



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1423 of 2012**

**BERNARD MUTUGI DANIEL.....CLAIMANT**

**VS**

**LENANA MOUNT HOTEL LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 7th August 2012 and filed in Court on 21st

August 2012, the Claimant sued the Respondent for wrongful and unfair termination of employment and failure to pay terminal benefits.

1. The Respondent filed a Memorandum of Reply and a Supplementary Memorandum of Reply on 11th September 2012 and 30<sup>th</sup> October 2012 respectively.
2. At the hearing Ms Muhanda instructed by Mudeshi Muhanda & Co Advocates appeared for the Claimant while Mrs. Kashindi instructed by Hamilton Harrison & Mathews appeared for the Respondent. The Claimant and the Respondent's witness James Mwaniki (RW1) gave sworn evidence and the parties' respective Advocates filed written submissions.

**The Claimant's Case**

1. The Claimant was employed by the Respondent in the position of Plumber effective 1st April 1991 at an initial salary of Kshs. 2,871. The Claimant stated that his salary was progressively reviewed to Kshs. 17,000 as at the time he left the Respondent's employment (letter of appointment and confirmation letter are marked "BMD2" and "BMD3" in the Claimant's documents).
2. On 4<sup>th</sup> May 2011 the Respondent wrote to the Claimant accusing him of installing old pipes in the Respondent's farm in Kiambu despite the Respondent having purchased new pipes. The Claimant was also accused of purchasing excess items from Intersect Hardware Services at a cost of Kshs. 2,580, over requisition and excess consumption of diesel on account of the Respondent's generators as well as loss of unspecified items. The Claimant was asked to submit an explanation with regard to these charges and was also suspended from duty pending submission of his explanation and further investigations (letter marked "BMD4" in the Claimant's documents).
3. On 9<sup>th</sup> June 2011, the Respondent wrote a reminder to the Claimant asking him to submit a written explanation on the charges leveled against him in the Respondent's letter dated 4<sup>th</sup> May 2011 (reminder is marked "BMD5" in the Claimant's documents).
4. On 22nd June 2011, the Claimant wrote to the Respondent forwarding his statement in response to the allegations leveled against him. On the allegation of installing old pipes at the Kiambu Farm,

the Claimant stated that 3 pipes had mist on them making them appear old. Following a complaint by the Managing Director, the supplier had replaced the pipes. On the allegation of over purchasing of fittings the Claimant stated that this was occasioned by change in positioning of pipes and that he had personally handed over the extra fittings which were returned to the supplier and a Credit Note issued. On the issue of over requisition of diesel and excess consumption thereof, the Claimant stated that he had followed the established procedure for requisition which involved the Managing Director and other employees and that the apparent over consumption was caused by frequent power outages. On the allegation that many items had gone missing under the Claimant's watch, the Claimant asked for further particulars.

5. On 9<sup>th</sup> September 2011 the Respondent wrote to the Claimant, demanding payment for fuel and other items allegedly stolen by the Claimant as well as replacement of a fuel gauge damaged by the Claimant. In the same letter the Respondent summarily dismissed the Claimant (letter marked "BMD6" in the Claimant's documents).
6. In his sworn evidence, the Claimant stated that the company that delivered the pipes in issue was not known to him and that in his view the pipes were not old, that the only issue was that 3 of them had some mist on them and that the same had been replaced by the supplier. He denied purchasing the items he is alleged to have over requisitioned stating that his job was to request for items generally and the management of the Respondent would then follow up on the purchase. On the allegation of misuse of fuel, the Claimant stated that every delivery would be confirmed by the Accountant, the Security Officer and the Claimant who would also confirm that all the fuel went into the generator.
7. The Claimant further told the Court that he had not been issued with any prior warning letter on any of the allegations leveled against him and that his dismissal letter had been issued by Five Hills Company Ltd, a company that was not known to him. The Claimant went on to state that prior to termination of his employment, he was not called to any disciplinary meeting and that therefore he was not given an opportunity to defend himself.
8. The Claimant added that he had not gone on leave during the entire period of his employment with the Respondent, that he had only been paid in lieu of leave for the year 1996 and that all his applications to proceed on leave had been declined by the Respondent.
9. The Claimant therefore claimed the following:

- a) 1 month's salary in lieu of notice.....Kshs. 17,000
- b) Leave pay (17,000/30x21x20).....238,000
- c) Severance pay(17,000/30x15x20).....170,000
- d) Salary for 5 months.....85,000
- e) 12 months' salary as compensation for unfair termination of employment
- f) Costs of the case plus interest

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

13. The Respondent, in its Memorandum of Reply and Supplementary Memorandum of Reply denied the Claimant's claim for wrongful and unfair termination of employment stating that the Claimant had been summarily dismissed after having been involved in the following acts of misconduct and unlawful acts as set out in the Respondent's letter to the Claimant dated 4<sup>th</sup> May 2011 and marked "BMD4" in the Claimant's documents :-

- a) Installing old pipes at the Respondent's establishments in Kiambu and Tigoni;
- b) Ordering for excess items at a cost of Kshs. 2,580 ;
- c) Over requisition for fuel for the Respondent's generators;

- d) Occasioning over consumption of fuel by the Respondent's generators;
- e) Loss of various items under the Claimant's care.

14. The Respondent therefore suspended the Claimant from duty effective 4th May 2011 to enable the Respondent to carry out investigations. The Respondent also asked the Claimant to give his explanation on these allegations. Following a reminder on 9<sup>th</sup> June 2011 the Claimant submitted his written explanation

under cover of his letter dated 22nd June 2011 (“BMD5” in the Claimant’s documents).

15. The Respondent having considered the Claimant's written explanation and finding them unsatisfactory summarily dismissed the Claimant and demanded from him return of the fuel not accounted for and replacement of a faulty fuel gauge for one of the Respondent's generators.

16. In its Supplementary Memorandum of Reply the Respondent denied that the Claimant's salary as at the time of his dismissal was Kshs. 17,000 and attached a copy of the Claimant's letter of confirmation showing the Claimant's gross salary as Kshs. 2,871 effective 1<sup>st</sup> January 1992.

17. In reply to the Claimant's claim for leave, the Respondent stated that the Claimant had taken leave for all the years he had worked with the Respondent save for some occasions when the Claimant would be paid in lieu of leave. The Respondent produced some leave application forms and documents showing payment in lieu of leave and stated that the other documents could not be traced.

18. The Claimant denied receiving the disciplinary memos attached to the Respondent’s Supplementary Memorandum of Reply and the Respondent abandoned this line of defence at the trial.

19. The Respondent's witness, James Mwaniki told the Court that Five Hills Company Ltd was the Respondent's management company.

### **Determination and Findings**

20. The first issue for determination in this case has to do with the Claimant's actual salary as at the time he left the Respondent's employment. The Claimant told the Court and the Respondent confirmed that his salary at confirmation was Kshs. 2,871. Curiously, this figure was blocked in the copy of the confirmation letter produced by the Claimant. The Respondent claimed that the Claimant had blocked the figure in order to mislead the Court. The Claimant in turn claimed that he had received the copy from the Respondent with the figure blocked.

21. According to the Claimant, his salary was progressively reviewed to Kshs. 17,000 as at the time he left the Respondent's employment. The Respondent denied the Claimant's claim but did not offer any further explanation.

22. The Court was not convinced that the Claimant worked at the same salary without any upward adjustment for 20 years. If by any chance the Respondent kept the Claimant on a salary of Kshs. 2,871 for that long then the Claimant had been grossly underpaid. If the Claimant's salary as at the time he left employment was not Kshs. 17,000 as averred by the Claimant, then the Respondent was duty bound to give the correct figure. Under Section 20 of the Employment Act, 2007 employers are required to provide

an itemised pay statement for employees in regular employment while section 10 of the Act requires employers to keep employee records.

23. I therefore find the Respondent's denial that the Claimant earned a monthly salary of Kshs. 17,000 without any further explanation insincere and a vain attempt to frustrate the ends of justice. An employer who has custody of employee records cannot simply come to Court and say "I deny that allegation and put the claimant to strict proof." Every party to a suit has an obligation to present every detail of information that is required to arrive at a just decision. Since the Respondent failed to discharge its responsibility in this regard I have adopted the figure of Kshs. 17,000 as the Claimant's monthly salary as at the time he left employment.

24. The second question for determination is whether the Claimant's summary dismissal was justifiable and lawful. Both parties gave detailed evidence on written communication between them, culminating with the Respondent's letter dated 9th September 2011 vide which the Claimant was summarily dismissed. The letter stated *inter alia*:

***"WE HEREBY DEMAND THE PAYMENT OF ALL DIESEL STOLEN AND FUEL GAUGE DAMAGED BY YOU.....THIS IS A CRIMINAL MATTER AND WE HAVE REPORTED TO THE POLICE FOR THEFT BY SERVANT."***

25. Prior to his dismissal, the claimant had been suspended by the Respondent's letter dated 4th May 2011, which stated *inter alia*:-

***"THE MANAGEMENT NEED A CLEAR EXPLANATION....WHY YOU DECIDED TO INSTALL OLD PIPES. WE HAVE ALSO OBSERVED THAT THE CONSUMPTION OF DIESEL FOR LENANA MOUNT HOTEL FOR JANUARY 2011, FEBRUARY 2011 AND MARCH 2011 HAVE (sic) GONE UP TO OVER KSHS. 100,000 PER MONTH, WHILE THE POWER IS IN CONSTANT SUPPLY. WE ALSO NEED A CLEAR EXPLANATION ON THE CONSUMPTION. WE HAVE NOTED THAT WE HAVE LOST MANY ITEMS WHICH CANNOT BE TRACED WHILE YOU ARE IN CHARGE OF THE MAINTENANCE SECTION OF OUR COMPANY, WE ARE DOING OUR INVESTIGATION IN REGARD TO OTHER ITEMS WHICH WE ORDER AND NOT SUPPLIED (sic) TO OUR ORGANIZATION. DUE TO THE ABOVE THE MANAGEMENT HEREBY RELIEF (sic) YOU FROM DUTY UNTIL THE ABOVE EXPLANATION AND INVESTIGATIONS ARE COMPLETE AND WE WILL TAKE ACTION DEPENDING ON THE OUTCOME."***

26. The Claimant offered his explanation in his written statement dated 24th June 2011. He remained under suspension until his dismissal on 9th September 2011. It was the Respondent's case that the Claimant's explanation as contained in his statement of 24th June 2011 had been considered and having been found inadequate, the Claimant was summarily dismissed.

27. Section 43 (1) of the Employment Act, 2007 provides that:

***(43)(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***

28. Section 45 (2) of the Act provides that:

***A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

**(b) that the reason for the termination is a fair reason -**

- (i) **related to the employee's conduct, capacity or compatibility; or**
- (ii) **based on the operational requirements of the employer; and**

**(c) That the employment was terminated in accordance with fair procedure**

29. Section 41 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:-

**(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make**

30. The test is always whether an employee facing disciplinary action has been given adequate opportunity to respond to charges leveled against them before action is taken. This becomes even more critical when loss of employment is in view. Some cases may be dispensed with by way of a show cause letter issued by the employer and a written explanation by the employee. However, in cases where there is a sharp divergence of viewpoints or where the subject matter in issue is technical in nature, then a live hearing is required. The question remains whether in the circumstances of the particular case, the employee has been given adequate opportunity to present their side of the story.

31. In this case, the Claimant submitted a written explanation which the Respondent rejected and went ahead to summarily dismiss him. The Respondent did not present the actual findings of the investigations promised in the Claimant's suspension letter dated 4th May 2011 or the outcome of the report to the police threatened in the Claimant's letter of dismissal dated 9th September 2011. The Claimant therefore transited straight from suspension on 4th May 2011 to summary dismissal on 9th September 2011.

32. In the case of Bartholomew Wanyama VS Moses Gitari and 2 Others (Industrial Court Cause No. 973 of 2011) this Court stated thus:-

***“The transition from suspension to termination cannot be that smooth and seamless. An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension.”***

33. Labour and employment rights are now anchored in the Bill of Rights and are protected under Article 41 of the Constitution of Kenya, 2010. It follows therefore that before disciplinary action as severe as summary dismissal is taken against an employee, the employees must be afforded and be seen to have been afforded every opportunity to defend themselves.

34. I therefore find that the termination of the Claimant's employment by way of summary dismissal amounted to unfair termination of employment within the meaning of Section 45 of the Employment Act, 2007.

35. I consequently award the Claimant the equivalent of 8 months' salary based on a monthly salary of Kshs. 17,000 as compensation for unfair termination of employment. In making this award, I have considered the Claimant's length of service with the Respondent. I have also considered the fact that the

Respondent did actually commence the disciplinary process but short circuited it by failing to give substantive consideration to the Claimant's defence. I also award the Claimant 1 month's salary in lieu of notice.

36. The Claimant asked for payment of leave for the entire period of his employment save for the year 1996 when his leave had been commuted. In its Supplementary Memorandum of Reply, the Respondent produced some leave application forms through which the Claimant had applied for leave. There was however no evidence that these leave applications were ever approved and the Claimant denied having taken any leave. The Respondent maintained that the Claimant had taken or had been compensated for all his leave.

37. Annual leave is provided for under Section 28 of the Employment Act. An employee is entitled to at least 21 days leave for every continuous service period of 12 months. Paragraph 4 of the Claimant's letter of confirmation stated that:-

**“YOU WILL BE ENTITLED TO 21 WORKING DAYS PAID LEAVE PER ANNUM TO BE TAKEN AT A TIME AGREED BY THE DIRECTORS/GENERAL MANAGER. SUCH LEAVE WILL NOT BE ACCUMULATED AND NO LEAVE PAY SHALL BE PAID IN LIEU.”**

38. The Claimant would therefore take annual leave only upon approval by the Respondent's Directors/General Manager. No evidence was adduced to prove such approval. Since the Claimant was paid in lieu of leave for the year 1996 I take it that the leave for the years before 1996 had been expended. It was however incumbent upon the Respondent to show that the Claimant had taken leave for the period from 1<sup>st</sup> January 1997 up to the time of his termination. They failed to do so and I therefore award the Claimant pay in lieu of leave for the period. I find no basis for the claim for severance pay which is applicable to cases of redundancy under Section 40 of the Employment Act.

39. The net effect of this Award is as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 17,000
- b) 8 months' salary as compensation for unfair termination of employment.....136,000
- c) Leave for the period between 1st January 1997 and 9th September 2011

I also award the costs of this case to the Claimant.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF JANUARY 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:-**

.....**Claimant**  
.....**Respondent**