



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 265 OF 2012**

**ALFONSE KIOKO MUTISYA ..... CLAIMANT**

**VERSUS**

**PETER MULEI & SONS LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The claimant Alfonse Kioko Mutisya filed this claim on 24<sup>th</sup> February 2012, for unlawful termination of his employment and failure to pay terminal dues and benefits by the respondent Peter Mulei & Sons. The respondent filed the defence on 18<sup>th</sup> April 2013 and admitted that the claimant was their employee and that he was terminated due to gross misconduct and denied the other claims. The claimant gave his sworn evidence and the respondent called Onesmus Kasyula and Rita Ndanu.

**Claimants' case**

2. In the claim the claimant stated that 25<sup>th</sup> October 2010 he was employed by the respondent as an Accountant Assistant at a monthly salary of Kshs.30, 000.00 and was issued with a contract where he was placed on probation for six months and upon confirmation he could be terminated by notice of one month or payment in lieu and that all his statutory deductions would be effected as required by law. He worked until 1<sup>st</sup> February 2012 when he was issued with a letter of termination citing the provisions of section 42(2), (3) and (4) of the Employment Act. The claimant however avers that this termination was unfair on the basis that he had already served his probation period and satisfactorily served the respondent for 15 months. That during his employment, the respondent failed to remit his statutory dues to NSSF and that he was not issued with his certificate of service.
3. That from the letter of termination the respondent failed to award him his service pay after failing to pay the NSSF dues which had been deducted from his monthly salary and thus claims for one month pay in lieu of notice, unpaid leave days, service pay and 12 months compensation for unfair termination together with costs and interest of the judgement amount.
4. In evidence, the claimant stated that on 1<sup>st</sup> February 2012 he was at work when he was issued with his letter of termination citing the provisions of section 42 (2), (3) and (4) of the Employment Act and no other reason was given for the termination. That at this time, there was a lot of work he was doing and he had only worked for 15 months and by relying on section 42 of the Employment Act, he was not on probation and therefore his termination was unfair.
5. The claimant went to NSSF and discovered that his dues had not been remitted even though his salary was less these dues. He was not paid any service dues after the non-remittance of his NSSF dues.
6. The claimant also stated that in the defence, the respondent cite that he was dismissed due to

misconduct, that he was engaged in disruptive activities but that this was not true and the same was false. At the time of termination he had taken an advance of Kshs.15,000.00 and he was not able to pay and since that time he has had difficulties in getting work, his child was unable to go back to school and his landlord locked him out and now is dependent on relatives for financial support.

7. On cross-examination he confirmed that before the termination he had an advance which was to be deducted from his dues. His supervisor was Mutiso and Onesmus as the managers. They were two at the back office and since there was more work, some more staff were added all being 4 in the same office. He would share the same computer materials with the others but that he was not on the internet during the time of work or share any photos. He held regular meetings with his supervisors but none related to his conduct and that he never shared any offensive material with his colleagues since there were CCTV cameras installed which captured work place for 24 hours.

### **Defence case**

8. In defence the respondent states that the claimant was their employee and was terminated due to misconduct and dishonesty and that he never served them with loyalty and dedication as he was severally caught by the managers engaging in disruptive activities during working hours and blatantly failed to reform even after several warnings. That the termination was procedural, they had given the claimant several warnings but he failed to change and thus followed the law in this case. That the respondent always paid all statutory dues including NSSF and thus there was no omission for any remittances to NSSF and that the claimant failed to collect his dues and certificate of service after his termination.
9. The respondent disputed the claim for unfair termination as they followed the law and that no service pay is due as remittance to NSSF have been paid with respect to the claimant and that the claim should be dismissed with costs to the respondent.
10. In evidence, the respondent called Onesmus Kasyula the Accountant with the respondent who supervised the claimant together with others within his office. That on 1<sup>st</sup> February 2012 the claimant was terminated on the grounds of poor performance as per the respondent expectations and the duties given to him he never met deadlines and did not update the respondent on what was happening and as his immediate boss, he took steps and called him to enquiry if the claimant understood his duties and what he was expected to do but he gave excuses and gave reasons as to why he never completed allocated tasks.
11. The witness also stated that he occasionally called the claimant to his office and together with the Director of Finance they both told him what was expected and therefore, the claimant had been given a fair chance. That the main problem that the claimant had was that he was a joker and never took issues seriously, when he failed to do his work, he was given a timeline, he would follow up only to realise that he had failed to implement what was agreed.
12. That the claimant had several people under him and shared the same office space. He was reported by Rita Ndanu, Jones Masika, Kioko Kavila, and Lucy Mbusya that there was a clip he was showing them which as a supervisor to them was wrong as it was phonographic. The clip was in his phone. This complaint was lodged with the Director who questioned the claimant. That the claimant was in an open office space where all accounts staff sat and he shared the clip with others which as their leader was not a good example.
13. On the claims, the witness stated that the respondent remitted all NSSF dues but sometimes they made omissions but these were rectified between the respondent and NSSF in follow ups. The witness followed up this matter but there was nothing he could do as this had affected other staff as well. He went to NSSF and got a statement but not with respect to the claimant. But there are records that indicate the respondent did pay to NSSF with regard to the deductions.
14. He also stated that after the claimant was terminated, his pay in lieu of notice was paid less an advance he had received and statutory deductions that were due and a cheque dated 2<sup>nd</sup> February 2012 was issued. They called the claimant to collect his dues but he rejected it on the basis that it was not as per his expectation. That the respondent is willing to give a certificate of service.
15. That the claim lacks merit and should be dismissed.
16. Another witness was Rita Ndanu Lonzi a Data Entry officer with the respondent and worked closely with the claimant as his immediate supervisor. That the claimant was not a serious person

and whenever she approached him for his assistance, he never gave her a solution and he would make it a joke. She reported to the Operations manager. They worked in an open office with 4 others and she learnt of an incident in their office where one morning a clip was sent to the claimant's phone and he drew the attention of the others to watch, there was Lucy, Christine, Masika and others who went to watch it. They moved from their desks. The witness only asked Lucy about it and learnt that it was a phonographic clip.

17. The witness further stated that the claimant was not serious at his work and she did not get the leadership that she needed from him.

### **Assessment**

18. Under the Employment Act, an employer can terminate the employment of an employee where there is a valid reason that is fair in the circumstances of the case. Failure to have a valid and fair reason for termination, such termination will be unfair. Beyond having a valid and fair reason for termination, an employer must also write such reason or reasons in the notice of termination to the employee. The requirement to have this notification in writing is important as from this notice; an employee has a right to challenge the validity of the termination and the fairness of it. Where 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, then the Court can award compensation to the employee or any other remedy found to be fair, just and equitable.

19. Under section 35(1) (c) states;

*(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. [Emphasis mine].*

20. Even where this written notice is issued, an employee can dispute the lawfulness and fairness of such termination as stipulated under section 35 (4) (a);

*(4) Nothing in this section affects the right—*

*(a) Of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46;*

21. Further to the above, the reasons given in the notice of termination must comply with the provisions of section 45 of the Act;

*(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*

...

22. In the letter of termination issued to the claimant, the respondent wrote as follows;

...

*Dear Mr. Kioko*

*RE: Termination of Employment*

*In pursuant to the employment act 2007, section 42 subsections 2, 3, and 4, I am sorry to inform you that your employment at Peter Mulei & Sons Limited has been terminated with effect from 1<sup>st</sup> February 2012.*

...

23. This letter was dated 1<sup>st</sup> February 2012, the same date it was to take effect. Under this letter the claimant was to be paid one month pay in lieu of notice. Hence the claimant reported to work on the 1<sup>st</sup> of February but received his letter of termination on the same date.

24. The reason or reasons for termination were not stated in the notice letter only the citation of section 42, subsection 2, 3, and 4 were done. Under these section, the law states;

*(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.*

*(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*

*(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

25. In whole, section 42 of the Act relate to the termination of probationary contracts. Under the provisions cited by the respondent as the reason for the termination of the claimant, I take it that the claimant was still held to be on probation even after serving them for over 15 months. the termination was therefore on the basis of a probationary contract that exceeded six months. this is a misapplication of the provisions fo the contract as between the claimant and the respondent as the clause on probation provided for 6 months, which could not be extended for more than the legal period of one year and could be terminated within seven days. However, the respondent decided to rely on this clause for the termination of the claimant. This was the reason given to the claimant for his employment termination.

26. In the statement of defence and evidence, the respondent witnesses Onesmus and Rita introduce other reasons for the termination of the claimant that do not touch to the written notification to the claimant. Rita indicated that the claimant as her supervisor was not effective in offering leadership and that he was sharing a phonographic clip with colleagues in the office, but she never watched this clip but learnt its contents from Lucy. No evidence was led to the effect of the notice issued to the claimant on 1<sup>st</sup> February 2012 with regard to his conduct while at work that related to the evidence of Ms Rita's evidence. Also, she never talked on the reason given in the termination notice, evidence relating to section 42 (2), (3 ) and (4) of the Employment Act.

27. Equally the evidence of Onesmus was to the effect that the claimant failed in the performance of his duties; he had to occasionally intervene to offer him guidance and even called another officer so that jointly, they could guide the claimant. This issue of the poor performance of the claimant was never cited in his notice of termination.

28. This is a fatal mistake on the part of an employer. A notice of termination must be unambiguous and written in a language that the employee can understand. To go contrary to what is stipulated in law, will be most unfair to an employee and this Court will not hesitate but award damages to an employee terminated over reasons that are not clear, ambiguous or not valid or justified. This is more important as from the contract of employment issued to the claimant I note he commenced work on 25<sup>th</sup> October 2010 until 1<sup>st</sup> February 2012, a period of over 15 months. If his contract was not confirmed after the probation period stipulate under clause 4.0 of this contract, then by operation of the law, this contract became confirmed automatically. The employer after the six (6) months as agreed by the two parties was estopped from applying these provisions as against the claimant [the employee] to his disadvantage. Probation period can only operate for the stipulated duration as under a contract of employment with an extension as agreed upon by the parties to this contract. In the absence of proof that there was an extension that the employee agreed to, then the employer cannot rely on the non-issuance of a letter of confirmation to say that the claimant/employee was still under probation.

29. The claimant commenced work with the respondent on 25<sup>th</sup> October 2010; this was a period way after the probation period expired. This could top be relied upon as a fair ground for termination of

his contract. In any event the evidence that the respondents laid in court was contrary to the termination notice as the same related to the conduct and performance of the claimant. The use of these two processes in pleading, in evidence and the notice issued to the claimant was a misapplication of the very law that the respondent was seeking to apply that laid out under the provisions of section 42 (2), (3) and (4).

30. On this basis, I find the termination of the claimant was procedurally and substantively unfair; the respondent failed to issue a proper notice for the termination and also failed to outline valid reasons for the same. The reason given for termination lacked fairness in all its tenets. This is contrary to the provisions of section 45 of the Act. Where the court finds that an employee has been unfairly terminated, compensation must be awarded.

### **Remedies**

31. In assessing the amount payable in compensation to the claimant, he gave evidence that he has suffered since he left the employment of the respondent and has not been able to get alternative employment as he now relies on relatives for financial support. No evidence was however given to indicate how the claimant has tried to mitigate his circumstances. Despite the respondents offering to pay some outstanding amounts due to the claimant, he refused to collect these dues despite the fact that he could still pursue his claim for unfair termination separately unaffected by his collection of outstanding dues. I will therefore award an amount equivalent to 3 months pay for the unfair termination.

32. Notice pay was due to the claimant as he was never given any notice as outlined in his contract. This will be awarded at one month pay amounting to Kshs. 30,000.00.

33. Service pay is payable to an employee where an employer does not make remittances as outlined in section 35(6) to registered pension scheme as under the Retirement benefits Authority, gratuity as under a collective bargaining agreement, to the National Social Security Fund (NSSF) or to any scheme established by an employer for the benefit of the employee in retirement. From the evidence, the attachments indicated by the respondent to have been for payments to the NSSF do not have a record attached to them to outline that indeed these payments related to the dues deducted from the claimant and the contribution from the respondent as the employer. The practice of many employers with many employees is to make a one cheque or payment to the NSSF with a schedule attached indicating which employees are beneficiary to the lump sum payment, otherwise, it would be impossible for any individual beneficiary to establish any claim out of the same. In this case, the duty rested upon the respondents to confirm to this court that indeed they had effected payment with regard to the NSSF remittances for the claimant and from the record I find none. The indicated payment to the NSSF by the respondent could have been with respect to anybody else. There is no linkage made that this was a payment with respect to the claimant. In this regard, where NSSF dues are not remitted with respect to an employee, the Court will award 15 days pay for the completed year the claimant served the respondent. This will be assessed at Kshs.15, 000.00.

34. The claim for leave days earned was not challenged in any material way. The duty rests on an employer to confirm from their records as to how many days were due to the employee. In this case the assertion by the respondents that only an amount of kshs.26, 639.74 owed in this regard was not supported. The claimant disputed the computation of his terminal dues which was an invitation to the respondents to confirm. Work records are kept by an employer who has a duty when in court to produce these records. This was not done here. I will therefore award the amount equivalent to one month pay for leave days outstanding at Kshs.30, 000.00.

35. The claimant reported to work on 1<sup>st</sup> February 2010, the day he was terminated. This was not a case for gross misconduct that warranted summary dismissal that required instant action. The respondent should pay the wages due for this day. I will award the sum of Kshs.1000.00.

For the loan started to be outstanding, there was no counter-claim by the respondent. I will therefore not make a deduction herein for the same.

**I will therefore enter judgment for the claimant as against the respondent in the following terms;**

- a. **I declare that the termination of the claimant by the respondent was unfair**
  - i. **Compensation for unfair termination awarded at kshs.90,000.00;**
  - ii. **Leave dues awarded at Kshs.30,000.00;**
  - iii. **Service pay awarded at Kshs.15,000.00;**
  - iv. **Leave dues amounting to kshs.30, 000.00; and**
  - v. **Pay for 1<sup>st</sup> February 2010 amounting to Kshs.1000.00.**
- b. **Costs of the suit; and**
- c. **Certificate of Service be issued within 14 days from today, sent to the claimant's advocates and a copy of the same to the last personal address of the claimant.**

Delivered in open court this 3<sup>rd</sup> day of September 2013.

**M. Mbaru**

**Judge**

In the presence of

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