



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1347 of 2012**

**MAURICE MUTHUI.....CLAIMANT**

**VERSUS**

**MR. DANIEL GACHUKIA.....1ST RESPONDENT**

**THE RIARA GROUP OF SCHOOLS LIMITED.....2ND RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated 7th August, 2012 and filed on 9th instant, this matter was brought to court. It lacks an expression of issue(s) in dispute on its face. The claimant prays for;

(i) That the claimant is entitled to be paid 12 months wages as compensation for loss of employment as provided for under section 15(c) of the Labour Institutions Act

- 2007. Kshs.19,002 x 12 months - Kshs. 228,024/=
- ii) One month pay in lieu of Notice - Kshs. 19,002/=
- iii) Severance pay for 4 years 15 x730.80 - Kshs. 43,851/=
- iv) Pro rata leave for 2 months 4 days x 730.80 Kshs. 2,923/=
- v) O/T week day as 20 hrs per week  
20 x 1.5 x4 x 12 x 84.50 - Kshs.486,720/=
- vi) Public Holidays O/T 14 Days 14x12x2x84.50 Kshs. 28,392/=
- vii) House Allowance 15% of the Basic pay  
19,002/=x15x4 years Kshs. 136,814/=

100

**TOTAL KSHS. 953,761/=**

viii) Any other award or benefit which this honourable court may deem fit to grant in the circumstances

of this case

The respondents by a memorandum of reply dated 4th October, 2012 and filed on 8th instant make a response praying that the claim be dismissed with costs.

The claimant's case is that at all material times prior to the institution of this suit the claimant was an employee of the respondent appointed as a security guard. At the time of dismissal he earned a salary of Khs. 19,002 per month payable at the end of every month. That on 12th July, 2012 the respondent illegally and unlawfully terminated the claimant's services without terminal benefits on allegations that he was driving company vehicle (sic) contrary to the Employment Act, 2007. The claimant at paragraph 6 of the claim further submits that he made several attempts at seeking an explanation for his termination of employment and when this was not forthcoming he resorted to the union who did not help either and therefore the filling of this claim.

He also submits that his termination of employment without paying his terminal dues or offering reasons was in bad faith, unlawful, punitive, humiliating, unfair and contrary to the principles of natural justice and fair play. It also contradicts section 35, 41 and 45 of the Employment Act, 2007.

The respondent denies the claim and prays that the same be dismissed with costs. His contention is that the claimant was offered employment on 17th April, 2008 by the respondent and assigned as a security guard with assignment as a day shift guard responsible for the protection of company property and personnel. That on 7th July, 2012 the claimant was reported to have been seen driving a company motor vehicle Reg. No. KAY 370X without authority from his seniors or supervisor. He was suspended on 12 July, 2012 vide a letter informing him of five (5) days suspension pending investigations on these allegations. On the same day the claimant voluntarily admitted the offence/misconduct and did a write up to this extent. He was in the light of this summarily dismissed on the same day. He further submits that the Finance Officer proceeded to prepare the final dues of the claimant to the tune of Kshs. 27,687.56 but the claimant has refused and or neglected to collect the same.

The matter variously came for mention and hearing until the 6th December, 2012 when counsel for the claimant submitted that the parties were agreeable to dispose off the suit by way of written submissions with the court granting fourteen days to each party to do the same. This was complied with and judgment set for today's date.

The claimant's submission reiterates his claim and further goes out to buttress his case. The respondent in his submissions also does the same and calls for a dismissal of the suit.

The issues for determination therefore are;

- (i) Was the termination of the employment of the claimant by the respondent unlawful?
- (ii) Is there a lawful case for the summary dismissal of the claimant by the respondent?
- (iii) Is the claimant entitled to the relief sought?

The 1st issue for determination touches on the lawfulness or otherwise of the termination of employment by the respondent. The claimant's contention is that his services were terminated without due procedure and unfairly and did not follow the rules of natural justice or even the provision of the Employment Act, 2007 in effecting the termination. He submits that his employment was suspended and terminated by letter of 12th July, 2012 thereby ousting a possibility of a fair hearing in the circumstances. Further, the procedure of termination flouted the provisions of section 40(I) (a) and (b) and 41(I) and (2) of the Employment Act, 2007 by absconding the procedural requirements of the disciplinary process. This is not entirely true. Section 40 touches an issue of termination on account of redundancy and therefore the requirements of section 40(I) (a) and (b) as provided would only apply where the situation and circumstances format a case of redundancy. The circumstances of this case are those of summary dismissal and therefore different.

Section 40(I) and (2) calls for a hearing of the presentations of an employee before termination or summary dismissal is effected. It call for an exploration of the reasons of termination to the employee and the employee is entitled to have another employee or shop floor representative of his choice present at this stage. The claimant contends that this was not done and therefore invalidates the legality of the termination.

The claimant further submits that an application of section 43 (3) of the Employment Act which validates summary dismissal would call for compliance with sections 40 and 41 of the Act. I would agree on the application of section 41 in the circumstances but deny that of section 40, this being a different subject matter from summary dismissal.

The respondent case is that on or about the 7th July, 2012 and on different occasions the claimant was seen driving two (2) of the respondent's motor vehicles namely a pick-up registration No. KAY 307X and a saloon van without authority or permission from his supervisor or any other senior officer of the respondent in flagrant breach of his terms and conditions of employment. On 12th July, 2012, after being informed of the misconduct, the claimant in writing admitted the misconduct vide a letter of the same date. This was followed by a meeting between the claimant, the Human Resource Manager and a Senior Security Officer where the claimant adduced details of his misconduct and signed in authentication thereof- see page 4 of the respondents written submissions. This admission therefore ousted the necessity or further investigations and he respondent effected a summary dismissal on the claimant. He was notified of the procedure for collection of his terminal dues but has to date not done the same. These, amounting to Kshs. 27,687.6 still lie with the respondent.

The dismissal of the claimant under these circumstances was lawful and I so find. All requisite procedural aspects were met by the respondent. Employees must be warned against misconduct as this results in unwarranted poor industrial relations, loss and waste. Employees are expected to conduct themselves in a certain manner to conform to the terms of the employment contract which is an integral component of the employment relationship. This satiates the first issue for determination.

The 2nd issue for determination is whether there is a legitimate case for summary dismissal in the circumstances. Section 44(3) of the Employment Act, 2007 spells out the circumstances for summary dismissal

Section 44(3)

*“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”*

This was the case here and therefore a lawful justification for a case for summary dismissal. This resolves the second issue for determination.

The final issue for determination is whether the claimant is entitled to the relief sought. The circumstances of the case bring out a case of a legitimate case for summary dismissal and therefore disentitles the claimant to the relief sought.

I am in the circumstances inclined to dismiss the claim with costs to the respondents.

Dated and delivered this **24th** day of **April**, 2013

**D.K. Njagi Marete**  
**JUDGE**

## **Appearances**

1. Mr. Odongo instructed by S.K. Opiyo Advocates for the claimant.
2. Mr. Kandere instructed by Nyachoti & Co. Advocates for the respondents.