire and fire employees.

32. Respondent's second witness was its nurse. She stated that on 15 August 2009, the Claimant visited the clinic and she decided to refer him to a doctor. The Claimant visited the doctor and returned on 18 August 2009 with the results. Among the recommendations was that the Claimant be put on light duties.

33. She further stated that a meeting was held on 28 August 2009, but the Claimant refused to sign the notes of the meeting. The meeting was attended by among others, a shop steward.

34. The witness denied forcefully taking the Claimant for an HIV test because it was not necessary. She confirmed she was present in the meeting of 2 September 2009, when the Claimant brought the Certificate of Redeployment.

### **Issues arising**

35. As already stated, the Claimant's testimony was incoherent. But the main complaint relates to unfair termination and the main issues arising are, whether the dismissal was unfair and if so, appropriate remedies. The Court has considered the Claimant's submissions though filed late.

### **Whether dismissal was unfair**

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

36. The reason given in the dismissal letter was that the Claimant declined to report for light duties and therefore failed to obey lawful and proper commands. This reason relates to misconduct and therefore section 41 of the Employment Act, 2007 is applicable.

37. According to the Respondent, a show cause letter dated 29 August 2009 was issued to the Claimant. The show cause letter was addressed to the Claimant, care of knitting department.

38. The show cause letter set out the allegations against the Claimant. The letter asked him to show cause why disciplinary action should not be taken against him.

39. The hearing required by section 41 of the Employment Act, 2007 can be conducted either through correspondence or through face to face hearing. In the instant case, the Respondent chose primarily correspondence.

40. On the face of it, the show cause letter meets the requirements of procedural fairness. But the puzzle is whether it was delivered to the Claimant.

41. The Claimant's testimony was that the show cause letter was not forwarded to him through a shop steward but was instead sent to his home address.

42. The Respondent's first witness stated that his department received a copy of the show cause letter. He did not make any reference as to whether and how the letter was delivered to the Claimant.

43. The Claimant's further testimony was that after 15 August 2009, he did not resume work. He reported at the workplace to take to the nurse the medical report on 18 August 2009 and on 21 August 2009 when a doctor never managed to reexamine him. His other testimony was that the guards at the gate would not allow him into the premises.

44. Balancing the evidence on record, the Respondent has not shown whether and how the show cause letter was delivered to the Claimant. The testimony that it was sent to his postal address was not controverted.

45. On the basis of the evidence, the Court finds that the show cause letter was not delivered to the Claimant, and therefore he was not aware of the contemplated disciplinary action. The dismissal was procedurally unfair.

46. Because of the conclusion, it is not necessary for the Court to examine whether the Respondent has proved the reasons for termination and that the reasons were valid and fair.

### **Appropriate remedies**

#### ***3 months wages in lieu of notice***

47. No contractual basis was laid for the giving of three months notice or pay in lieu of notice. The fall back position is therefore the minimum statutory period of one month under section 35(1)(c) of the Employment Act, 2007.

48. At time of dismissal, the Claimant was earning basic pay of Kshs 7,783/-. The Court awards him an equivalent as one month pay in lieu of notice.

#### ***Outstanding 16 days annual leave***

49. The Respondent did not controvert this claim or produce leave records. Pursuant to sections 9, 10(3) and (7) and 74 of the Employment Act, 2007, the Court would find for the Claimant in the sum of Kshs 11,483/-.

#### ***6 days off duty***

50. This head of claim was also not rebutted through employment records or through testimony. The Court awards the Claimant the sum claimed.

#### ***14 years severance***

51. The claim was not presented as one of redundancy. The claim for severance pay is therefore misplaced.

### ***Refund of medical bills***

52. The Claimant sought Kshs 1,600/- on account of medical expenses. No invoices or bills were produced. The Claimant did not mention issue of medical expenses in testimony. This head of claim is declined.

### ***14 years gratuity***

53. The Claimant did not lay a contractual or statutory foundation for gratuity as opposed to service pay provided for under section 35(5) of the Employment Act, 2007. However, the Claimant produced a statement from the National Social Security Fund indicating membership.

54. By dint of section 35(5) and (6) of the Employment Act, he would not be entitled to service pay.

### ***12 months compensation***

55. This is one of the primary remedies for unfair termination. It is a discretionary remedy. The discretion is however fettered by the provisions of section 49(4) of the Employment Act, 2007.

56. The dismissal has been found unfair. The Claimant served the Respondent for about 13 years. Considering the length of service, the Court would award him the equivalent of 10 months gross wages assessed as Kshs 96,830/- as compensation.

### ***Injury at the workplace***

57. The Claimant further sought orders compelling the Respondent to complete the occupational injury report/compensation forms. The Respondent is under a statutory obligation to report all occupational injuries in the workplace and it should fulfil its statutory obligations.

### **Conclusion and Orders**

58. The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

a. One month wage in lieu of Notice	Kshs 7,783/-
b. Outstanding 16 days leave days	Kshs 11,483/-
c. 6 days off duties	Kshs 2,240/-
d. 10 months gross wages as compensation	Kshs 96,830/-
<b>TOTAL</b>	<b>Kshs 118,336/-</b>

59. The Respondent is ordered to complete the Department of Occupational Health and Safety workplace injury forms and forward the same to the Ministry of Labour within 10 days.

60. The heads of claim for severance pay, refund of medical bills and gratuity are dismissed.

61. No order as to costs because Claimant filed submissions late.

**Delivered, dated and signed in open Court in Nakuru on this 28<sup>th</sup> day of 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Simiyu instructed by Simiyu & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers