



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

**CAUSE NO. 1936 OF 2012**

**MARK T. MWANGI .....CLAIMANT**

**VERSUS**

**GATEWAY INSURANCE COMPANY LIMITED .....RESPONDENT**

**JUDGEMENT**

1. On 27<sup>th</sup> September 2012, the claimant, Mark T. Mwangi, filed a claim for non-payment of his dues and accrued rights and wrongful termination of his employment by the respondent Gateway Insurance Company Limited. On 21<sup>st</sup> January 2013 the claimant filed their response to the defence and counter-claim where he denied the claim against him.

**Claimant's case**

2. In the claim, the claimant stated that on 28<sup>th</sup> January 2003 he was retained by the respondent as an Area Sales Supervisor, Thika and due to his outstanding performance he was promoted to Branch Manager earning a basic salary of Kshs.80,000/= and this being a new branch, he performed in an exemplary manner. On 5<sup>th</sup> March 2010 the General Manager of the respondent terminated his employment where he has suffered loss and damage.
3. Under the contract of employment between the parties, it was agreed that before termination one would give the other reasonable notice of one month or payment in lieu thereof taking note that the claimant was a Branch manager, had served for many years, and was advanced in age and therefore by implication, he was entitled to a longer notice of 6 months.
4. That as a result of the unfair termination, the claimant has suffered damage and continues to suffer as this was done without regard to his past experience, his standing in the insurance industry, his position, years served and the expertise and the difficulty in finding other employment with comparable terms noting his age. He lost his salary, and claim to be paid for 6 months together with special damages incurred in mitigating his damages and for a termination that was malicious. That at the time of termination he had leave days outstanding amounting to kshs.644, 800.00, unpaid salary for March 2010 at Kshs.80, 000.00 and unpaid allowances at kshs.9, 250.00.
5. The claim is for a declaration that the claimant's termination was unlawful; he should be paid notice at 6 months, unpaid dues amounting to kshs.734, 050.00, compensation for 12 months, damages for wrongful termination, certificate of service together with costs
6. In evidence the claimant gave his sworn statement that he commenced work with the respondent as Thika area Supervisor where he undertook promotional activities and in 2004, when the respondent opened the Thika Branch office, he became the Branch Manager with duties for marketing, collecting debts, sourcing for new business and supervising other employees. As the

- first branch manager, he had the task of establishing the branch in the region; he did well and won awards of excellence.
7. In 2010 the General Manager called the claimant and was summarily dismissed. He was not given notice as per his contract or given the reason for the summary dismissal. He was 46 years old then and has not been able to get a new job due to his age and the changes in the insurance sector. He was owed dues which were never paid – he had leave of 200 days and when he applied he was told that as the branch manager, he could not leave the branch alone.
  8. The claimant further stated that his employment was unfairly and constructively terminated, he was given a long letter with a list of anomalies where he sought to have a meeting at the head Office to explain himself but he was not given any audience and thus decided to file this claim in court. That all the allegations against him were false, he sought to have a hearing but the respondent declined.
  9. At this time, the claimant had hoped to work for the respondent until retirement at 60 years but was not given the chance. He had outstanding loans at this time and could not repay and the Certificate of Service was only issued on 4<sup>th</sup> February 2013, 3 years after the termination.
  10. He was accused of insubordination and failure to obey lawful orders. In this regard, he stated that the respondent sent auditors to his branch but did not know them, he only saw people moving around the branches but did not know they were doing an audit and he never participated in it. He was accused of not paying premiums of up to 2 million and his explanation was that the gross premium was deposited with the agents and he paid the net and what owed, the respondent could be able to recover. On the accusation that he issued certificate, he stated that he did not collude with clients and he was not given time to defend himself against these allegations.
  11. A memo was issued to him with 7 accusations that he responded to in his response dated 26<sup>th</sup> February 2010. That he was not called for a hearing. The accusations were false and if they had been true, he should have been arrested. To him this was inhumane treatment having served the Thika Branch well and due to his advanced age, the respondent knew he could not get a similar job.
  12. In cross-examination, he confirmed that he had diligently served for 7 years, 6 of which, he was the Branch manager. That 3 people came and demanded to see files where he gave them a desk and a list of file and then left the office as he realised they did not need his attention. They came back the next day and continued with the exercise and were assisted by all the staff. However, they could not get all the files as the records were all old and there was no space to place them in an orderly manner. His branch was elevated to that status from a sales office due to excellent performance. That he was accused of not accounting for over 2 million which was due to the difference between gross premium and net premium paid and for the period under review, the difference was the 2 million hence the shortfall and the auditors accused him erroneously since there was an explanation to this difference.
  13. He also confirmed that in 2009 he had been directed not to issue certificates to agents and intermediaries. That previously, he had given temporary certificates. That this was the first audit that was ongoing but did not ask them what they were doing while at his branch.
  14. That on 9<sup>th</sup> February 2010, the respondent sent a memo that outlined the various accusations against him to which he gave a response on 16<sup>th</sup> February 2010;

First accusation was that there were 637 undeclared certificates to which he said 37% were unused and the rest were all accounted for. He got certificates at the branch and all serial numbers were recorded as issued from the register and once issued, the drafts are sent to Nairobi [head office] for the data to be entered. That the Nairobi office failed to key in these details while the branch had done their part;

Second accusation was that he took insurance of his own vehicle to which he responded that he had taken an insurance cover for his own vehicle for inspection but once this was done, he returned it. He had taken a one month cover but never used it. He did not pay for it as the purpose was to only serve for inspection and then return it. On his second vehicle, he delayed the payment as he was terminated before he could pay. That this was not a conflict of interest to insure his own vehicles as he had made arrangements to make deductions from his salary;

Third accusation was that he gave certificates to unbrockered agents without authorisations to which he replied that there was one agent who was authorised and only this agent got the certificates;

Fourth accusation was that he undercharged premiums to which he responded that the market dictated that he should offer competitive rates and he used what all others were using;

Fifth accusation was he was rude to the auditors and failed to comply with the General Manager's interventions to which he responded by disagreeing with this allegation as it was not true;

Sixth accusation was that he validated claims that were not genuine to which he denied; and

Seventh accusation was that he did not account for PSV premiums amounting to kshs.2, 078,053/= to which he responded that once a cover was issued it formed part of the gross production where the gross was over 24 million of premiums out of which 10% was commissions and when this was removed and paid to the agents, the balance was 22 million all amounting to 100%. That since the respondent was poor in paying commissions and the agents in his areas were complaining, they would therefore deduct their commissions and the claimant would receive premiums less this commission. The respondent had a procedure where the accounts office would pay less commission as part of the business. Agents paid to his office less their commission. In his branch the practice was for an agent to remit premiums less their commission. As the manager he had the discretion to determine which agents could make these deductions

## **Defence case**

15. The respondent denied the claim and that he stated that the claimant was not diligent in his duties, he was dishonest and compromised in the dispensation of his duties resulting in the loss of Kshs.2, 078,053/= between the period of 1<sup>st</sup> January 2007 to 31<sup>st</sup> December 2009. That the claimant was involved in insubordination, failure to follow lawful commands within the scope of duty and collusion with claimants against the respondent and when they made enquiries from him, the respondent was met with unsatisfactory answers hence the claimant breached a fundamental provision of his contract.
16. The respondent further stated that the claimant failed to account for monies paid by clients and intermediaries to the respondent by negligence and compromise and thus the respondent was legally justified in the summary dismissal as set out under section 44(4) of the Employment Act. That the claims outlined by the claimant are not due in the case of summary dismissal.
17. The respondent also lodged a counter-claim, that following an audit of the Thika Branch where the claimant was the manager, they discovered that within the period of 1<sup>st</sup> January 2007 to 31<sup>st</sup> December 2009 there was a shortfall of Kshs.2,078,053/= as a result of the claimant discharging his duties dishonestly and negligently. That the claimant also allocated his two vehicles registration numbers KAS 267C and KAB 858F, Insurance Certificates from the respondent for over 3 years without paying premium. That in the circumstances of the case, the claim should be dismissed and the counter-claim confirmed with costs to the respondent.
18. In evidence, the respondent called Stanley Wilunga the Head of Human Resource of the respondent since 2011 where he is responsible for personnel, training and staff motivation and though employed after the dismissal of the claimant, he stated that he was conversant with his file and case details. There were memos and responses from the claimant where summary dismissal was for the reasons of insubordination, unbecoming conduct and failing to honour lawful instructions'. That the claimant obstructed auditors in their work and also failed to account for premiums paid by clients amounting to kshs.2, 078,053/= from 1<sup>st</sup> January 2007 to 31<sup>st</sup> December 2009. That he also issued certificates to agents without following laid down procedures and also colluded with claimants against the respondent interests.
19. The witness further stated that he was in contact with the claimant when he was following up his case and payments and advised him to conclude the issues raised in the memo subject of his dismissal and his dues would be paid. This was particularly with regard to premiums over his vehicles which were used for private business against the respondent for 3 years. That he was keen

- to conclude the matter but the claimant failed to respond.
20. Arising from the acts of the claimant, the respondent was forced to close the Thika branch and this affected 3 other employees due to malpractices where one passed away and two others were dismissed.
  21. The respondent has a policy that at the beginning of each year the manager has to give a schedule of leave days due to staff and when time comes every staff must submit an application. There is a formal application process which if filed in triplicate, one left on file, one to the employee and one on the personal file. Once leave is rejected it must be cancelled and a copy given to the employee. The claimant had 205 days not taken for leave and the value was Kshs.539, 178/=. Where leave was not taken within 18 months, this was legally forfeited and that there were good grounds against the claimant for summary dismissal. They needed to agree on how he was to settle his liabilities but failed to avail himself.
  22. In cross-examination the witness confirmed that the claimant was given the reasons for the summary dismissal. He was dismissed for covering his own vehicles and from the audit the claimant had not accounted for money which was his duty to.
  23. The second witness was Geoffrey Mariga Ngatia who was part of the underwriting team of the respondent who undertook audit at various branches. In 2009 he was directed by the respondent to do a health audit of all their offices nationally and to check if they were complying with laid down regulations. They had specific terms of reference that guided their work in a team of three officers. They were top cover 3 years from 2007, 2008 and 2009.
  24. In November 2009 the team went to Thika branch where they were impolitely received as they had not given notice and the branch manager was very rude to them and wanted to know if they had nothing better to do. The claimant as the manager in Thika should have known the need for the audit and should have been supportive to the team sent to his branch by the respondent. He however left the office stating that he was busy and left no instructions to the other staff to assist them. The witness called the General Manager seeking his abstinence and intervention and the claimant turned up in the afternoon.
  25. The witness together with the others needed to see the files from the registry but there were no files given despite the General Manager intervention. They left for the day and returned the next day where the claimant was in the office but no files were available. They however did their audit and discovered mass irregularities, they filed a report where they noted the claimant had failed to declare certificates to his own vehicles where he had taken a cover for 3 years. The claimant was asked to pay.
  26. That the responsibility for all certificates at the breach was on the manager and the witness found out in their audit that the claimant had many gaps as certificates had been issued in an irregular manner. The effect of this was that they could not ascertain the level of liability associated with undeclared certificates or the amount of loss the company had on the unaccounted documents and the respondent was ultimately not able to respond to the government regulator on these certificates.
  27. That implication of this was that the respondent was bound to lose its image that they were not in control of their certificates and would have lost business.
  28. They also discovered debit drafts were received and not remitted. The process was to receive business and the manager was supposed to ensure the proposal was filed in full but they found several areas not completed or grossly incomplete and premiums were not remitted. The effect of this was that the respondent would make underwriting losses and be unable to meet its commitments, some certificates were not declared or the proposals executed by both parties. Examples were given like that of one Stephen Mwangi certificate Number B452297 whose certificate was not declared, premium was not paid and debit file was filed with an annual cover issued valued at Kshs.6,067/= was paid. That this was not the premium sum to be paid on a 12 months cover as this should have been Kshs.7, 500/=. Another case was that of Stanley W.O. with debit draft not forwarded, no payment made and proposal was incomplete and only the name of the insured was indicated and the vehicle details were missing but there was an annual cover issued.
  29. One of the reasons for the dismissal of the claimant was the issuance of unpaid for certificates because the policy in underwriting, all agents are workers of the principal; they get instructions from the principal who in this case was the respondent. As the agents transact business, they collect

- premiums and cheques in the name of the respondent and are not allowed to sign certificates on behalf of the respondent as this is the policy and practice.
30. The witness went to state that they got some certificates with intermediaries of the respondent but all the details had not been entered on the register by the claimant. That the procedure was that on a daily basis, all clients were registered noting the insured number and the risks, the agent, period of cover and nature of cover, the amount, receipt and signature – all set out in columns. That one example for the claimant was Dick Githaiga who was issued with certificate as the client who had an agent but from the records it was indicated that this client got the certificate whereas he had an intermediary, Dignity. That these were serious gaps.
31. On undeclared certificates, the certificates were issued by the head office and AKI certified where the branches would requisition when needed. The head office would check on how the certificates were used. From the audit it was discovered the register on certificates and the records had discrepancies and the respondent had lost over 2 million or this was not accounted for or there were no documents to support. That collection of premiums is on gross and against the law for an agent to collect on behalf of the principal as all collections should be remitted and then commissions paid. Out of the 24 million supposed to have been collected, only 22 million was collected hence the balance of Kshs.2, 078,053 was uncollected. From all collections, the respondent is supposed to pay 5% to KRA as interest on income.
32. That the audit team found the claimant to have an unaccounted for money amounting to Kshs.2, 078,053/= there was also found to be gross misconduct and lack of guidance to staff at the claimant's branch.

## Assessment

The issues herein relate to the summary dismissal of the claimant and the questions that arise are;

Was this dismissal fair in the circumstance of the case?

Was the claimant given a hearing?

Is the respondent owed as under the counter-claim?

33. Summary dismissal is lawful only where the employer has complied with the provisions of Section 44 of the Employment Act (the Act). Under Subsection 44(3), summary dismissal is acceptable only where the employee has by his conduct showed that he has fundamentally breached his obligations arising under the contract of service. Such conduct on the part of the employee is called gross misconduct under the provisions of Section 44(4) of the Act.
34. Where there are grounds or reasons for removal of an employee and these amount to gross misconduct, then the employer is entitled to dismiss the employee without giving a notice and a hearing as envisaged under Section 41 of the Act. However, if the reasons for removal are not proved to amount to gross misconduct, then the provisions of Section 41 of the Act will have to apply and the employee is entitled to the full protection of the Section. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever an employee dispute and claim that the circumstances of the case did not give rise or amount to reasons of gross misconduct.
35. In this case, the claimant acknowledged to having received the memo dated 9<sup>th</sup> February 2010 from the General Manager that did outline seven (7) issues that he was required to respond to. This memo followed an audit undertaken by respondent officers sent to the claimant branch. These are details admitted by the claimant. This memo was followed with a reply by the claimant dated 9<sup>th</sup> February 2010 and the respondent not satisfied sent another memo dated 15<sup>th</sup> February 2010 seeking further clarification and another one dated 16<sup>th</sup> February 2010 on the same subject. These exchanges resulted in the summary dismissal letter being issued to the claimant dated 5<sup>th</sup> March 2010 noting the reasons for the dismissal as insubordination, obstruction, failing to account for Kshs.2,078,053, not following laid down procedure while at work and collusion with claimants as against the respondent.
36. As a general rule, a decision regarding the lawfulness of a summary dismissal in terms of section

44 of the Employment Act will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the reasonableness of the employer's belief that the continued presence of the employee at the workplace might jeopardise the interests of the employer. The justifiability of a summary dismissal invariably rests on the existence of a *prima facie* reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible to meaningfully engage in the second line of enquiry – the justifiability of summary dismissal – with the requisite measure of it being summary. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the summary nature of the dismissal is justifiable.

37. As outlined in the respondent memo dated 9<sup>th</sup> February 2010, there were serious allegations against the claimant that warranted him to give a response touching on his conduct, work and duty as under the provisions of section 44 (4) (c) and (e), of the Employment Act;

***(c) an employee wilfully 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;***

***(d) ...***

***(e) an employee knowingly fails, or refuses, 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.***

38. The conditions for summary dismissal already existing against the claimant, the respondent still went ahead to engage him with follow up memos seeking more explanations. This was done by the claimant in follow up responses but these were still found unsatisfactory.

39. Through the audit and the various responses made by the claimant to the respondent, they were able to establish that there was a good and justifiable reason to believe that the claimant had committed gross misconduct. It was possible to do so on the paper exchanges; and whether the claimant was denied a physical hearing prior to the summary dismissal had no bearing on the serious allegations made against him in the responses that he submitted to the respondent. The principles as laid down in the case of ***Plason-Evans Paints Limited versus Van Riebeeck Paints (Pty) Limited [19840 3, 623 (A), Labour Appeals Court of South Africa***, were adhered to where admitted facts through affidavits, written statements should be admitted provided these facts related to the issues at hand. Where common cause facts form the basis of a claim, then the court will admit them as such.

40. In this case the claimant was issued with a memo that did outline allegations against him, he had an opportunity to respond to these allegations to the best of his knowledge and he cannot be found to say that he was never given a hearing at all. Nothing prevented the claimant from writing down his submissions in response to the detailed memo sent to him by the respondent who in the final analysis of the case gave summary dismissal.

41. The respondent case sets out a detailed and compelling *prima facie* case of serious misconduct against the claimant. Most of the allegations were not even denied by the claimant in reply. The reasons he advanced for not dealing with his work diligently, on insubordination, and conflict of interest are at best spurious. He even stated in his evidence that;

*On the second car KAS 267C, I procrastinated on payment and I was terminated before I could pay. I got a demand letter on this from the respondent. As head of Thika branch I did not have a supervisor. It was not a conflict of interest to insure my own car but I made arrangements to have a deduction from my salary. Thirdly, I gave certificates to unbrockered agents without authorisation...*

42. An officer, senior as the claimant was as a Branch manager, had the senior responsibility to undertake his duties to the best interests of his employer at all times. The act of taking a vehicle cover for purposes of having his private vehicle pass the inspection process and then return the same cover, was in itself gross misconduct and an act unbecoming of a senior employee who

should act more responsibly. He should not have done that as this act was contrary to the provisions of section 44 of the Employment Act, despite the fact he had no supervisor over him at the branch. He should have conducted himself in a responsible manner notwithstanding. That is why he had been given the responsibility of being branch manager by the respondent as an officer who could be trusted with their property, business and assets, but he chose to use these for his own private purposes. If the audit had not been conducted, this conduct would have gone on unabated as the claimant did not see anything wrong with it. He could simply take cover for his vehicles; use them to a short purpose and then return. Even though he was committing criminal acts and was never arrested as he suggested in his evidence, this was a perfect ground for summary dismissal.

43. In the final analysis, therefore, the outcome on the evidence presented is that the conditions precedent to the lawful exercise of the power of summary dismissal – a *prima facie* of serious misconduct – was indeed fulfilled.
44. Even where the rationale for a hearing where all parties are physically present remains compelling and persuasive, this is not the only mode of conducting a hearing. The right to a hearing was not infringed in this case. Written responses, submissions and further responses and submissions, were adequate forums for the claimant to details his defences to the written memoranda from the respondent. The claimant opted to file the claim before he could exhaust this right.

### **Remedies**

45. On the claim for notice pay for six month, I find this claim unjustified. There was a contract as between the parties herein, notice period was stipulated at one month where termination arose. As assessed above, this was a case of summary dismissal where in law, notice does not arise or become payable. This was a summary dismissal. As outlined above no notice was due. I will decline this claim.
46. Leave days are due to any employee who has earned them. Subject to the provisions of section 28(4), even where an employee's leave should be taken within 1 ½ year, the employer must demonstrate that they encouraged such an employee to take such leave but such an employee failed to do so. The claimant submitted that as the branch manager, Thika, whenever he wanted to go on leave he was asked to stay since there was no other senior supervisor to take over from him. The respondent did not show any effort to have somebody take over the functions of the claimant to allow him to go on leave. The duty rests with an employer to guide their employee on such measures as good practices on how to take their leave days as due to enable them take a well deserved rest and to enhance their productivity. The claimant gave his labour to the respondent instead of taking leave days, this should be compensated. I will therefore grant the 205 days admitted by the respondent as due to the claimant at Kshs.539, 178.00.
47. The claimant also worked in March 2010 and his salary was due. Despite the summary dismissal, time worked should be remunerated. I will award the pay for March 2010 at Kshs.80, 000.00
48. On the claim for allowances, I find no evidence as to how these allowances arose. I will decline this claim.

### **Counter-claim**

49. The respondent did lay out the basis of their counter-claim, and demanded the payment of Kshs.2, 078,053.00. This arose from the audit conducted relating to 1<sup>st</sup> January 2007 to 31 December 2009. The claim also related to insurance covers due from the claimant with relation to his two private motor vehicles KAS 267S and KBA 858F. From the audit, the respondent stated that there were discrepancies following the claimant allowaigh agents to remit lower premiums which were less the commission, issuing clients with vehicle insurance certificates without premiums beign paid and issuing certificates to intermediaries.
50. From this evidence, I note the claimant did agree to a large extent that indeed as the Thika branch manager, due to competition and business environment, he used his discretion to allow agents keep their commissions and remit premiums less. This explanation was however contrary to respondent procedure and the claimant could not explain why he was unable to follow this laid down process or the basis of his use of discretion contrary to his employer practice. This was

found to be negligent and formed the basis of his summary dismissal. He is therefore liable.  
51. Equally, I find that the claimant was not able to explain as to why insurance certificates were issued to some clients vehicles without being paid for. This was inclusive of his own two private vehicles. He did not deny or give a reasonable explanation as to why he has not paid for the covers he took for his private use or why he issued certificates to intermediaries well knowing that the respondent was incurring business losses. I therefore find him liable.  
52. I will therefore award the respondent as per the counter-claim, the amount of Kshs.2,079,912.00. There will be no costs.

**Conclusion.**

**On the basis of the claim and the amounts due to the claimant being assessed at Kshs.619,178, I enter judgement for the respondent as under the counter-claim for Kshs.2,079,912.00 less that which would have been due to the claimant all being Kshs.1,460,734.00.**

Delivered in open court this 22<sup>nd</sup> day of August 2013.

**M. Mbaru**

**Judge**

**In the presence of**

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