



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 286 of 2011**

RICHARD OJUANG HABADA.....  
.....CLAIMANT

VS

ELECTRO TECHNOLOGIES LIMITED.....  
.....RESPONDENT

Mr. Amuga for Claimant

**AWARD**

The claimant filed this suit on 3<sup>rd</sup> March, 2011 claiming that his employment had been unfairly terminated by the Respondent. Accordingly, he claims one month's salary in lieu of notice in the sum of Kshs.7,500, payment in lieu of leave days not taken for a period of 4 years in the sum of Kshs.28,000/= and a maximum of 12 months' salary being compensation for the unfair termination.

The facts of his case may be summarized as follows:-

He was employed in August 2006 as a shamba boy and was later promoted to a messenger. His normal duty was to take money to the bank for banking and collect mail from the Post Office and other similar errands. He was the only employee doing that work for the Respondent Company which was engaged in electrical wiring on various construction projects.

He continued working as such until the 3<sup>rd</sup> May 2010, when the Managing Director of the company, Mr. Patel summoned him and asked him to take leave of absence for 2 days. He did as instructed and when he returned, he was told that the Respondent did not have sufficient work for him and therefore, his services were terminated by a letter dated 3<sup>rd</sup> May, 2010. He produced a copy of his payslip which showed that at the time of his dismissal he earned a basic pay of Kshs.7,500 and had registered with NSSF and NHIF. He was also paying a salary advance in instalments of Kshs.1,010.00. He did not tell the court how much balance of the loan amount was unpaid at the time of his termination. He alleged that he was not allowed to take leave for a period of 4 years and was entitled to 21 days' leave per annum. He claims payment in lieu thereof. He adduced evidence that, he had not become redundant because the work he did

continued as before and he was the only employee doing the work. He therefore, concluded that his services were unlawfully and unfairly terminated and he claims compensation in respect thereof. He was not given notice prior to the termination and was not paid in lieu thereof and therefore claims, one month's pay in lieu of notice.

The Respondent filed its memorandum of defence on 22<sup>nd</sup> March, 2011. When the matter came before me for hearing on 3<sup>rd</sup> December, 2012, the Respondent's representative, Mr. Madala did not appear for the respondent. The hearing date had been taken by consent on 24<sup>th</sup> October 2012, before Hon. Justice Onesmus N. Makau.

The court proceeded to hear the claimant's case in the absence of the Respondent. However, the court has taken into account the defence filed by the Respondent as follows:-

The Respondent conceded that the claimant was employed on 1<sup>st</sup> August, 2006 as an attendant and he continued to work as such until when his services were terminated on 5<sup>th</sup> May, 2010.

The Respondent states that the quality of service by the claimant had progressively deteriorated and had failed to improve in spite of the admonishment by the Respondent. His services were therefore terminated for poor workmanship.

The Respondent filed computation of terminal dues paid to the claimant upon termination on 3<sup>rd</sup> May, 2010 which shows:-

(i) That the claimant was paid Kshs.8,000 in lieu of Notice.

(ii) Claimant was paid leave allowance calculated pro-rata for the period of time worked and duly paid which worked out to Kshs.18,602.67.

(iii) Unpaid salary for the days worked in the final month in the sum of Kshs.800 and the total terminal dues to the claimant was Kshs.27,403.00

He had outstanding loan of Kshs.28,523.

The total monies deducted from his terminal benefits including NSSF, NHIF, Loan outstanding and P.A.Y.E. was Kshs.31,826, which left him with a negative balance of Kshs.4,424. The terminal dues computation dated 4<sup>th</sup> May, 2010 appears on the face of it to have been signed by the claimant as alleged by the Respondent, and is annexed to the defence as exhibit "APPA". The Respondent also attached a list of salary advance to the claimant which amounted in total to Kshs.34,850. The monies were allegedly advanced on diverse days between 19<sup>th</sup> March, 2009 and 17<sup>th</sup> March, 2010.

Though the claimant denied receipt of salary advance (loan) the payslip he produced himself for the month of October 2009, shows that he was deducted Kshs.1,010 being salary advance. He did not refer to this item at all in his evidence before court.

Upon a careful analysis of this case, the court finds that the claimant indeed worked for the Respondent from 1<sup>st</sup> August, 2006 to 5<sup>th</sup> May, 2010. That the reason for the termination given by the Respondent was for poor work performance whereas, the claimant told the court that he was declared redundant. Where the employer alleges that an employee's service was terminated for poor work performance, he has to demonstrate that was the case by way of producing verbal and/or written admonishment, counseling intended 'to improve his performance', steps taken to ensure that the standard of performance improved and finally a warning that in spite of the efforts made by the employer, the employee's performance had failed to improve and that his services would be terminated if the situation did not change. Though different employers have different practices in this regard governed by their Human Resource Manuals and procedures and also dependent on the financial capacity of the entity to engage in career development of the employee, the minimum standard is as provided Under Section 43(1) of the Employment Act No.11

of 2007 as follows;

*In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45”.*

Section 45(1)(2) on the other hand provides that, “*a termination of employment by an employer is unfair if the employer fails to prove –*

- (a) that the reason for the termination is valid;*
- (b) that the reason for the termination is a fair reason*
  - (i) related to the employee’s conduct, capacity or compatibility; or*
  - (ii) based on the operational requirements of the employer; and*
- (c) that the employment was terminated in accordance with fair procedure.*

The Respondent having alleged that the claimant’s services were terminated for poor work performance, has failed to demonstrate through the papers filed on record, that this was the case, since it did not show a single letter written to the claimant in this respect. It did not also produce a letter of termination that provided this as the reason for the termination.

Accordingly the termination of the services of the claimant was unfair within the meaning of Section 43(1) as read with Section 45 of the Employment Act. The claimant is therefore entitled to compensation for unfair dismissal in terms of Section 49(1)(c) of the Employment Act. In this respect, he had faithfully served the Respondent for a period of four years. His termination was abrupt and did not prepare him for the predicament. However, the court believes the version by the Respondent that, it did pay him terminal dues as per the tabulation annexed to the Statement of Defence including, notice pay, payment in lieu of notice, leave days not taken and salary for days worked. The court also finds that the claimant actually had taken a loan with the Respondent and his dues were lawfully deducted to pay the debt. Accordingly, all claims for payment of terminal benefits are dismissed.

Taking all the circumstances of his case into account the claimant is awarded six (6) months’ salary being compensation for unfair dismissal in the sum of Kshs.  $(7,500 \times 6) = 45,000/=$  The Respondent to pay the costs of the suit.

**It is so ordered.**

**DATED and DELIVERED** at Nairobi this 10<sup>th</sup> day of April, 2013

Mathews N. Nduma

**PRINCIPAL JUDGE**