



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

**AT NAIROBI**

**CAUSE NO. 187 OF 2013**

**MICHAEL WAMBUA MASAKU ..... CLAIMANT**

**VERSUS**

**MALKEN HOUSING SYSTEM LIMITED ..... RESPONDENT**

**Mr. Nzaku for Claimant**

**Mr. Kiragu for Respondent**

**JUDGMENT**

1. Claimant was employed by the Respondent as a site clerk by a letter of appointment effective 1<sup>st</sup> August 2010. He was later promoted to the position of a site supervisor which position he held until the date of summary dismissal on 8<sup>th</sup> January 2013.

2. It is the Claimant's case that he was first employed by Taarifa Engineering Limited on 5<sup>th</sup> January 2010 as an office clerk which company preceded the Respondent company and the letter of 1<sup>st</sup> August 2010, merely transferred his employment to the Respondent. The first salary was kshs.15,000/= per month but as at the time of dismissal the salary had increased to Kshs.18,000/= per month.

**Claimant's case**

3. The Claimant alleges that the summary dismissal was not for a valid reason and was not procedurally fair.

That he had not misconducted himself to warrant the action taken by the Respondent.

He had served the Respondent for three years and was not paid any terminal benefits upon dismissal.

4. The Claimant therefore prays for;

- a. a declaration that the summary dismissal was wrongful and unfair and he be paid maximum compensation equivalent to twelve (12) months' salary for the dismissal;
- b. one month salary in lieu of notice in the sum of Kshs.18,000/=;
- c. forty one (41) days salary in lieu of leave in the sum of Kshs.36,000/=;
- d. overtime of 469 hours in the sum of Kshs.53,997.85.
- e. grant of certificate of service;

- f. in the alternative the Claimant be reinstated in his former position without loss of benefits and / or seniority.

### **Respondent's case**

5. The Respondent filed a memorandum of Reply to the memorandum of claim and a counter claim on 26<sup>th</sup> February 2013.
6. The Respondent states that it employed the claimant on 1<sup>st</sup> August 2010 and not on 5<sup>th</sup> January 2010 as alleged by the Claimant.
7. The salary of Kshs.18,000/= per month is admitted. The Respondent further admits that the Claimant was entitled to 23 days leave with pay per year and that termination of the employment contract was to be by either party giving one month's notice in writing or payment in lieu thereof.
8. In case of summary dismissal the notice or payment in lieu was not applicable.
9. The Respondent avers that the Claimant was summarily dismissed on grounds of gross misconduct and in particular for absenting himself from his place of work without leave or other lawful cause on 21<sup>st</sup> December 2012 from 10 a.m. and accordingly wilfully neglected to perform his supervisory work which it was his duty to perform.
10. This he did contrary to a clear communication given to the workers and the supervisors that the 21<sup>st</sup> December was a normal working day from 8 a.m. up to 5 p.m.
11. The Claimant therefore knowingly failed or refused to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
12. It is the Respondent's contention that the site manager Mr. Ayub Oloo Oluoch conducted investigations on the matter and met the Claimant at the Embakasi office on 8<sup>th</sup> January 2013 and explained to the claimant the reasons why he was being summarily dismissed. That the claimant was given opportunity to answer the allegations which explanation was not satisfactory.
13. The site Manager summarily dismissed the Respondent and offered to pay him terminal dues and grant him a certificate of service but the Claimant declined to accept the same.

### **Overtime**

14. The Respondent states that the Claimant was paid for any overtime work done and noted that the payslips submitted by the Claimant himself for the months of October to December 2010, November and December 2011 and September to November 2012 clearly show that overtime was paid to the Claimant in those eight months. The Respondent attached a pay sheet marked "MHS3" for the period 2011 and 2012 in which is indicated payment of overtime to the Claimant.
15. The Respondent does not deny asking the claimant to do batching plant duties from 5<sup>th</sup> January 2010 until the time of dismissal.

The entire claim is denied in total.

### **Counter claim**

16. The Respondent avers that it assigned the Claimant with;
- a. pair of safety boots

- b. dust coat
- c. piece of Respirator mask; and
- d. one (1) plain coat and submitted a document marked “MHS4” verifying the issuance.

17. The Respondent avers that the Claimant has failed or neglected to return the items and demands return of the same and or reimburse the Respondent Kshs.4,590/= in respect thereof.

18. The Respondent further claims Kshs.68,540/= from the Claimant being money paid on his behalf to cover medical fees. That this money was later converted into a loan and he is still liable to pay the same.

19. The Respondent produced receipts evidencing the said payment marked “MHS5” and claims payment of the money by the Claimant.

The Respondent also claims costs of the suit.

20. The Claimant did not file a reply to the Respondents response to the memorandum of claim and counter claim.

### **Testimony**

21. The Claimant testified under oath in support of the particulars of claim and the prayers thereof. He insisted that he commenced work on 1<sup>st</sup> January 2010 and not on 1<sup>st</sup> August 2010 as alleged by the Respondent.

22. He stated that on 21<sup>st</sup> December 2012, employees were breaking for Christmas holiday. That he completed his shift using a concrete mixer during lunch time. He changed his clothes ready to break for Christmas.

At about 4.30 p.m. he asked the site Manager Mr. Kevin Maingi Kirinya to give him permission to leave.

The Claimant left and returned on 3<sup>rd</sup> January 2013.

23. On 8<sup>th</sup> January 2013 at 7.50 a.m. he received a letter of summary dismissal. The Claimant told the Court that he was not given a show cause letter nor did he appear before any disciplinary committee to explain why his services should not be terminated.

### **Leave**

24. The Claimant seeks twenty three (23) days leave owed to him from January 2012. He told the Court that days given to him as sick-offs and other offs were wrongly calculated as leave days.

### **Overtime**

25. The Claimant told the Court he normally worked from 8 a.m. to 5 p.m. daily but at times worked overtime.

26. He admits that his payslips indicate overtime payment but states that according to his letter of appointment, he was supposed to work forty five (45) hours a week and therefore ought to have stopped working at 1 p.m. on Saturdays but always worked up to 5 p.m. He is claiming three (3) hours for every Saturday in the sum of Kshs.53,997.85. The Claimant states that no overtime was paid for this period. Overtime showing in the payslips was for any other time when he worked overtime.

27. The letter of appointment produced by the Claimant confirms that the Claimant normal working hours were forty five (45) hours per week. The hours spread from 8 a.m. to 5 p.m. from Mondays to Saturdays including fifteen (15) minutes tea break and one (1) hour lunch break daily.

28. It is therefore not correct that the Claimant was supposed to normally break from work at 1 p.m. on Saturdays but rather forty five (45) hours were to be spread between 8 a.m. to 5 p.m. from Monday to Saturday.

A quick calculation however, shows that working from 8 a.m. to 5 p.m. daily adds up to forty eight (48) hours a week.

29. The Respondent has not shown how the three (3) hours overtime was factored daily as overtime in the payments shown as overtime in the payslips. The Claimant insists that he was only paid for overtime when he worked after 5 p.m. on any given day and therefore seeks payment as prayed.

### **Notice pay**

30. The Claimant further states that he ought to have been paid one (1) month's salary in lieu of notice. He states even if the offence complained of was true which is denied, it was not serious enough to warrant summary dismissal.

He told the Court that he had left fifteen (15) minutes earlier with permission from the site Manager.

### **Leave**

31. He told the Court that he had not taken twenty three (23) days leave in the year 2012. He said that he was not paid in lieu of leave in the salary slip for December 2012. This was only done in December 2011. He stated that he was entitled to 30 days leave per year.

### **Compensation**

32. The Claimant claims maximum compensation for unlawful and unfair termination for he was not dismissed for a valid reason and a fair procedure was not followed in that he had left work fifteen (15) minutes early on 21<sup>st</sup> December 2013 with permission of the site Manager and was not accorded opportunity to explain that before a competent committee.

The Claimant said, he had since obtained alternative employment and would not insist on reinstatement therefore.

33. The Claimant withstood very close cross-examination insisting that on the material day, there was no general notice to employees not to leave by 5 p.m. He was accordingly given permission to leave fifteen (15) minutes early by the site supervisor which action was quite in order.

34. He insisted that he was owed overtime since the overtime paid did not include payment for the extra three (3) hours per week.

The Respondent put to him that between the year 2011 to 2012, he was paid Kshs.118,920/= as overtime. The Claimant admitted this fact.

He said he was a good worker and had received only one warning letter during his tenure with the Respondent.

He insisted that he was owed leave days and was not paid in lieu thereof in 2012.

The Claimant admitted that payment for medication was paid by the Respondent as alleged.

35. He denied that he was ever given a hearing before dismissal. He stated that he was only asked to read the letter of termination which had been written prior to the meeting with Mr. Ayub Oloo.

36. He admitted that he refused to receive Kshs.11,000/= for the days worked in January 2013.

## **Response**

37. RWI was Mr. Ayub Oloo Aluoch, the site Manager at the material time.

He told the Court that on 21<sup>st</sup> December 2011, he was not at site until after 5 p.m. when he arrived and found the Claimant absent. The Claimant was a supervisor. Furthermore, another supervisor by the name of James Kimani was also absent. Mr. Kevin Maingi acted as the site Manager for the day.

38. A meeting had been scheduled for the workers before they broke off for Christmas and the Claimant was aware of that.

The meeting continued in the absence of the two supervisors.

39. The witness denied that the Claimant had been given permission to leave early. There was no written documentation to that effect and he insisted that the allegation by the Claimant that he had been given permission to leave early was false.

40. The witness said that the Claimant had forty (40) men under him and had left them without supervision. He supervised construction works. The task for the day was not completed due to lack of supervision and the workers had to come the following day to complete the job.

He stated that, he only found the acting site Manager Mr. Maingi at the site on the material day.

41. The witness told the Court that the employees returned to work on 3<sup>rd</sup> January 2012 and on 8<sup>th</sup> January 2012 he called the Claimant to come and explain why he had left early on 21<sup>st</sup> December 2012. That he was in the presence of the Human Resource Manager at the time. That the Claimant did not have a proper explanation and he was summarily dismissed for misconduct.

## **Overtime**

42. He explained that the Claimant and other employees were paid overtime on weekly basis as the payslip shows clearly.

The Claimant was also paid for four (4) days worked in January, 2013.

## **Counter claim**

43. The Respondent paid for a Hospital Bill incurred by the Claimant in the sum of Kshs.70,000/=. This was over and above the National Hospital Insurance Fund payment. The unpaid balance was Kshs.68,540/= which the Respondent counterclaims.

44. The Respondent also claims Kshs.4,590/= in respect of work, equipment not returned by the Claimant upon his dismissal.

45. The witness insists that the summary dismissal was for a valid reason and in terms of a fair procedure.

Under cross examination the witness admitted that he was not the immediate supervisor of the Claimant.

46. The witness admitted that he arrived at the site after 5 p.m. on the material day. He alleges however, he was told that the Claimant had left site at 10 a.m. in the morning and not at 4.45 p.m. as the Claimant alleges. He told the Court that the Claimant punched in at 8.36 on 21<sup>st</sup> December 2012 but did not punch out as is the practice. He then called the claimant to explain why he left early. This took place on 8<sup>th</sup> January 2012. The Claimant did not have a good explanation and was dismissed summarily.

The witness did not explain the three (3) hour overtime worked every week but said that overtime was paid only to those who worked overtime.

47. RW2 was Abigael Mueni, the Human Resource Officer. She had joined the company in July 2013 after the Claimant had left. She had no firsthand information of what took place in her absence.

She told the Court that she had no record of the alleged meeting between RWI and the Claimant on 8<sup>th</sup> January 2013.

The witness told the Court that normal working hours was from 8 a.m. to 5 p.m.

48. That leave forms were filled in respect of leave days taken and a gate pass was given for short-offs taken by employees and was signed by the site Manager. She told the Court that she did not see any gate pass for the 21<sup>st</sup> December 2012.

49. The witness said that the loan advance to the Claimant was being progressively deducted. The money was paid for medical expenses incurred by the Claimant.

The witness told the Court that from the records, claimant had no outstanding leave days.

The witness said that the Claimant was paid for the four (4) days worked in January 2013 which he declined to take. He also refused to collect the certificate of service.

### **Determination**

50. The evidence adduced by the Claimant is to the effect that on 21<sup>st</sup> December 2012, at 4.45 p.m. he was granted permission by the site Manager Kevin Maingi to break for Christmas holiday. This was fifteen (15) minutes earlier than the knock of time at 5 p.m.

The permission was granted verbally. That at the time he had completed his work supervising the concrete mixer works.

51. RWI contradicts this evidence stating that he was informed by other persons, not called to testify before Court that the Claimant had left at 10 a.m. in the morning without permission and he was therefore dismissed for misconduct.

52. The Respondent did not give the Claimant a show cause letter so as to explain under what circumstances he left work on 21<sup>st</sup> December 2012. A disciplinary hearing was also not held to give the Claimant opportunity to explain the circumstances under which he left work on the day. The Claimant was condemned to summary dismissal without a hearing contrary to the provisions of **Section 41** of the **Employment Act**, which mandates an employer to provide an employee, in the company of a person of the employee's choice opportunity to explain his case before termination of employment / or summary dismissal.

53. The site Manager Mr. Kevin Maingi, who the Claimant alleges gave him permission to leave fifteen (15) minutes early was not called to testify by either party.

54. RWI, arrived at the site after 5 p.m. and therefore had no first hand information whether or not the Claimant had left work after 5 p.m.

55. To this end, the Court gives the benefit of doubt to the Claimant and finds that the Claimant has discharged the onus placed on him under **Section 47(5)** of the **Employment Act**. The Claimant has proved on a balance of probabilities that the summary dismissal was wrongful.

The Respondent has failed to justify the summary dismissal of the Claimant and the Court finds that the

summary dismissal was contrary to **Section 45(1)** as read with **Section 45(2)(a)** in that it was not for a valid reason.

56. Regarding procedural fairness, from the evidence before Court, it is clear that no show cause letter was given to the Claimant nor was he afforded a disciplinary hearing before the summary dismissal. The summary dismissal was therefore not done in terms of a fair procedure as provided under **Section 45(2)(c)** of the **Employment Act**.

57. Accordingly, the Claimant is entitled to compensation for unlawful and unfair dismissal from work in terms of **Section 49(1)(c)** of the **Employment Act**.

58. In determining the quantum of compensation to be awarded to the Claimant, the Court is guided by the provisions of **Section 49(4)** as read with **Section 50** of the **Act**.

59. The Claimant was a supervisor who had a good record at work except for one letter of warning. He had served the Claimant for about three (3) years and expected to continue serving in that position and higher positions in future. He was not given a certificate of service but had already gotten new employment. He did not receive any terminal benefits upon summary dismissal.

In the circumstances the Court awards him compensation equivalent to six (6) months salary in the sum of Kshs.108,000/=.

#### **Notice pay**

60. The Claimant is entitled to notice pay equivalent to one month's salary in the sum of Kshs.18,000/= and the Court awards him accordingly.

#### **Leave**

61. The Claimant adduced evidence to the effect that as at the date of summary dismissal, he had twenty three (23) outstanding leave days. The Respondent is obliged to keep records of leave *inter alia* and produce the same to rebut the claim by the employee.

62. The payslip before Court shows that the Claimant was paid in lieu of leave days in December 2011, but this did not happen in December 2012.

The Court finds that the Claimant is entitled to payment in lieu of twenty three (23) leave days not taken in the sum of Kshs.13,800/=. **Arrear salary**

63. The Claimant was not paid the salary for four (4) days worked in January 2013 there being no payslip to that effect and the Court awards him the sum of Kshs.2,769 accordingly.

#### **Overtime**

64. The payslips produced show that the Claimant received payment for overtime from time to time. However, he told the Court this was in respect of hours worked after 5 p.m.

65. That his contract of service provided that he was to work only forty five (45) hours a week. He however was working from Monday to Saturday from 8 a.m. to 5 p.m. This evidence was not rebutted by the Respondent.

66. The Claimant seeks payment for the three (3) extra hours worked daily amounting to 409 hours x 115.38 totaling Kshs.53,997.85.

The Court is satisfied that this claim has been established on a balance of probabilities and awards accordingly.

### **Counter Claim**

67. The Court is satisfied that the Claimant did not return tools of trade in his possession worth Kshs.4,590/=. The Court therefore awards the Respondent Kshs.4,590/= compensation in respect thereof.

68 With regard to the counterclaim for Kshs.68,540/= in respect of a medical advance made to the Claimant by the Respondent. The Court equally finds that the Respondent has proved on a balance of probabilities that it advanced this amount to the Claimant for his own use and the amount had not been fully recovered from his salary at the time of the summary dismissal.

69. Accordingly, the Court will set off the sum of Kshs.73,130/= from the award given to the Claimant.

Accordingly, the Court's final award is as follows;

- i. Kshs.108,000/= being compensation for the unlawful and unfair dismissal;
- ii. Kshs.18,000/= notice pay;
- iii. Kshs.15,900/= in lieu of leave;
- iv. Kshs.53,997.85 overtime;

Total award Kshs.198,666/=;

Less counterclaim Kshs.73,130/=;

**Net award Kshs.125,536/=.**

The award is to be paid with interest at Court rates from date of judgment to payment in full.

Each party to bear the costs of the suit as the claim and the counterclaim have succeeded.

**Dated and Delivered at Nairobi this 13<sup>th</sup> day of November, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**