



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 951 of 2012**

**DAVID NJEKA.....CLAIMANT**

**VS**

**LAVAGE DRY CLEANERS LIMITED.....RESPONDENT**

## **AWARD**

### **Introduction**

1. By a Memorandum of Claim dated 5th June 2012 and filed in Court on even date the Claimant sued the Respondent for wrongful termination of employment, unlawful withholding of salary and failure to pay terminal benefits. The Respondent filed a Response on 3rd July 2012 and the matter was heard on 22nd November 2012 with Mr. Odawa instructed by Moses Odawa & Company Advocates appearing for the Claimant and Mr. Kimondo instructed by Kimani Kimondo & Company Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Laundry Manager, Jackson Muhia.

### **The Claimant's Case**

2. According to the Claimant's Memorandum of Claim, he was employed by the Respondent as a general worker in May 2005 at a monthly salary of Kshs.9,185. His salary at the time he left the Respondent's employment had risen to Kshs. 12,834. In his sworn evidence the Claimant gave 4th October 2005 as the effective date of his employment. He further testified that he worked as a Machine Operator as well as a general worker. He was not issued with a letter of appointment. He was issued with payslips from 2006 to 2011 but was not given any payslip in 2005.

3. On 21st November 2011 the Respondent accused the Claimant of stealing a customer's coat. The Claimant testified that on 22nd November 2011, he met Jackson Muhia a Manager at the Respondent Company and Mustafa who was a Director. The Manager told the Claimant to write a letter regarding the missing coat but the Claimant did not write the letter. The Claimant admitted having received a warning letter on an unrelated matter prior to the incident at hand.

4. The Respondent's Manager told the Claimant to leave his place of employment and the Claimant has not been recalled to date. It was the Claimant's case that he was not involved in the alleged theft and that in fact the coat in issue was eventually found within the Respondent's premises. The Claimant stated that he was not given an opportunity to defend himself and that the Respondent had withheld his salary and other dues. The Claimant stated that he had sustained partial amputation of his left hand fingers thus

diminishing his chances of employment as an artisan.

5. The Claimant therefore claimed the following:

- a) Salary arrears..... Kshs. 89,838
- b) Service pay @ 15 days for every year of service.....38,502
- c) Three months notice period.....38,502
- d) 21 days worked in November 2011.....12,834
- e) Overtime pay for 21 days in November 2011.....3,570
- f) Unremitted NSSF dues.....24,000
- g) 12 months' salary in compensation for unfair termination.....154,008
- h) Costs and interest
- i) Any other relief the Court may deem just to grant

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

6. In its Response the Respondent stated that on 18th November 2011 the Claimant was involved in a theft at work which was reported at the Central Police Station. The stolen coat was later recovered from a third party outside the Respondent's premises. According to the Respondent, the Claimant had handed over the coat to the third party with the aim of picking it later on. The day after the theft, the Claimant absented himself from duty without permission. The Claimant also failed to record a statement on the incident. The Claimant returned to the Respondent's premises and upon being asked to give his explanation on the incident in writing he left and never went back. The Respondent therefore treated the Claimant as a deserter.

7. It was the Respondent's case that having absconded duty the Claimant made it impossible for the Respondent to offer him an opportunity to be heard. The Respondent's witness, Jackson Muhia testified that the Claimant had told him that he would not write a letter as instructed. The witness further testified that the police file on this matter was still open. The Respondent denied any knowledge of partial amputation of the Claimant's left hand fingers in the course of the Claimant's employment with the Respondent.

### **Findings and Determination**

8. The first issue for determination in this case is whether the Claimant deserted duty or was terminated. It was the Claimant's case that the Respondent terminated him by denying him access from his usual place of work. The Respondent on the other hand maintained that the Claimant deserted duty because he knew he was under investigation by the police.

9. Section 47(5) of the Employment Act, 2007 provides that :

***(5) For any complaint of unfair termination of employment or***

***Wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

10. The law requires each party to discharge its respective burden. The Respondent stated and the

Claimant admitted that the Claimant was required to give a written explanation on the coat in issue but he failed to do so. In the case of **Jackson Butiya Vs Eastern Produce Limited (Industrial Court Cause No 335 of 2011)** this Court held that:

***“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law”.***

11. In normal practice an internal disciplinary process is triggered by correspondence between the employer and the employee. By declining to to present his written explanation as required by the Respondent, the Claimant effectively locked himself out of the internal disciplinary/grievance handling process. He cannot therefore be heard to say that he was not given an opportunity to defend himself. For this reason, the Claimant's claim for unfair termination fails and is hereby dismissed. The claims for salary arrears and three months notice are also dismissed on this account.

12. From the payslips submitted by the Claimant, it was evident that the Claimant was a contributing member of the National Social Security Fund (NSSF). The claim for service pay is therefore precluded under Section 35 of the Employment Act. The claim for unremitted NSSF dues was not proved and is therefore dismissed.

13. In the final analysis, the Claimant is only entitled to his salary for the month of November 2011 which the Respondent's witness, Jackson Muhia admitted was not paid to the Claimant. The Claimant is also entitled to overtime earned for the month. This should be released to the Claimant within the next 30 days from the date of this Award.

Each party will bear their own costs.

Orders accordingly.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF APRIL 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**