



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1537 of 2011**

**JOSEPH OCHIENG BARASA ..... CLAIMANT**

**-VERSUS-**

**P.C WORLD LIMITED ..... RESPONDENT**

**JUDGMENT**

By a Memorandum of Claim dated 6<sup>th</sup> September 2011 and filed in Court on 8<sup>th</sup> September 2011 the Claimant alleges unlawful and unfair termination of his employment by the Respondent and prays for the following orders:-

- (a) A declaration that the dismissal or termination of the Claimant's employment was unlawful and unfair and the Claimant is entitled to his terminal dues and compensatory damages.
- (b) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs.112,00/=.
- (c) Interest on (b) above from the date of filing suit till payment thereof.
- (d) Cost of this suit plus interest thereon.

The Respondent filed a reply on 8<sup>th</sup> March 2012 in which they admit employing the Claimant but allege that he was dismissed for gross misconduct on the grounds that he was sent to deliver an hp toner to a customer but instead delivered a counterfeit.

The Respondent admits calculating the Claimants terminal benefits and using the same to offset the price of the toner which they had to replace.

The party's were heard on 11<sup>th</sup> December 2012 when the Claimant testified on his own behalf while the Respondent called Mr. Anthony Ngige Njuguna, an Accountant with the Respondent. The Claimant was represented by Mr. Makokha instructed by Namada & Co. Advocates while the Respondent was represented by Ms. Nyobendo instructed by Mang'erere J. & Co. Advocates.

In his testimony the Claimant stated that he was employed by the Respondent on 2<sup>nd</sup> June 2010 as a Rider. His job entailed delivery of goods by motorbike. That on 12<sup>th</sup> June 2011 he arrived at work and did his work as usual. In the evening he was called by a Director by the name Bobby Gardeier and given a letter and told to go and read it. The letter was a summary dismissal on the grounds that he delivered counterfeit toners to a client on 6<sup>th</sup> May 2011. He testified that the delivery was actually on 9<sup>th</sup> May 2011,

that he was given the toner by the Head of Stores Mr. Haman in a sealed box. The delivery was to JHPIEGO whose office is about 100 meters from Respondents office and took only 10 minutes. That he delivered the box and the customer stamped his copy of invoice which he returned to the office. That he did not check the contents of the sealed box. He testified that he did not know about the allegation that he had exchanged toners until he received the dismissal letter, that he was never given an opportunity to defend himself. He further testified that he was not paid any terminal dues. He urged the Court to award him leave, Certificate of Service and other prayers as in his claim.

Mr. Anthony Ngige Njuguna on behalf of the Respondent testified that he works for the Respondent as an Accountant and knows the Claimant. That on 6<sup>th</sup> May the Claimant was given 2 toners to deliver to a client who later complained by letter that he was sold counterfeits. He testified that at P.C. World they source for goods from the manufacturers directly. That they asked the client to give back the toners so that they could ascertain from the manufacturer if the toners were counterfeits, that the manufacturer confirmed that the toners were not the ones sold to the Respondent and that is why the Respondent concluded that the Claimant exchanged the toners sold to the client. He testified that the Claimant was talked to by the Director in the presence of the Store's Manager and the HR in the boardroom at 11.00 a.m. and that the director took time to explain to the Claimant the reasons why he had to be summarily dismissed due to gross misconduct. He testified that the Claimant was not paid any dues because the amount the company owed him after deducting the cost of the toner was less than the cost of the toners.

In cross examination he stated that the meeting between the Claimant and the director was on 11<sup>th</sup> June 2011, that the dismissal letter was written on 10<sup>th</sup> June 2011 and that the Claimants terminal dues were calculated up-to 10<sup>th</sup> June 2011. He admitted that the Claimant is not the only one who handled the toners. He also confirmed that the Claimant had not been warned of any misconduct for the period he had worked for the Respondent.

The issues for determination are whether the summary dismissal of the Claimant was fair and whether the Claimant is entitled to the reliefs sought.

The Claimant testified that he was given the toners by the Store's Manager in a sealed box to deliver to JHPIEGO whose office was about 100 meters away, that he did not check the contents of the box, delivered it to the customer who signed his copy of the invoice which he took back to the company on 9<sup>th</sup> May 2011. The customer wrote on 12<sup>th</sup> May 2011 to complain about delivery of counterfeits. The Claimant was dismissed a month later on 11<sup>th</sup> June 2011 although his dismissal letter was dated 10<sup>th</sup> June 2011. Respondents witness **ANTHONY NGIGE NJUGUNA** testified that the Claimant was "*talked to*" by the Director in the presence of the Stores Manager and the HR on 11<sup>th</sup> June 2011.

There are serious flaws with the process as explained by ANTHONY NGIGE NJUGUNA. In the first case, he was not present at the meeting and therefore all that he testified about is hearsay except for the calculation of the terminal dues for the Claimant which he testified he did.

Secondly, the decision to summarily dismiss the Claimant, according to his testimony, was reached a day earlier and the letter written on 10<sup>th</sup> June 2011. The terminal dues were also calculated up-to 10<sup>th</sup> June 2011 and the effective date of the dismissal stated is 10<sup>th</sup> June 2011, yet the Claimant was dismissed on 11<sup>th</sup> June 2011.

According to his testimony the letter of dismissal was handed over to the Claimant by the director at the close of day on 11<sup>th</sup> June 2011 without any prior discussion. Since the evidence by the Respondents witness is hearsay and therefore inadmissible, the Claimant's testimony remains unchallenged.

From the circumstances of the cases there could have been interference with the contents of the box before it was handed over to the Claimant, while the box was with Claimant or after delivery of the box to the client. No evidence has been adduced that any investigation was carried out to ascertain at what point the original toners were swapped with the counterfeits. The least the Respondent was expected to have

done was to ask the Claimant to give an explanation. This was not done. The Claimant was thus condemned unheard.

The Respondent has referred me to **CASE NO. NAIROBI HCCC.NO.2838 OF 1996: JOHNSON B. WAIROMA –VS-SECURICOR KENYA LTD.** Counsel for the Respondent did not indicate the part of the judgement or the principle in the judgement that he was relying upon. A party who wishes to rely on an authority must demonstrate the relevance of that authority to the Court. It is not for the Court to start speculating about what Counsel intended to rely on from the authorities. I have all the same read the Authority and find nothing relevant to the present case.

Claimants Counsel has relied on the decision of Hon. Lady Justice Linnet Ndolo in **DONALD ODEKE – VS- FIDELITY SECURITY LIMITED in Industrial Court Cause no.1998 of 2011** in which the Judge observed that **“an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.”** And further that **“it does not matter what the offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair.”**

I agree with the position of Hon. Lady Justice Ndolo in the above case and find that the Claimant suffered unfair termination as the Respondent failed to observe the procedure provided for in Section 41, 43 and 45 of the Employment Act.

Having found that the summary dismissal of the Claimant was unfair, I now look at the reliefs sought:-

**a) Notice**

The Claimant is entitled to notice as provided under Section 49(1) (a) of the employment Act. I award him Dhd.8,000 accordingly.

**b) Leave**

The Respondent admits that the Claimant was entitled to 21 days leave per year. According to the tabulation the Claimant had already taken 10 days leave and there is a balance of 11days. The Claimant did not contest this.

I therefore find that the Claimant is entitled to 11 days leave which translates to Kshs.2,933.30.

I award him the said sum.

**c) Compensation**

Having found that the Claimant was unfairly terminated he is entitled to compensation. He has prayed for the maximum of 12 months' salary.

I have considered the length of service of the Claimant, the salary he was earning, the total value of his terminal benefits and consider that compensation equivalent to 6 months salary will be reasonable in the circumstances.

I therefore award him Kshs.48,000/=.

The Respondent will also pay the Claimants costs.

Orders accordingly.

Read in open Court and signed on this 30<sup>th</sup> day of April,2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**

**Present in person**

In the presence of:- \_\_\_\_\_ Claimant

**No appearance**

\_\_\_\_\_ for Respondent