



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1287 of 2011**

**SIMON OYARO OMINGO .....CLAIMANT**

**VERSUS**

**SAWARN SINGH AND SON LTD .....RESPONDENT**

**JUDGEMENT**

1. This is a claim dated 26th July 2011 for wrongful, unlawful and unfair termination of employment of Simon Oyaro Omingo the claimant. The Respondent Savarn Singh and Sons LTD response dated 29th November 2011 admit that the Claimant was their employee but he was dismissed for misconduct.

2. The Claimant submitted that he was employed as an Electrician from August 2005 but on the 15th March 2010 he was maliciously and summarily dismissed from his employment on falsified and unsubstantiated grounds contrary to the Employment Act, terms of service and other relevant statutes. That his monthly salary was Kshs.10, 000.00 and at the point of dismissal he said he was not paid his dues for the 5 years he had worked for respondent. That he demands he was not given notice of termination and thus claim pay in lieu of notice amounting to Kshs.10,000.00, 25 days unpaid having worked in March 2010 and underpayment for 2 years all amounting to Kshs.9,000.00 per month. The further claims his leave not taken for 5 years and overtime worked for public holidays, Saturdays and Sunday for the 5 years as he was made to work 3 extra hours on Saturday, public holidays and 8 hours on Sundays. There is also a claim for damages and compensation for unfair termination.

3. In evidence, the Claimant stated that he was an Electrical Technician he started work with the Responded in August 2005. He was in charge of installation of electrical works as technician and his station of work was Industrial Area in Nairobi but would be sent to various sites where work was to be undertaken all over the country. By 2010, hi salary was kshs.9, 000.00. That on 5th March 2010 he was working at the Mbagathi Hospital site when the manager came and took him to the office and told him to go home and report back to work on 12th March 2010. That the Manager made noted that the Claimant had used more materials at the site than expected and the respondent needed to conduct investigations.

4. That on 12th March 2010 he reported back to work, the Director advised him to wait for the Manager and when he came he advised him to go back home and wait for the respondent to call him. That the Claimant demanded for a written document on the reason he was being sent home and why he had to wait instead of working. That no notice or warning had been given to him and he was thus concerned that he was being sent home without knowing the reasons for it. That this was not given and his salary for March was never paid.

5. That on 20th March he was called back and upon reporting the Manager took him to Industrial Area Police Station over charges that he had received cash on M-Pesa and was required to return it. That he was detained for two days and released and preceded to the Labour Office that he Respondent had reported him about his poor workmanship and loss of materials. That both parties discussed the matter

and the Respondent was told by the Labour Officer to calculate his dues.

6. The Claimant further gave evidence that the Police did not charge him with any offence as the parties were advised to go and discuss on how the Claimant was to pay the money he had wrongly received from the Respondent. That on 6th March 2010 the Claimant's son was in hospital and he asked friends to give him money. That Alice sent the money but she later called and said it was erroneous but by then he had already withdrawn the money and used it.

7. That at the Labor Officer the officer asked the Respondent to settle Claimant's dues which was Notice pay and service and what was given was less so he declined to accept it. That what was due amounted to Kshs.25,210.00 but since he had erroneously received Kshs.21,870.00 through M-Pesa, he had a loan of Kshs.5,000.00, he owed his Sacco Kshs.7,000.00 and the respondent was not a member as this was a staff merry-go-round he should not have been deducted these monies at all. He thus refused to take what the Respondent gave him in terminal dues.

8. That the SACCO had a way of re-payment and at the time of termination, he did not owe and the Sacco had not indicated or demanded any debt from him and therefore the Respondent was wrong to make any deductions in this respect.

9. He therefore claims for one month pay for lack of termination notice, underpayment for two years, and pay for leave for 2 years, pay for leave for 3 years and for two years he said he had worked overtime for Saturdays and Sundays. That in 2006 he never went for Christmas or New Year holidays and that some employee was paid and he was not paid. That the payment vouchers indicated by the Respondent as his acknowledgement of payments were never signed by him and therefore he was never paid.

10. That the Respondent only paid NSSF and for 2 years and thus claims for his service for 3 years and his Certificate of Service.

11. In cross examination the Claimant confirmed that his gross salary was Kshs.9, 000.00 and not Kshs.10, 000.00 as earlier stated. That the reasons fro termination was malicious. That in March he worked for 5 days and not 25 days as earlier stated. That his overtime was paid for and he acknowledged and that he is a member of NSSF No. 211308919. That the claim for severance pay is for 3 years. He also acknowledged that Kshs.21,870.00 was sent to him at 1.41 pm and Alice called to indicate it was an error and asked to refund it but he never returned this money as he had already used it. He further confirmed that he had a loan of kshs.5000.00 unpaid. That the Sacco gave him cash and he had not refunded. That some salary slips do not indicate his signature. That he only owed the respondent kshs.3, 000.00 and not Kshs.35, 210.00.

12. Upon further rare-examination, the Claimant stated that he was aware that he had a loan of kshs.5000.00 which he had taken to pay school fees and that he had not refunded the M-Pesa cash as this claim came after his termination. That when he went to the office to refund the cash, he was instead arrested yet there was no demand for this money. And that it was true his net salary was Kshs.9, 000.00.

13. Upon the Court questioning the witness, he stated that he was arrested on allegations that he had received M-Pesa from Alice, his work colleague erroneously and refused to return these funds. That he admitted the claim at the police station and he was asked to refund the money and thus was released.

14. On the other hand it was the Respondent's case that the respondent worked for them and was terminated for gross misconduct on the 6th of March 2010. That he was paid Kshs.10, 000.00 a month less statutory deductions and was registered with NSSF. That at the time of termination his dues were computed and he was advised and this comprised:

(a) 5 days worked in March 2010 amounting to Kshs.1,959.00

(b)Fare for 5 days at Kshs.300.00

(c)2 annual leaves at Kshs.18,460.00

(d)88 hours overtime at Kshs.4,500.00  
(e)1 month salary in lieu of notice at Kshs.10,000.00  
All amounting to Kshs.35, 210.00

15. That by the time of termination the Claimant owed the respondent as follows:

(a) Mpesa money erroneously sent to him amounting to Kshs.21,870.00

(b)Company Sacco welfare group amounting to Kshs.7,000.00

(c)Loan with respondent amounting to Kshs.5,000.00

All amounting to Kshs.33, 870.00

16. That the respondent was requested to pay up his dues but refused to do so insisting that the respondent was the one owing.

17. In evidence the Respondent called Hanna Wambui Kamau who was in Respondent Administration in Accounts and would do salaries and calculate other dues. That she worked closely with the Claimant. She stated that on March 5th 2010 the Manager went to supervise the Mbagathi Hospital site work and to supervise the Claimant and found his work was not good, wrong wiring and photos were taken indicating wrong installations. That this was a Saturday and on Monday the Claimant was suspended for a week pending investigations.

18. That when the Claimant reported back, there was no agreement. That after a week on the 19th Ms. Alice Nelima Musa was to send emergency funds to an employee and by error she sent this money to the Claimant's number and only realised her mistake when the acknowledgement came back. The witness was not in the office but the details were confirmed to her, they tried to reverse the transaction but this was not possible as the Claimant had already withdrawn the money at 4.07 pm on the 16th of March 2010. It was impossible to reverse the transaction. That Alice tried to discuss the matter but the Claimant refused to refund the money and the matter was reported to the police and then to the Ministry of Labour and the Labor officer advised the Respondent to compute the dues owing.

19. That the termination letter to the Claimant was given by Mr. Mugnai the Manager. That in computing the terminal dues, the claimant was to refund the Mpesa money sent by error and the merry-go-round money he had received. That his NSSF and NHIF were paid by the respondent. That overtime was paid immediately this was done and nothing was outstanding. That when the Claimant went to Rongo, there was a supervisor to confirm the overtime which was not the case here. This was not approved and so not subject to payment.

20. That some staff who was out in the field would give authority to fellow colleagues to collect and sign vouchers for them. That this was common practice and the witness on numerous occasions signed for money on behalf of the Claimant as most did not have bank accounts. That they were neighbours in Kikuyu and she used to collect his salary and take it to him at home. That he was paid his dues in full.

21. In cross examination the witness was clear that she did not know why the claimant was terminated. That it was the Manager who determined that the work he did was not done well and took photographs to show the poor workmanship. She was not present when he was suspended and only learnt of this information from others.

22. The termination letter issued to the Claimant dated 12th March 2010 indicated that:

*... Your services have been terminated as from 6th March 2010. This is due [to] gross misconduct at the site you were working on at Mbagathi National Hospital ...*

23. This letter proceeded to outline the various examples of gross misconduct on the part of the Claimant.

24. I note the provisions of Section 44 of the Employment Act Where gross misconduct is cited as the reason for termination:

*Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice that to which the employee is entitled by any statutory provision or contractual term...*

*The following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily ... shall not preclude an employer or employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal.*

25. Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct.

26. Even where summary dismissal is not cited a notice of termination must be preceded with a hearing on the grounds of misconduct to give the Employee an opportunity to defend himself and facilitate the employer arrive at a reasonable decision based on this defence. This is what is envisaged under section 41 of the Act. Equally important is Section 43 of the Act that require proof of reasons for termination and the duty rests on the persons alleging misconduct to proof these grounds particularly where these reasons are disputed like in this case otherwise such termination will be unfair as under Section 45 of the Act.

27. The Claimant herein submitted that he was summoned to the office; several allegations leveled against him and told to proceed on suspension pending investigations. He reported back and was arrested, remained in custody for two days and it seems after this he went to the Labour officer where he was advised to have his dues calculated. The Claimant did not go into the allegations leveled against him in the letter of termination to confirm if they were true or false. All what he insisted upon was that his dues were not computed properly. Equally the Respondent witness was not of much help and she did not address the termination reasons at all as she confirmed she was not present and Mr. Mugnai the manager was the one conversant with the case. Her evidence was not helpful in any material way.

28. I need to note that when parties submit pleadings in Court, they need to take them seriously and where averments are made in general terms and lack in evidence, this Court will not hesitate but dismiss those averment. It is the duty of a party to confirm their claim. It is not clear why the Respondent failed to call Mugnai the Manager or Ms. Alice in evidence to confirm the transactions in this matter.

29. On a balance of probabilities, I find that the case of the claimant on the reasons for his termination was not contradicted in a material way and I find that he was unfairly terminated.

30. The claim for termination notice was not challenged and payment in lieu of notice is therefore due calculated at **kshs.10, 000.00**. Equally the claim for days worked was admitted but I find the Claimant was notified of his termination in the letter dated 12th March 2010 and not on 6th March 2010 when he was put on suspension. I also note from the evidence of the Respondent witness, she indicated that the Claimant was still negotiating his claim by the 16th of March. I will however grant pay for the 12 days worked in March amounting to **kshs.4, 000.00**.

31. The claim for underpayments for two years through claimed were not outlined and it was not clear into eh pleadings or in his evidence as to when this was due. It was equally heard for the Court to identity which duration was covered for the two years claimed for underpayments. This prayer is thus declined. This was similarly applicable for the unpaid leave claim. The claimant totally failed to articulate this prayer. I however note the Respondent admitted as owing leave for two years and I will confirm this

as due but base the amount on the last salary of the Claimant at Kshs.10,000.00 thus for the two years this adds up to **Kshs.20,000.00**.

32. **Overtime** admitted is hereby confirmed at **Kshs.4, 500.00**. This is buttressed by the evidence of the Respondent witness Hanna Wambui Kamau who stated that the claimant was supervised the Manager who was not called to confirm that indeed what was stated was correct. One important thing though from her evidence was that the Claimant was working on a Saturday and confirmation that overtime may have been due. I will take this for the benefit of the Claimant.

33. There was fare allowance that was admitted amounting to **kshs.300.00** and I will confirm this amount.

34. In making payments to any employee, an employer must ensure that all the statutory deduction due are removed from the gross pay. And employer is therefore in law entitled to make a deduction of any amount which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award; This Court is guided by provision of Section 19 of the Employment Act.

35. Employees who out of their own free will join employees welfare associations, Sacco, Union do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, there are owed all their savings without taking into consideration the collective agreement under their Sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.

36. The Claimant did not dispute he was a member of the Respondent employee welfare group and that he had benefited from the proceeds of this group. He was terminated and there was no longer a link between him and his employer and fellow employees. This is a Court of Justice and whatever was pending due from the Claimant should be put into consideration herein. I therefore find that he equally owed Kshs.21, 870.00 that he admitted to have erroneously received and the loan that was unpaid all amounting to Kshs. 33,870.00.

37. In the final analysis the amounts due to the claimant are (10,000 as notice pay, 4,000 days not paid, 20,000 for leave, 4,500 for overtime and 300 for travel) Kshs.38,800.00. From this amount a deduction of 33,870 will be made and the balance awarded to the Claimant all amounting to Kshs.4, 930.00.

For the above reasons, I enter judgement for the Claimant in the following terms:

**(a) A declaration that the termination of the Claimant's employment by the Respondent was unfair.**

**i. One month salary as compensation for unfair termination amounting to Kshs.10,000.00**

**ii. Payment to the Claimant of a sum of Ksh.4,930.00 plus interest at court rates from the date of judgment till full payment; and**

**(b) Costs of the suit.**

These are the orders of this Court.

Delivered in open court at Nairobi this 25th day of March, 2013.

**Monica Mbaru**  
**JUDGE**

In the presence of

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Court clerk