



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1683 OF 2011**

**SIMIYU KIBENGO GODFREY.....CLAIMANT**

**VS**

**PRIVATE SAFARIS (E.A) LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant’s claim which is brought by way of a Memorandum of claim dated 21<sup>st</sup> September 2011 is for unfair termination of employment and failure to pay terminal benefits. The Respondent filed a Memorandum of Reply on 6<sup>th</sup> December 2011 and the matter was heard on 25<sup>th</sup> June 2013 with Mr. Nyabena instructed by Nyabena Nyakundi & Co Advocates appearing for the Claimant and Mr. Kalongo instructed by Walker Kontos Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Head of Human Resources, Susan Kuria. Both parties filed written submissions.

**The Claimant’s Case**

2. The Claimant was employed by the Respondent on 19<sup>th</sup> June 1991 in the position of Driver/Guide and was confirmed on 27<sup>th</sup> September 1991. He worked as such until 3<sup>rd</sup> March 2011, when his employment was terminated. At the time of his termination, the Claimant’s salary was Kshs. 14,520. On 10<sup>th</sup> June 2011, the Claimant wrote to the Respondent’s Managing Director, disputing the reasons advanced for the termination of his employment and seeking payment of his terminal dues. There was no response to the Claimant’s letter.

3. It was the Claimant’s case that the Respondent did not give any valid reasons for terminating his employment. Further, the Claimant was not given an opportunity to respond to the allegations leveled against him. The Claimant testified that prior to his termination, he was told to provide written explanations on booking of a Balloon Safari for the Respondent’s clients and failure to transfer a Manager to the airport. The Claimant provided the written explanations as required. He was however not issued with a show cause letter nor called to any disciplinary meeting.

4. The Claimant claimed the following:

- a. A declaration that his employment was unlawful and unfair
- b. 3 months’ salary in lieu of notice.....Kshs. 43,560.00
- c. Leave for 20 year.....290,400.00
- d. 11 public holidays per year.....536,123.06

- e. House allowance.....245,723,06
- f. Overtime @ 3 hours per day.....1,411,600.00
- g. 12 months' salary compensation for unfair termination.....174,240.00
- h. Certificate of service
- i. Costs and interest
- j. Any other relief the Court may deem just to grant

**The Respondent's Case**

- 5. In its Memorandum of Reply, the Respondent stated that the Claimant's employment was subject to termination by one month's notice or salary in lieu thereof. It was the Respondent's case that the Claimant's performance was poor and that the Claimant lacked integrity.
- 6. The Respondent further pleaded that the Claimant was given an opportunity to be heard and was paid all his terminal dues and thereafter discharged the Respondent from any further liability.
- 7. With regard to the claim for leave, the Respondent stated that the Claimant took his leave from time to time and any leave not taken was forfeited in accordance with the Respondent's policy. The Claimant took all his off days and public holidays and all overtime was compensated by off days given to the Claimant.

**Findings and Determination**

- 8. The first issue for determination is whether the Claimant has made out a case for unfair termination.
- 9. Section 45 (2) the Employment Act, 2007 of provides that:

***(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 that***

***(c) That the employment was terminated in accordance with fair procedure.***

10. The provisions under Section 45(2) require that for an employer to legitimately terminate an employee's employment, they must not only have a manifestly valid reason but must also exercise due process in effecting the termination. Put another way, there must be both substantive and procedural fairness.

11. According to Section 43(2) of the Employment Act, 2007 legitimate reasons for termination of employment constitute those matters that the employer genuinely believes to exist and which would cause a reasonable employer to terminate an employee's employment. Since these are matters to be determined on a balance of probability, they must be explained to the employee in a language the employee understands. In addition, the employee must be given an opportunity to respond to the allegations made against them. The procedure for doing so is found in Section 41 of the Employment Act, 2007 which provides as follows:

***(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 the 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***

12. According to the Respondent, the Claimant was guilty of misconduct on two counts. First, he booked a Balloon Safari for the Respondent's clients privately thus denying the Respondent income. Second, he failed to make a scheduled airport transfer for one of the Respondent's Managers. Following these incidences, the Claimant was called to account and he gave his written explanations which were received by the Respondent on 3<sup>rd</sup> March 2011. On the same day, the Respondent terminated the Claimant's employment.

13. There was no evidence of any communication either verbal or written between the time the Claimant submitted his written explanations and the time his termination letter was written. The Court was therefore unable to determine whether the Respondent gave any consideration to the explanations provided by the Claimant.

14. In the case of **Bernard Mutugi Daniel Vs Lenana Mount Hotel Limited (Industrial Court Cause No. 1423 of 2012)** this Court held that:

***“Labour and employment rights are now anchored in the Bill of Rights and are protected under Article 41 of the Constitution of Kenya, 2010. It follows therefore that before disciplinary action..... is taken against an employee, the employee must be afforded and be seen to have been afforded every opportunity to defend themselves.”***

15. In the Court's estimation, the Respondent did not afford the Claimant adequate opportunity to defend himself. I therefore find the termination of the Claimant's employment unfair within the meaning of Section of 45 of the Employment Act, 2007 and award him 8 months' pay in compensation.

16. The Claimant claimed house allowance for his entire period of service. In countering this claim, the Respondent produced the Claimant's letter of appointment dated 19<sup>th</sup> June 1991 which provided at Clause 3 that:

***“You will be paid a salary of Kshs. 2,500 consolidated. 15% of the salary is housing elements”***

17. The letter of 19<sup>th</sup> June 1991 was followed by a confirmation letter dated 27<sup>th</sup> September 1991 which did not provide any figures. Then a pay slip produced by the Claimant gave the figure of Kshs. 14,520 as both basic and gross pay. The Respondent did not explain these discrepancies nor did it produce a pay statement as required under Section 20 of the Employment Act, 2007.

18. The Respondent further argued that since the Claimant was housed while on duty at the lodges, he was not entitled to house allowance. I respectively disagree. In my view, an employee who is accommodated by the employer or at the employer's expense in a non-accompanied environment such as a Game Reserve, National Park or Security Zone cannot be said to be housed by the employer within the meaning of Section 31(1) of the Employment Act, 2007.

19. The failure to pay house allowance was a continuing injury within the meaning of Section 90 of the Act and the claim having been brought within a period of less than 12 months is well within time. In view of the foregoing, the claim for house allowance is allowed. Consequently, the Court has loaded the figure of Kshs. 2,178 being 15% house allowance making a total figure of Kshs. 16,698 which the Court has adopted as the Claimant's salary for purposes of this Award.

20. With regard to the claim for leave, the Respondent provided leave application forms dated 29<sup>th</sup> December 2005, 10<sup>th</sup> November 2006, 30<sup>th</sup> April 2009 and 20<sup>th</sup> April 2010. Although the Respondent did not provide all the leave records, the Court adopted the leave form dated 20<sup>th</sup> April 2010 as indicative of the Claimant's leave status. The Claimant is therefore entitled to prorata leave for the 2010/2011 period only. The Court found the claim for 3 months' salary to be without any basis while the claims for public holidays and overtime were not proved.

21. The final effect of this Award is as follows:

- a. 8 months' salary compensation for unfair termination.....133,584
- b. House allowance (230 months).....500,940
- c. Prorata leave (8 months).....7,798

**Total.....642,322**

The Respondent is further directed to issue the Claimant with a Certificate of Service.

I award the costs of this case to the Claimant.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF OCTOBER 2013**

**LINNET NDOLO**

**JUDGE**

*In the Presence of:*

.....*Claimant*

.....*Respondent*