



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**INDUSTRIAL SUIT NO. 521 OF 2011**

*(Before D.K.N. Marete)*

**HAROLD OTIENO.....CLAIMANT**

**VERSUS**

**SECUREX AGENCIES (K) LTD.....RESPONDENT**

**JUDGEMENT**

This matter is in court vide a statement of claim dated 21st March, 2011 and filed on same order date in April, 2011. The issue in dispute herein dubbed nature of claim is cited as;

***“Claim for compensation for unlawful dismissal and termination”.***

The respondent employer on the other hand by a memorandum of reply dated 3rd May, 2011 and filed on the following day denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that at all material times to this suit, he was an employee of the respondent working as an Assistant Operations Manager at a salary of Kshs. 55,000.00 per month. He further submits that on or about 30th October, 2010 while in the cause of duty, the respondent in breach of their express or implied terms of conduct of employment unlawfully dismissed and or summarily terminated the claimants employment without regard to the Employment Act, 2007.

**PARTICULARS OF BREACH**

- a. Summarily dismissing the claimant without any valid reasons.
- b. Unlawfully dismissing the claimant without rendering any valid reasons.
- c. Failing to pay to the claimant his salary for the month of October.
- d. Dismissing the claimant without issuing the mandatory on (1) month’s notice.
- e. Dismissing the claimant without paying him one month’s salary in lieu of notice.
- f. Failing to issue to the claimant a certificate of service.
- g. Failing to compensate the claimant for leave not taken.
- h. Failing to adhere to the contract of employment

i. Failing to adhere to the Employment Act, Cap 11 of 2007

As a result of the said dismissal, the claimant suffered psychological anguish and trauma, financial constraints, loss of confidence, loss of earnings, extreme stress and damages and therefore claims;

a) One month's salary in lieu of notice	Kshs. 55,000.00
b) October 2010 pay	Kshs. 55,000.00
c) Leave not taken (30 days)	Kshs. 55,000.00
d) Unlawful termination (12 months)	Kshs. 660,000.00
e) Severance pay	Kshs. 27,500.00
f) Certificate of service	<u>Kshs.55,000.00</u>
<b>TOTAL</b>	<b><u>Kshs.907,500.00</u></b>

The claimant further submits that despite demand and notice of intention to sue, the respondent has failed and on neglected to compensate him. He ultimately prays for;

- a. General damages and exemplary damages for unlawful termination.
- b. Costs of this suit.
- c. Interest on (a) and (b) above at court rates.

The respondent in defense denies the claim and puts the claimant on a luster of proof. He contends that the employment of the claimant was not unlawfully terminated but he was summarily dismissed in accordance with the terms of the contract and particularly clause a of the employment letter which provided that the claimant should not engage in any other business that is in conflict with his office. That the claimant engaged in a business where he was proprietor and executive director of Haphil Africa Securities (K) Ltd which was a competition to the respondent and therefore in conflict with the claimants employers interests and therefore a case of conflict of interest.

The respondent further submits that termination of the claimant's employment was in accordance with the law and practice and that the claimant was paid one month's salary in lieu of notice, unpaid annual leave and accrued salary arrears. Further, the respondent submits that the claimant was in accordance with the law entitled to twenty one (21) days leave, eleven (11) of which he had taken leaving a balance of ten (10) days that was compensated/paid for and that he was issued with a certificate of service. There are therefore no other salary arrears owing to the claimant.

The matter variously came to court for mention and hearing until the 28th November, 2012 when the claimant testified and closed his case. In his evidence the claimant reiterated his position as expressed in the statement of claim to the extent that the termination of his employment was unwarranted and unlawful. At the close of the claimant's case, counsel for the respondent opted and submitted for disposal of the matter by way of written submissions. This was agreed and the matter set for mention on 18th December, 2012.

The issues for determination therefore are;

- 1) Was the termination of the claimants employment wrongful and unlawful?
2. Is there a case for summary dismissal as pleaded by the respondent?

3. Is the claimant entitled to the relief sought?

4. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the claimant's employment was wrongful and unlawful in the circumstances. This can only be deduced from the evidence and facts of the case emerging from evidence.

The claimant, in his submissions reiterates his assertions as expressed in his claim and evidence in support thereof. That he was dismissed (read sacked) from employment and not paid a farthing in terms of his terminal dues. That despite giving authority in writing to Mr. Melvin to collect his dues, these were not made. The respondent denies the illegality of the termination of employment and submits that all terminal dues were paid to the claimant.

Despite the claimant's testimony in evidence and denial of linkages with Haphil African Securities (K) Limited which caused a conflict of interest and breach of contract by the claimant, the respondent does not adduce evidence in support of his allegations. He merely says it and leaves it to run on its own. The letter of termination is brief and does not offer any reasons or grounds for termination. It is dated 30th November, 2010 and record, "Termination of services".

The respondent further seeks to rely on the concept of summary dismissal as per section 44 and more so section 44(3), Employment Act, 2007. That the law entertains cases of summary dismissal for recalcitrant employees as in the present case.

It is my finding that a case for lawful termination of employment or even dismissal of the claimant is not established by the respondent and I therefore find for the claimant. The allegation of conflict of interest and breach of clause of the letter of employment is not supported by tangible evidence of the same from the respondent. It remains a mere allegation. The claimant chose not to adduce evidence in support of his case and it therefore fails from its onset. And so far goes the 1 issue.

The case of summary dismissal also collapses by the wayside. Why would the respondent not have made a case of summary dismissal in his letter of termination dated 30th October, 2010? Further, the case does not demonstrate a case for summary dismissal as envisaged by section 44 (3), Employment Act.

44. (1).....

(2).....

(3) *Subject to the provision 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.*

(4).....

And this clears the 2nd issue.

If the respondent loses on the test of legality for termination of employment like he has under the two issues above, then the claimant is entitled to the relief sought. I therefore order relief as follows;

i. One month's pay in lieu of notice Kshs. 55,000.00

ii. Salary for October, 2010 Kshs. 55,000.00

iii. Undertaken and unpaid leave

For 26 days =  $26/30 \times \text{Ksh. } 55,000.00$

Kshs. 47,630.00

iv. 6 month's compensation for unlawful

Termination of employment

Kshs. 330.000.00

**Total**

**Kshs. 487,630.00**

v. The respondent is issues a certificate of service to the claimant.

vi. That the costs of this cause shall be borne by the respondent.

Dated, delivered and signed this 14th day of June, 2013.

**D.K. Njagi Marete**

**JUDGE**

**Appearances**

1. Kinyanjui Njugunal & Company Advocates for the claimant.
2. Amolo for the respondent.