



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 519(N) of 2009**

SIMON OTSIENO MAKANDA..... 1<sup>ST</sup> CLAIMANT

GODFREY ELFASI WERE ..... 2<sup>ND</sup>  
CLAIMANT

-VS-

KENYA MOTORS AND EQUIPMENTS LIMITED.....RESPONDENT

Mr. Makokha for the Claimants

Mr. Kiuna for the Respondent

**AWARD**

The Memorandum of Claim was filed on 16/9/2009 and later amended with the leave of court on 18/3/2010.

The Respondent had responded to the initial memorandum on 17/11/2009 and filed further memorandum of response to the amendments on 31<sup>st</sup> March, 2010.

The matter was partly heard by Justice Stewart M. Madzayo on 19/10/2010 before whom the Claimants, Simon O. Makanda and Godfrey E. Were testified in support of their claims as 1<sup>st</sup> and 2<sup>nd</sup> Claimants respectively.

The 1<sup>st</sup> Claimant was employed by the Respondent on 1/6/2003 as a spray painter of motor vehicles. He worked continuously as such until the 20<sup>th</sup> July 2009, when he was summarily dismissed for insubordination in that he had defied instructions from his supervisor Mr. Kabuga to buff a car using a sanding machine. He told the court that he had explained to the supervisor that the sanding machine would remove the paint of the car and hence destroy it and demanded that he be provided with a buffing equipment for the purpose. He was instantly dismissed for insubordination. The buffing machine was spoilt at that moment.

The 2<sup>nd</sup> Claimant was employed as a superintendent on 1/6/03. He was also summarily dismissed together with the 1<sup>st</sup> Claimant on 20/7/2009 for refusing to use a sanding machine to buff a customer's

car. He corroborated the evidence of the 1<sup>st</sup> Claimant that the buffing machine was spoilt and if they had followed their supervisor's instructions to use the sanding machine on the car, the same would have been spoilt in that the sanding machine would have scratched the car and removed paint

He told the court further that himself and the 1<sup>st</sup> Claimant were wrongfully and unlawfully dismissed for advising their supervisor to provide them with the right equipment for the job they were doing. The supervisor had demanded that they complete buffing two cars on the material day but they did not start at all for lack of equipment.

The Respondent called Kenneth Nteere Rintaugu to testify in support of the Respondent's case. He told the court that he was a Director of the Respondent Company and knew the 1<sup>st</sup> and 2<sup>nd</sup> Claimants well.

He testified that the two were employed in the spray painting department from 24<sup>th</sup> June 2003, and they were summarily dismissed on 21<sup>st</sup> July 2009. The witness told the court that he summarily dismissed them for defying the instructions of their supervisor, one James Kabugi to buff a customer's motor vehicle and to follow his own instructions.

He told the court that it was reported to him by Mr. Kabugi that the two had refused to use the available buffing machine because it was not big enough. When he went to inquire from them at 9.00 a.m. in the morning why they had not done the job as instructed the previous day, they told him that they would do it but needed a bigger buffing machine. He asked them to do the job as directed. He then went to attend a meeting and when he came back at 12.30, they had not done the buffing. He told the court that he had assured the client that the motor vehicle would be ready for delivery that afternoon. He called the 1<sup>st</sup> and 2<sup>nd</sup> Claimants to his office and they told him that they would not do the work unless they got the correct machine for the purpose.

He summarily dismissed them for insubordination which had resulted in serious inconvenience to the customer.

He explained to the court that, a buffing machine is a sponch attached to a motor. A sanding machine on the otherhand uses a sanding disc on the rough surface. The two are not interchangeable though the same motor can be fitted with a buffing sponch or a sanding disc.

The witness was subjected to intense cross-examination and told the court that the two employees had served the Respondent for a period of 7 years and had not witnessed this type of incident before from them or any other employee.

He insisted that the Claimants had a buffing machine and were not instructed to use a sanding disc in place of a buffing machine. He said that they wanted him to buy a bigger buffing machine. He added that the claimants were merely defiant and insubordinate.

### **Finding on Facts**

The version told by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants as to why they declined to do the job given to them by the supervisor on 20<sup>th</sup> July 2009 and that by the Director on 21<sup>st</sup> July 2009 is mutually destructive.

The two Claimants insist that they were asked to use a sanding machine to buff a customer's car, whereas the Director told the Court that the two refused to buff the car using a small buffing machine and insisted that they be provided with a bigger one. He told the court that he had asked them to use the buffing machine available and that he would address the issue of buying a bigger one later. That he had explained to them that the customer needed the car urgently and in any event by the afternoon of 21<sup>st</sup> July, 2012.

From the testimony of the two claimants and that of the Director, it is clear to the court that a

sanding machine could not be used to buff a car since it could scratch the body and remove its paint.

It is highly unlikely that the Respondent whose core business for a long time was to spray paint cars and therefore was well familiar with buffing and sanding of cars would ask its employees to use a sanding machine on a car that only required buffing. It is common cause such use of a sanding machine would have destrous consequences.

The court finds the version told by the Respondent that there was available a small buffing sponch but the Claimants desirous of having a bigger one declined to use it for the purpose more credible and most probably true. That indeed they had demanded to be bought a new buffing machine so as to be more effective and efficient. Indeed, the 1<sup>st</sup> Claimant told the court that the buffing machine had been spoilt. It is therefore highly unlikely that the Respondent had demanded that the two use a sanding machine to smoothen a car that did not require spray painting.

The issues that arise from this determination are as follows;

- a) Was the Respondent justified to summarily dismiss the Claimants from their employment?
- b) What remedies if at all are available to the Claimants?

### **The Law**

(a) In terms of Section 44(1) of the Employment Act 2007,

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

Section 44(3) provides that a summary dismissal may only be done *“when the employee has by his conduct indicated that he has fundamentally breached his obligations ensuing under the contract of service”*.

In the present case, the employees allege that they were not provided with the tools to do the work they were employed to do. The Respondent on the otherhand, insisted , which the court found true, that it had provided them with equipment though not perfect to provide the service it required of them, but had in open defiance of the employer declined to do the job.

The Court finds that though the Claimants had some justification to demand better working tools from their employer, they were wrong to openly defy, not only their immediate supervisor, but also the Director of the Company that employed them in the manner described in this case.

They should have obeyed the instructions of the employer provided that it was not detrimental to their health or wellbeing. They have not testified that using an old buffing machine though it made their work more difficult was detrimental to their health. They insisted that they only wanted to provide a better service to the Respondent’s customers.

Section 44(4)(c) provides that any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, -----

- (c) *“an employee willfully neglects to perform any work which it was his duty to perform -----”*

Though the circumstances of this case fall squarely within the purview of

this provision, and the Respondent may have been justified to summarily dismiss the Claimants, the Court has also considered the reason for their misconduct which in the court’s view is an extenuating

circumstance in that the employer may have been under obligation to provide better working tools for the purpose.

Accordingly, though the employer, was justified to terminate their employment, it has failed to show that it was entitled to summarily dismiss them. The court, therefore substitutes the summarily dismissal for normal termination of employment. The claim for compensation for unlawful dismissal is therefore dismissed.

It is common cause that the 1<sup>st</sup> Claimant earned a monthly salary of Kshs.10,000 at the time of termination. That he was registered with NSSF to which the employer contributed monthly and also he has established that he worked extra 4 hours every Saturday for 7 months in the year 2009 but was not paid overtime.

Similarly, the 2<sup>nd</sup> Claimant earned Kshs,11,000 per month at the time of termination and was registered with NSSF to which the employer contributed monthly. He too worked 4 extra hours on Saturdays and was not paid overtime for 7 months in the year 2009.

Accordingly, the Respondent will pay to;

1<sup>st</sup> Claimant – Simon Otsieno Makanda:-

- (a) One month's salary in lieu of notice in the sum of Kshs. 10,000; and
- (b) Kshs.7,000 being overtime for 4 hours worked on Saturdays in 7 months in the year 2009.

Total Award = Kshs.17,000/=

2<sup>nd</sup> Claimant - Godfrey Were

- (a) One month's salary in lieu of notice in the sum of Kshs.11,000; and
- (b) Kshs.7,700 being overtime for 4 hours worked on Saturdays in 7 months in the year 2009.

Total Award = Kshs.18,700/=

Both Claimants abandoned their claims for payment of gratuity having conceded that they were duly registered with NSSF and all contributions were duly submitted by the Respondent.

Each party to bear its own costs of the suit.

**It is so ordered.**

**Dated and Delivered** at Nairobi on this 25<sup>th</sup> day of June, 2013.

Mathews N. Nduma

**PRINCIPAL JUDGE – INDUSTRIAL COURT**