



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 451 of 2011**

**PETER WAWERU CHEGE ..... CLAIMANT**

**VERSUS**

**LARI DIARIES ALLIANCE LTD. .... RESPONDENT**

**J U D G M E N T**

By a statement of claim dated 11th March, 2011, the claimant seeks the court's intervention to order the respondent to pay him his terminal dues as a result of wrongful termination of his employment.

According to his statement of claim, he was employed by the respondent on 5th September, 2007 as a salesman and was confirmed to the position on 15th November, 2008. He worked for the claimant until 31st October, 2008 when he got involved in a road accident which he claims took place while he was in the course of his duties. He claims his employer (the respondent) was fully aware of the accident yet dismissed him summarily.

The respondent on its part while admitting that the claimant was its employee and further that he was involved in an accident denies it summarily dismissed the claimant. The respondent avers that the claimant applied and was granted 49 days leave on 20th October, 2008 and was to report back to work on 2nd January, 2009. However according to them the claimant neither reported back nor communicated with the respondent. According to the respondent therefore the claimant absconded duty and by his own action terminated his contract of employment.

The respondent further contends that despite desertion it continued to pay the claimant's salary until end of 2009 when the same was stopped and that it was only after the salary was stopped that the claimant through his advocate demanded compensation for wrongful termination.

The respondent accordingly claimed the refund of salary erroneously paid to the claimant when he did not work for the respondent.

During the trial it was only the claimant who gave evidence since the hearing proceeded ex-parte after the trial judge satisfied himself that the date was taken by consent.

The claimant stated how upon discharge he went to his employer's place on crutches in order to be reallocated duty but the new manager did not give him any work. He therefore requested for a letter of reinstatement but was not given any. He therefore sought legal advice on the issue.

The employment Act is clear on how employment relationship can be brought to an end. It provides that where the contract of employment is unclear on the issue of termination or where there is no such contract an employment relationship may only be terminated in accordance with the Act (section 35).

The Act proceeds to provide that parties to an employment contract may terminate their relationship by giving notice in relation to the interval in which salary or wages are paid. (See Section 35 of the Act).

In the case of the claimant, clause 4 of the contract of employment provides that in the event of termination either party were to give one month's notice or payment in lieu thereof.

It is undisputed that the claimant was an employee of the respondent. It is further undisputed that the claimant got involved in an accident and was hospitalised for sometime. The disputed issue however is that whereas the claimant says the respondent knew about his incapacitation, the respondent contends that the claimant applied for 49 days leave at the end of which he failed to return to work hence he was deemed to have deserted duty by the respondents.

No evidence was exhibited either in the memo of response nor in court to show that the respondent called upon the claimant to show cause why he should not be taken to have absconded duty. In any case the respondent continued to pay him throughout 2009 when he was not at work.

Nothing was difficult in issuing the claimant with a dismissal or termination letter on grounds of desertion. In the circumstances the court finds that the claimant's services were wrongfully and unfairly terminated.

Having so found, the court orders the respondent to pay the claimant one month's salary in lieu of notice on account of wrongful termination.

On account of service pay, the claimant is not entitled to claim the same since under clause 10 of his letter of appointment he was a member of the company's provident fund scheme. In that regard the court orders that he be paid his dues under this fund.

Concerning unfair termination the court takes the view that employers pay for services rendered by employees. It was therefore understandably difficult for the respondent to continue paying an employee whose services they were not getting. But that said, nothing prevented them retiring the claimant on medical grounds if they were reasonably convinced that his incapacity was such that he could no longer serve in the respondent's employ.

Section 45(1) of the Employment Act prohibits unfair termination of employment and where it does occur Section 49(1) (c) provides that the court can order payment of up to equivalent of 12 months salary as compensation.

In this case, the respondent paid the claimant throughout 2009 when he was not working. This obviously must be taken into account in assessing any measure of compensation to the claimant. In that regard the court orders that the respondent do pay the claimant equivalent of 6 months salary as compensation for unfair termination of employment.

In conclusion the court orders as follows:-

The claimant be paid

1. Kshs.10,000 on account of salary in lieu of notice.
2. Kshs.60,000 on account of unfair termination of employment.
3. Staff Pension dues.
4. The respondent do issue the claimant with certificate of service.

The payments shall be subject to statutory deductions.

It is so ordered.

Dated at Nyeri this 30th day of January, 2013.

**Abuodha J. N.**

**Judge**

Delivered this 20th day of February, 2013.

**Delivered in open Court in the presence of ..... for the Claimant and  
..... for the Respondent.**

**Linet Ndolo**

**Judge**