



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

**AT NAIROBI**

**CAUSE NO 168 OF 2013**

**DENIS MAINA GATHANJU.....CLAIMANT**

**VS**

**LAND & MARINE PUBLICATIONS (K) LTD.....RESPONDENT**

**AWARD**

**Introduction**

1. Denis Maina Gathanju, the Claimant in this case worked as the Respondent's Editorial Director. Following termination of his employment, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Response on 25<sup>th</sup> March 2013 but did not call any witnesses at the hearing. The Claimant testified on his own behalf.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as Editorial Director effective 1<sup>st</sup> January 2011 at a monthly salary of Kshs. 215,000. On 7<sup>th</sup> June 2012, the Respondent's Managing Director, Gary Gimson met the Claimant and instructed him to immediately resign from his position. The Claimant declined to accede to Gimson's verbal demand and by letter dated the same day, Gimson asked the Claimant to tender his resignation by the end of the day. Thereafter, the Claimant was denied access to the Respondent's premises.

3. The Claimant states that no reason for the termination of his employment was advanced and that prior to the termination he was not afforded any opportunity to be heard. The termination was therefore unjustifiable and unfair and the Claimant claims the following:

- a. Kshs. 50,166 being salary for 6 days worked in the month of June 2012;
- b. Kshs. 215,000 being notice pay;
- c. Kshs. 229,000 being leave pay for 35 days;
- d. Kshs, 2,580,000 being 12 months' salary in compensation for unlawful termination;
- e. Certificate of service;

f. Costs and interest

### **The Respondent's Case**

4. In its Response, the Respondent admits having employed the Claimant at a gross salary of Kshs. 215,000. The Respondent also admits that a meeting took place between its Managing Director and the Claimant. The Respondent goes on to state that the Claimant was informed of the reasons for the termination of his employment and that prior to the termination, he was given the opportunity to respond to the allegations leveled against him but he failed to do so.

5. In the Response, the Respondent sets out the reasons for the termination of the Claimant's employment ranging from nepotism, financial impropriety to absenteeism from work. According to the Respondent, the Claimant asked for the option to resign which was granted. The Claimant however declined to hand in his resignation letter prompting the Respondent's Managing Director to write to the Claimant in that regard.

6. The Respondent denies that the e-mail dated 9<sup>th</sup> April 2012 attached to the Claimant's Statement of Claim originated from its Managing Director and states that the Claimant hacked into the Managing Director's e-mail and sent the offending mail to his own in box.

### **Findings and Determination**

7. The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment was justifiable and fair;
- b. Whether the Claimant is entitled to the reliefs sought.

### **The Termination**

8. Section 43 of the Employment Act, 2007 provides that:

***(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.***

9. On 7<sup>th</sup> June 2012, the Respondent's Managing Director, Gary Gimson wrote to the Claimant as follows:

*“Further to this morning's meeting, I am giving you an opportunity to resign by close of business today from your position as editorial director at Land & Marine Publications (Kenya) Ltd.*

*Once I have received your resignation, I will instruct Mayur Shah to arrange payment of all monies owing to you, including any outstanding leave. This will be paid at month end and will be subject to your good conduct during the intervening period.*

*I look forward to receiving your resignation letter some time later today.*

*In the meantime, I would like to wish you every future success and to thank you for the excellent work that you have undertaken on behalf of Land & Marine Publications (Kenya) Ltd during the last 18 months or so.*

*Yours sincerely*

*Gary Gimson*

*Managing Director*

*Land & Marine Publications (Kenya) Ltd*”

10. A reading of this letter does not disclose any reason for the termination of the Claimant's employment. Moreover, the Claimant testified that the allegations made against him in the Respondent's Response and on which he was cross examined by Counsel for the Respondent were not put to him at the time his employment was terminated.

11. Employers must understand that before terminating the employment of an employee they must take the employee through a disciplinary process in which the reason(s) for the termination are clearly spelt out. An employer who abdicates this primary responsibility cannot be allowed to re-enact the disciplinary process before the Court. It is not the duty of the Court to participate in internal disciplinary processes; the role of the Court is to examine these processes *post facto* with a view to determining compliance with the law.

12. As stated by this Court in *John Otieno Mukabi Vs Kenya Builders & Concrete Ltd [2014] eKLR*:

***“an employer is required to provide the reason for termination of employment of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause. Once an employer decides to take the ultimate disciplinary action of terminating the employment of an employee, the reason for the termination must be clearly stated in the letter of termination. By the time an employee exists from employment on account of termination, the reason for their termination must be clear.”***

13. An analysis of the circumstances surrounding the termination of the Claimant's employment does not reveal any stated reason(s) for the termination and the Court therefore finds the said termination unfair for want of substantive justification.

14. From the Respondent's Response as well as the line of cross examination adopted by Counsel for the Respondent, the Court caught a whiff of allegations of misconduct against the Claimant.

15. Section 41 of the Employment Act, 2007 establishes the procedure for handling cases of misconduct as follows:

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

16. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

17. There was no evidence that the Claimant was subjected to the disciplinary process required under Section 41 of the Act and the Court therefore finds that the termination of the Claimant's employment was unfair for lack of due process as well.

## **Reliefs**

18. Having found the termination of the Claimant's employment unfair both substantively and procedurally I award him four months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the events leading to the

termination of the Claimant's employment. I further award the claimant one month's salary in lieu of notice.

19. With regard to the claim for leave pay, the Respondent did not produce any leave records to disprove the Claimant's claim. I therefore award the Claimant leave pay for the entire period of service. The claim for salary for six days worked in the month of June 2012 also succeeds and is allowed.

20. Ultimately, I make an award in favour of the Claimant in the following terms:

a. 4 months' salary in compensation for unfair

termination.....Kshs. 860,000

b. 1 month's salary in lieu of notice.....Kshs. 215,000

c. Leave pay for 2011 (215,000/30x21).....Kshs. 150,500

d. Prorata leave pay for 2012 (215,000/30x9).....Kshs. 64,500

e. Salary for 6 days worked in June 2012

(215,000/30x6).....Kshs. 43,000

Total.....**Kshs. 1,333,000**

21. The Claimant is also entitled to a certificate of service. The Respondent will meet the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF NOVEMBER 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Echesa for the Claimant

Mr. Kimani for the Respondent