



**1REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 180 OF 2012**

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

**DAVID B. SIMIYU MUSUNGU.....CLAIMANT**

**VERSUS**

**K.K. SECURITY LIMITED.....RESPONDENT**

**JUDGEMENT**

When this matter came for hearing on 19th March, 2013, both parties were ready to proceed. Mr. Wesonga requested that the matter be consolidated with Cause No. 179/2012 where the respondent is the same and the circumstances similar. The parties submitted that they had filed a consent to this extent and the court allowed the application for consolidation of the cause and hearing of the same.

By a consent dated the 11th March, 2013 the parties agreed to fruitethe Notice of Motion dated 14th February, 2013 with the following consent orders of court;

1. Industrial Cause No. 180 of 2012, David B. SimiyuMusunguVs KK Security Ltd and Kenya Kazi Services Ltd and Industrial Cause No. 179 of 2012, AggreyAmulavuVs KK Security Ltd and Kenya Kazi Services Ltd be consolidated and heard together.
2. Industrial Cause No. 180 of 2012, David B. SimiyuMusunguVs KK Security Ltd be selected as a test suit on the issue of liability.
3. That the two cases be heard on the 18th March, 2013

The consent order was to the extent that Cause No. 180 of 2012 be selected as a test case on the issue of liability.

In Cause No. 180 of 2012, David B. SimiyuMusunguVs K.K. Securities Ltd, the claim dated 21st March, 2012 was filed on 22nd March, 2012. The issue in dispute is thereon cited as;

***“Wrongful, unlawful and unfair termination summary dismissal founded on invalid reason and alleged failure to pay claimant’s terminal dues”.***

His case is that he was employed by the respondent as a guard and his duties were to guard various establishments and institutions which the respondent had been contradicted to provide security services during the day or night. That on 13th February, 2009, without any investigations, notice, proper procedure and valid reasons, the respondent summarily dismissed the claimant on an allegation of theft that had allegedly occurred on 12th February, 20109 in a PesaPoint machine along Lower KabeteRoad in

Nairobi. This was, in the claimant's submission, pursuant to a fabricated report by the employees of the respondent's sister company, K.K.Logit Limited – see annexure DSBM 2.

The claimant further submits that he and his two colleagues were on 13th February, 2009, charged at Kibera Law Courts with stealing contrary to section 279 of the Penal Code in Criminal Cause No. 658 of 2009. They were upon trial acquitted for lack of evidence in support of the case. The claimant avers that the respondent did not conduct any investigations to ascertain the veracity of the claim against himself nor was he granted an opportunity to be heard even upon acquittal. The Respondent was uncooperative and declined to settle the Claimant's pursuit for unfair dismissal and therefore this suit.

**He prays for:**

- a. **Salary for the month of February 2009.....Kshs. 19,407/80**
  - b. **One month's salary in lieu of notice.....Kshs. 19,407/80**
  - c. **18 days service pay for each year worked (19 days).....Kshs. 221,248/92**
  - d. **The equivalent of twelve month's salary being damages  
for wrongful dismissal.....Kshs. 232,893/60**
- TOTAL Kshs. 492,958/12**
- e. **Claimant's Certificate of Service.**

The test case matter, (No. 180 of 2012), variously came to court until the 19th March, 2013 when the claimant testified in support of his case. CW 1- David B. Simiyu Musungu duly sworn testified that he is now jobless and stays with his brother in Kawangware. He was employed by the respondent as a guard on 23rd September, 1991. Firstly this was by EARS who later merged with the 1st respondent and retained the employment.

He reiterates the events of 12th February, 2009 as expressed in the memorandum of claim, the ugly scenario of the police, the police station and the prosecution in Chief Magistrate's Criminal Cause No. 658 of 2009 at Kibera where he and all other accused were ultimately acquitted under section 215 of the Criminal Procedure Code for lack of proof.

The claim in Cause No. 179 of 2012 dwells on similar testimony and in any event Cause No. 180 of 2012 was the test case on which Cause No. 179 of 2012 would be determined.

The issues for determination therefore are;

1. Was the termination of the claimant wrongful, unfair and unlawful?
2. Was a case for summary dismissal warranted in the circumstances?
3. Are the claimants entitled to the relief sought?
4. Who bears the costs of this suit?

Unfair termination of employment is the province of section 45 of the Employment Act, 2007. This defines and details instances of unfair termination as hereunder;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *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 employees 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.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

a. *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

© *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

e. *the existence of any previous warning letters issued to the employee.*

The other applicable legal phenomenon is section 44 which sets out the conditionalities for summary dismissal.

44.(1) *Summary dismissal shall take place when an employer terminated 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.*

(2) *Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

(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 contractual of service.*

(4) *Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an*

*employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-*

- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
- b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*
  - © an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
- c. an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed in authority over him by his employer;*
- d. (e) an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*
- e. in the lawful exercise of any power of arrest given by or under anywritten law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*
- f. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

Moreover, section 41 of the said Act provides the need for notification in instances of termination of employment.

*41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

The termination in the instant case did not pursue the requirements of the law on summary

dismissal and fair termination as espoused on section 44 and 45 of the Employment Act, 2007.

Section 41 on notice of termination was not invoked and this renders the termination of employment invalid, wrongful, unfair and unlawful. The claimant is therefore entitled to redress for unlawful termination of his employment contract.

This dismissal and termination of employment is also lacking in both procedural and substantial fairness and lacks compliance with the Employment Act and the rules of the natural justice relating to the right to be heard.

I am therefore inclined to find for the Claimants and allow the claim with costs. This of course, shall not include the claim for severance pay(Item 3), this strictly not being a case of redundancy as per section 40 of Employment Act, 2007. I therefore order for compensation in terms of the other prayers sought out as follows:

1)	Salary for the month of February, 2009	Kshs. 19,407.80
2)	One month's salary in lieu of notice	Kshs.19,407.80
3)	12 months salary for wrongful dismissal	<u>Kshs.232,893.60</u>
	<b>TOTAL</b>	<b><u>Kshs.271,907.20</u></b>

2. The respondent is ordered to issue a certificate of service to the claimants respectively.

This having been a test case on liability for Industrial Cause No. 179 of 2012 where all factors were constant the claim in this matter is upheld and allowed as follows;

1.	Salary for the month of February, 2009	Ksh.17,500.00
2.	One month's salary in lieu of notice	Ksh.17,500.00
3.	Unpaid responsibility allowance from May 2005 to February, 2009 (46 months) atKsh. 1550.00 per month	Ksh.71,300.00
4.	12 months compensation for wrongful dismissal	<u>Ksh.210,000.00</u>
	<b>TOTAL</b>	<b><u>Ksh.316,300.00</u></b>

3. The costs of this suit shall be borne by the Respondent.

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

**D.K. NjagiMarete**

**JUDGE**

**Appearances**

1. Mr. Wesonga instructed by Wesonga& Company Advocates for the claimants.
2. Mr. Kivuva instructed by WaruhiuK'owade&Nganga Advocates for the respondent.