



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

**CAUSE NO. 433 OF 2013**

**GEOFFREY LAGAT**

**CLAIMANT**

**v**

**ELKAWA ENTERPRISES LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Geoffrey Lagat (Claimant) was employed by Elkawa Enterprises Ltd (Respondent) in 2000 and separated with the Respondent sometime in August 2013. The Claimant was not happy with the separation and on 11 December 2013, he commenced legal proceedings against the Respondent alleging breach of contract and unlawful termination, and seeking damages for unfair termination, 3 months' pay in lieu of notice, severance pay and compensation for underpayments among other ancillary reliefs.

2. The Statement of Claim was served upon the Respondent and it filed a Memorandum of Defence on 31 March 2014. The Cause was heard on 9 October 2014.

**Claimant's case**

3. The Claimant's case is that he was employed by the Respondent in July 2000 as a bouncer and served for two months after which he left to work with Jambo Casino. After about 4 months working with Jambo Casino, the Respondent's Manager called Njoroge called him back to take up duties on a daily basis and he resumed duty from 31 January 2001 at a salary of Kshs 2,800/-.

4. The Claimant stated that he worked until 31 December 2012 when the Respondent closed its operations in Eldoret due to low business and relocated to Kitale.

5. The Claimant also stated he reported to Kitale on 5 February 2013 after his leave and worked until 25 August 2013 when the Respondent's Director called him to go and see him. He went to see him on 27 August 2013 but did not find him. He was advised to see him the next day.

6. Regarding the process followed in the lead to separation, the Claimant stated that when he called the Respondent's supervisor John Mwangi, the Supervisor told him the Director did not want him to continue working. Attempts to get the Director on the phone did not succeed.

7. Later, the Claimant got the Director who told him to seek alternative employment and therefore he asked for a certificate of service and his dues.

8. The Claimant further stated that he did not abscond from work and that he did not receive any warning letters relating to his absence. He denied receiving letters dated 12 September 2013 and 15 October 2013 and stated the postal address P.O. Box 1281 Eldoret was not his. He stated the correct postal address was

P.O. Box 1287 Eldoret.

9. On the termination, the Claimant stated that he was not given any notice and therefore he was seeking compensation for unfair termination, pay in lieu of notice, severance pay and costs and that he was earning Kshs 12,300/- at time of separation.

10. In cross examination, the Claimant stated that he was not issued with a written contract though he was getting pay slips. He also stated that when he resumed work his salary was set at Kshs 4,500/- and this was increased with time. He would take one off day every week and another off with permission because his family was staying in Eldoret, and was signing an attendance register.

11. Challenged on his conduct, the Claimant denied that he beat up a customer/pregnant woman in the presence of one John Nyongesa or that there was violence on 24 August 2013.

12. The Claimant admitted that he was a contributor to the National Social Security Fund and was not being underpaid.

### **Respondent's case**

13. The Respondent called its Director, Joseph Wangari Mwea. He confirmed that the Respondent had employed the Claimant at a club called Places, Eldoret as a bouncer in 2000 but he left in 2002 to join Jambo Casino. In 2005, the Claimant returned and was reengaged as a bouncer/security officer.

14. Regarding the working hours and days, he stated the Claimant was expected to work 6 days in a week and there was a muster roll for marking attendance. At some point, the Manager told him that the Claimant was taking one extra day off work without permission.

15. On the reason for termination, the Director stated that the Claimant beat up a customer on 25 August 2013 in his presence and he summoned him to go to Eldoret to discuss the issue but he never turned up. He further stated the Claimant had a tendency to beat up customers.

16. He denied terminating the services of the Claimant but instead stated that it is the Claimant who absconded duty and that two letters were written to him on 12 September 2013 and 15 October 2013.

17. He admitted that the Respondent owed the Claimant wages for days worked in August 2013 and no other dues. The Claimant was not being underpaid.

### **Issues for determination**

18. From the pleadings, evidence and written submissions, in the view of the Court the issues arising for determination are the applicable law, whether the Claimant was terminated or not, whether termination if at all was unfair, whether Claimant was underpaid and appropriate remedies.

### ***Whether Claimant was terminated***

19. The Respondent contends that the Claimant absconded from work and was not terminated. As a result of the absenteeism, the Respondent wrote to the Claimant on 12 September 2013 and 15 October 2013. The first letter sought to know the whereabouts of the Claimant while the second letter was informing him that because he had failed to explain his absence he stood dismissed.

20. Absenteeism from work without permission or adequate explanation is one of the grounds upon which an employer may dismiss an employee.

21. Under section 41 of the Employment Act, 2007, an employer is under a statutory obligation to observe procedural fairness if the termination is on ground of *misconduct, poor performance or physical incapacity*.

22. Beating up a customer or absence from work without permission fall under the rubric of misconduct.
23. In my view, the correct legal position is that an employee who has deserted duty or absented himself from duty is also entitled to a hearing and the employer should contact or make reasonable attempts to contact him to meet the required threshold.
24. In the instant case, the show cause letter was addressed to a postal address which the Claimant has denied. The Respondent did not challenge the Claimant on the issue of postal address or explain where it got the postal address it used from.
25. The Court therefore finds as a fact that the Claimant did not receive the letter(s).
26. Further, it is clear that the letter of 15 October 2013, though addressed to a postal address disowned by the Claimant, that Respondent had taken a decision to dismiss the Claimant stood dismissed for absconding from work,
27. The Court therefore finds that the Claimant was dismissed purportedly on the ground of absconding from work.

### **Whether the termination was fair**

#### ***Whether Claimant has proved unfair termination***

28. The Claimant's evidence that a Supervisor called John Mwangi informed him that the Respondent's Director had said he did not want him to continue working was not challenged. The said John Mwangi was also not called. The Court is satisfied that the Claimant has met the low threshold of proving his termination was unfair.
29. The obligation thus fell upon the Respondent to meet the statutory burden imposed on employers by sections 41, 43 and 45 of the Employment Act.

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

30. Before terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*, an employer is under a statutory obligation to observe the procedural fairness safeguards outlined in section 41 of the Employment Act, 2007. The equivalent of procedural fairness in public law is natural justice. The principles are more or less the same.
31. The Respondent wrote to the Claimant to explain his whereabouts. That letter was misdirected. The Respondent did not attempt to explain where it got the postal address. It could as well have been a typographical error. But the Court will not speculate in the absence of an explanation by the Respondent.
32. The Respondent had other avenues of communicating with the Claimant. The Claimant and the Respondent's Director had communicated on phone previously. This was not attempted.
33. On the basis of the evidence placed before Court, the Court is satisfied that the Respondent has not demonstrated that it complied with section 41 of the Employment Act, 2007 and finds that the dismissal was procedurally unfair.

#### ***Substantive fairness***

34. An employer is required to prove the reasons for termination and further that the reasons for termination are fair and valid reasons. The reason given by the Respondent was that the Claimant absconded from work. He was absent without permission and failed to explain the absence.
35. The Respondent annexed to its Memorandum of Defence, muster rolls for some unspecified 3

months. The rolls indicate that the Claimant was absent for an average of 4 days for each of the three months. The evidence from both parties was that the Claimant was entitled to one rest day per week. The 4 days absence for each of the three months, in my view only go to confirm that the Claimant was taking the statutory and contractually agreed weekly rest days.

36. The muster rolls do not explain under what circumstances and how the Claimant stopped reporting to work. It was incumbent upon the Respondent to prove the reason for dismissal and that the reason was fair and valid. The Respondent did not satisfactorily discharge the burden and the Court finds and holds the dismissal substantively unfair.

### **Appropriate relief**

#### ***Underpayments***

37. Although the Claimant pleaded that he was being paid below the minimum prescribed rates, in evidence he testified that he was not being underpaid. This head of claim is therefore misplaced.

#### ***Damages for unfair termination***

38. Pursuant to section 49(1)(c) of the Employment Act, 2007, the equivalent of not more than twelve months gross wages is one of the primary remedies where a finding of unfair termination is made.

39. The remedy is discretionary and the Court is enjoined to consider any, some or all of the factors outlined in section 49(4) of the Act, otherwise the Court may exercise its discretion arbitrarily or capriciously. Towards this end, a party should place material before Court as to which of the factors are relevant. Unfortunately, this was not done.

40. The Claimant served the Respondent from 2000 with some breaks (periods disputed) but at least for more than 8 years.

41. Considering the length of service, the Court would award the Claimant the equivalent of five months gross wages assessed at Kshs 61,500/-.

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

42. No contractual or statutory basis for this relief was established. The Claimant was being paid by the month. Pursuant to sections 35(1) (c) and 36 of the Employment Act, 2007, the Claimant is entitled to one month pay in lieu of notice in the sum of Kshs 12,300/- which was the salary at time of separation.

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

43. The Claimant was not declared redundant neither was his case presented as one of redundancy. An award of severance pay is therefore not available to him.

#### ***Compensation for underpayments***

44. In view of the admission by the Claimant that he was not being underpaid this head of relief does not lie to him.

#### ***Costs***

45. The Claimant was directed to file and serve his written submissions before 23 October 2014. The submissions were only filed on 5 November 2014, two days before the date scheduled for judgment. No reasons for the delay were given even through a letter to the Deputy Registrar. For this reason, the Court declines to exercise its discretion to award the successful Claimant costs.

## **Conclusion and Orders**

46. In light of the above discussion, the Court finds and holds that the Claimant was unfairly terminated, the Respondent having failed to discharge the statutory burden placed upon it and the Court awards him and orders the Respondent to pay him

- |       |                                    |                      |
|-------|------------------------------------|----------------------|
| (i)   | One month salary in lieu of Notice | Kshs 12,300/-        |
| (ii)  | 5 months wages as compensation     | Kshs 61,500/-        |
| (iii) | <b>TOTAL</b>                       | <b>Kshs 73,800/-</b> |

47. The head of reliefs for severance pay and compensation for underpayments are dismissed.

48. Each party to bear their own costs.

**Delivered, dated and signed in open Court in Nakuru on this 7<sup>th</sup> day of November 2014.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant      Mr. Maritim instructed by Maritim Omondi & Co. Advocates

For Respondent    Mr. Mukira instructed by Mwangi Mukira & Co. Advocates