



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 275 of 2012**

**LINUS BARASA ODHIAMBO..... CLAIMANT/APPLICANT**

**VERSUS**

**WELLS FARGO LIMITED ..... RESPONDENT**

**JUDGMENT**

The Claimant Linus Barasa Odhiambo filed the memorandum of claim on 22<sup>nd</sup> February, 2012 through the firm of Ouma Mulanya and Company Advocates. The Respondent Wells Fargo Limited filed the response on 7<sup>th</sup> May, 2012, through Kimani Githongo and Company Advocates. The Respondent's list of documents was filed on 24<sup>th</sup> September, 2012.

The claimant prayed for judgment against the Respondent for:

(a) A declaration that the Respondent's termination of the claimant's employment was illegal, unlawful, unfair and inhumane and the claimant is entitled to payment of his due terminal benefits and damages.

(b) An order for the Respondent to pay the claimant his terminal dues and compensatory damages totaling Kshs.175,045/= including:

(i) One month salary in lieu of notice - Ksh.13,465/=

(ii) Compensatory damages for unfair or unlawful termination calculated at 12 months gross salary being

Ksh.13,465 x 12 - Ksh.161,580/=

By an agreement made and dated 1<sup>st</sup> April, 2010, the Respondent employed the Claimant as a guard at a basic salary of Ksh.6839/= and house allowance paid at the statutory rate. Clause 7 of the agreement provided that the agreement would be terminated by the Respondent without a prior notice if the claimant at any time was guilty of any act or omission amounting to gross misconduct as specified in Section 44 of the Employment Act, 2007. Further Clause 8 (f) of the agreement stated that, as part of the special instructions, reporting on duty under the influence of alcohol or drugs was strictly prohibited and would result in summary dismissal.

This cause came up for hearing on 27<sup>th</sup> September 2012, when the claimant gave oral testimony and one Mr. Patrick Maiyo, the Respondent's Human Resource Officer testified on behalf of the Respondent.

The Claimant testified as follows:

1. That he was employed by the Respondent as a guard from 10<sup>th</sup> April, 2010 up to 13<sup>th</sup> June 2011, when he was unlawfully terminated from employment.
2. That on 9<sup>th</sup> June, 2011 at 5.45 a.m. he was at his station of duty at Nakumatt Lifestyle when his immediate supervisor one Mr. Isaac Wasike came and alleged that the claimant was drunk. That the claimant had bad working relationship with his supervisor and the supervisor acted with malice and bad faith.
3. That upon the allegation of being drunken being made by the supervisor, the Claimant was taken to the Respondent's offices where the Respondent made a statement that he was not drunk at all. However his bosses tore his genuine statement and forced him to write another misleading statement which was produced by the Respondent's witness as Exhibit 2(a).

The statement read:

***“REF: IRREGULARITY***

***I am Linus Odhiambo of employment No.116126 currently deployed at Nakumatt Lifestyle. I happened to find myself in a wrong company peer pressuring me to take alcohol. It was at around 2000 hrs that I left the pub having taken 2 bottles of beer. I reported on duty today in the morning at 0545 hrs fit for the job apart from the alcohol scent which the in charge sensed and forwarded the matter.***

***Yours faithfully,***

**SIGNED  
Linus Odhiambo”**

4. That the Claimant admitted having taken two beers on the material night but was not drunken or disorderly on the morning in question. That he had been working for sometime having relieved a workmate that morning.
5. That after recording the misleading statement by force, he was asked to wait till evening and told to go home for the day. He was asked to report at the office the following day but when he did, he was asked to report again on 13<sup>th</sup> June, 2011.
6. That subsequently on 13<sup>th</sup> June, 2011 he was denied entry to the offices and locked out at the Respondent's gate from where the Respondent's Officer advised him to wait until he would be called.
7. That the letter of dismissal was dated 15<sup>th</sup> June 2011 but he had picked it a week later.
8. The letter for summary dismissal dated 15<sup>th</sup> June 2011, stated as follows;

***“Dear Mr. Barasa***

***RE: SUMMARY DISMISSAL***

***Your services are summarily dismissed with effect from 13<sup>th</sup> June 2011 following the incident of 9<sup>th</sup> June, 2011 whereby you reported for duty intoxicated and incapable of performing your duties.***

***Your final dues payable through the accountant after completion of clearance procedures are as follows:***

- 1. Ksh.4,000/= being refund for uniform deposits.***
- 2. Salary for days worked up to 08/6/2011.***
- 3. Overtime for days worked up to 08/6/2011***
- 4. Overtime carried forward from 23/5/2011 – 31/5/2011***
- 5. Payment in respect of twenty eight (28) days accrued leave.***

***All dues shall be paid net of statutory deductions, loans, advances, loss, shortages in issues and other deductions that may be lawfully effected.***

***The above enumeration of your dues is as per records held. However, please read and make any claims you may have as no claims shall be entertained after payment is made and received.***

***Yours faithfully,  
WELLS FARGO LIMITED***

***SIGNED  
F.K. MAINA  
PERSONNEL DIRECTOR”.***

9. That the claimant further testified that his termination was verbal when on 13<sup>th</sup> June 2011, Mr. Maiyo, the Respondent’s Human Resource Officer told him that he had been terminated.

10. As directed in the letter of dismissal, the claimant testified that he made his claims through his advocate’s letter dated 1<sup>st</sup> December 2011 whose file copy is attached to the memorandum of claim. The respondent, the claimant testified, never responded to the Advocate’s letter hence this cause.

For the Respondent, Mr. Patrick Maiyo, the Human Resource Officer testified.

The witness stated as follows:

1. That intoxication was a misconduct both in the contract of employment and under the provisions of Section 44 of the Employment Act, 2007.
2. That the Claimant was taken to the office on the material day upon being suspected to be drunken and therefore the determination of his suitability for continued service on the material day was necessary.
3. On the material day the Claimant was not subjected to any tests, medical or otherwise, to determine his intoxication. He was not and it was never alleged that the claimant was disorderly, late or unable to perform his duties. The allegation was that he was drunken and therefore intoxicated contrary to the law and the service agreement.
4. That as a Human Resource Officer he understood intoxication in the circumstances of the case to mean taking alcohol to a level unable to perform duties on the part of the claimant.
5. That there were no witnesses called or at all during the meeting the claimant was summoned to and who testified as to the alleged intoxication. Further there was no medical examination. No person gave evidence except the supervisor’s statement reporting the case.
6. That the witness did not recall or know of any response to the demand letter by the claimant’s

advocates.

7. The claimant was not late for duty on the material day. He was dismissed on account of intoxication and not lateness.

8. The claimant had before recorded statements and been summoned by his supervisors as shown in Defence exhibits 2(a), 2(b), 2(c), 2(d) and Exhibit 6 which specifically related to a warning letter for failure to sign summons.

It is not disputed that the Claimant's last gross monthly salary was Ksh.13,465/=

The issues for determination in this case are:

(a) Whether the employer had a valid reason to terminate the services of the claimant.

(b) Whether the claimant is entitled to the remedies prayed for.

Subsection 43(1) of the Employment Act states that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. Subsection 43(2) of the Act provides that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. These provisions of the Act apply even in the instances of summary dismissal. In particular, subsection 44(3) of the Act provides that subject to provisions of the Act (such as provisions of Section 43), an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service. The issue in this case is whether the respondent has passed the test set by section 43 of the Act. The alleged grounds for termination is intoxication. The Respondent's witness has clearly stated that the Claimant's intoxication was never verified on the material day. No medical evidence or scientific verification was undertaken. In addition, the respondent's witness confirmed that the claimant made a statement which was produced in evidence. The court finds that the claimant having been orderly, punctual, at work and in absence of any scientific process, the respondent has failed to prove the reason for removal or termination of the claimant. To intoxicate is to cause a person to lose control of their faculties. The Claimant could not have been intoxicated if he was orderly as confirmed by the Respondent's witness and if he was able to record the statements upon which the respondent relied on. Further the court finds that the statement the claimant made on the material day was not an admission of intoxication or evidence of intoxication; it was evidence that the claimant, in his own words, had "alcohol scent" but not intoxicated. The making of the statement by itself shows the claimant was in control of his faculties and not intoxicated.

The second issue for determination is whether the termination in this case was unfair. Having found that the respondent has failed to prove the reason for termination, the court finds that the termination was unfair under subsection 45(2) of the Act which provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid. In this case, the alleged reason being intoxication, it was invalid because the reason was never subjected to any scientific or observable verification. The claimant was throughout the material time in control of his faculties and therefore not intoxicated.

In making this finding, the court has considered the service agreement and the relationship between the complainant and his supervisors; the respondent's employees responsible for the supervisory and management functions. The agreement does not provide for any grievance management procedures. This consideration is crucial when the summons and claimant's statements are looked at closely. Defence exhibit 2(a) is the claimant's statement made in circumstances where the claimant while on duty received a call on his personal cell phone from the only person who was in touch with his wife who was hospitalized. That appears to have been a special circumstance that constrained the claimant to receive and answer the caller. Defence exhibit 2(b) is the claimant's statement in circumstances whereby the

respondent's client defied lawful request by the claimant to stop before entering the premises the claimant was guarding. The client having refused to stop, in the claimant's own words, **"I had no other special mechanism to stop him and I proceeded for the next vehicle"**. Once again that would appear to have been a valid grievance for which the claimant did not have to be visited with adverse summoning. Defence Exhibit 2 (c) is the Claimant's statement on the occasion when he had disputed the verbal cancellation of his off duty. The claimant wrote in the statement, thus,

**"It was Tuesday morning 26.04.2011 when the in charge approached me to inform that my Wednesday off duty was stopped. I raised concerns over issues which were ahead of me citing out crucial domestic issues which so (meaning "saw") the in charge walk away without saying a word. The in charge communicated nothing more in the rest of the day and to me silence meant agreement over my pledge. I proceeded with my off duty only to be verbally sent to the office in the face of reporting on duty this morning"**.

The court finds that the circumstances constituted another valid grievance for which the claimant did not have to be visited with an adverse summon.

The court has delved into these details to establish that the absence of a grievance procedure and the absence of a clear disciplinary procedure in the service agreement exposed the claimant to unfair labour practices. Fair labour practices demand of employers to agree or prescribe fair grievance management procedures to enable the employee to ventilate grievances. The grievance management procedures should cover situations of grievances between the staff and the employer, among the staff and between the employee and the employer's clients. It is unfair labour practices to expose staff to employer's unilateral adverse decisions in circumstances of valid and legitimate grievances an employee has to raise against the employer, fellow staff or the employer's clients. The court finds that grievances falling short of misconduct or being disputed allegations of misconduct by employees deserve a fair grievance management clause or procedure failing which the employee is exposed to unfair labour practices in contravention of Article 41(1) of the Constitution.

In the instant case, the court finds that the termination of the claimant's employment was in breach of fair labour practices because prior to the purported summary dismissal, the claimant was subjected to unilateral adverse decisions by the respondent in circumstances that clearly required and should have attracted a fair grievance management procedure.

Counsel for the claimant submitted that the termination of the service agreement was unlawful and unfair because the claimant was denied natural justice and due process as provided for under Section 41 of the Employment Act, 2007 requiring notification and hearing before termination on grounds of misconduct, including, gross misconduct that would attract summary dismissal under Section 44 of the Act. Counsel for the respondent objected and submitted that summary dismissal does not require a notice and a hearing.

The court has carefully considered this point and finds that summary dismissal is a dismissal which the employer is entitled to dismiss without notice. In particular subsection 44(2) of the Act provides that subject to provisions of Section 44 of the Act (providing for summary dismissal), 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. Summary dismissal is lawful only where the criteria prescribed under Section 44 of the Act is complied with. Under Subsection 44 (3), summary dismissal is tenable only where, **"the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service"**. Such conduct on the part of the employee is referred to as "gross misconduct" under subsection 44(4) of the Act. Where the ground for summary dismissal constitute justifiable or lawful grounds for such dismissal, that is, amount to gross misconduct, then the employer is not culpable for breach of any law and is free from liability; and in such instances Section 41 of the Act prescribing notification of alleged misconduct and hearing before termination shall not apply. However, where the circumstances are such that the grounds for removal are such that they did not amount to gross misconduct, then the wings of Section 41 will spread out and the employee is entitled to the full protection of the Section. Accordingly, disputes of summary dismissal will

be subjected to the test in Section 41 of the Act whenever the employee disputes existence of gross misconduct in any instance of such dismissal. Employers stand advised that the power to dismiss summarily must therefore be exercised sparingly and in the most obvious cases of gross misconduct. It is a discretion that stands on a thin line and to avoid the price of unfair dismissal or termination, it were safer for the employer to follow the wide path of due process through notification and hearing as provided for in Section 41 of the Act. The only clear exception to notification and hearing is the termination of probationary contracts as provided for in Section 42(1) of the Act; and even this exception is subject to provisions of any agreement and standing procedures that govern the employee's and the employer's rights and obligations during the probationary period. In the present case, the reason for termination having been found to have been invalid, the court finds that the claimant was entitled to the full protection of Section 41 of the Act so that due process through a notification and hearing was necessary.

The final issue for determination in this cause is whether the claimant is entitled to the remedies as prayed for in the memorandum of claim. Under clause 7(b) of the service agreement the claimant was entitled to one calendar month's written notice for termination or payment of a sum equivalent to one month's basic salary in lieu of notice. The Respondent did not give the agreed notice and the court finds that the claimant is entitled to one month basic salary in lieu of the termination notice being Ksh.7,323.00/=.

The claimant has also made a prayer for twelve months gross salary for unfair termination. The contract of service in this matter was for a fixed term of 12 months. Subsection 45(3) of the Employment Act, 2007 provides that 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.

Under that Subsection one may take the view that employees for less than thirteen months like the claimant cannot have a right to complain that they have been unfairly terminated. However this court upholds the findings of the High Court that the subsection is unconstitutional as per the Judgment by the Honourable Justice Isaac Lenaola in **Samuel G. Momanyi – Versus – The Honourable Attorney General and SDV Transami Kenya Ltd, High Court Petition No. 341 of 2011**. The High Court in that petition held that subsection 45(3) is unreasonable and inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said section purported to deny the petitioner the rights and freedoms enshrined in the said Articles of the Constitution. Of subsection 45(3) of the Act, the learned Honourable Judge stated as follows:-

***“22. I have held as above because I am in agreement with the Petitioner that there is no explanation offered by either the 2<sup>nd</sup> respondent and the Attorney General why a person who has worked for one (1) year and one (1) month is the only one who can claim that his employment has been unfairly terminated and that one who has worked for less than that period cannot have the benefit of that claim. I have attempted on my own and without assistance from Counsel to get the justification for such a provision but my efforts have come to naught. I have elsewhere above reproduced Section 36 of the South African Act and it is easy to see that a person who works for less than 24 hours a month may genuinely have no claim for unfair termination but how can one explain that a person who has worked for a full year and more can be unfairly terminated and have no recourse to the protection of the law? Why discriminate in such a blatant manner and why close the doors of justice to an otherwise deserving litigant on account of period served which is not legitimately too short to have any lawful meaning?”***

This court wholly agrees with the findings, holding and reasoning of the learned Judge. Subsection 5(2) of the Employment Act provides that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy practice. It cannot be that the law gives with one hand and takes away with the other especially in circumstances where such derogation would be inconsistent with a clear constitutional provision.

Thus the court awards the claimant twelve months gross salary for unfair termination. The respondent shall also pay the claimant a sum of Ksh.16,233.00/= as admitted and computed by the respondent comprising refund for uniform deposit, leave due of 28 days worked and not paid in the last month up to

08/06/2011 being 8 days, overtime worked up to 08/06/2011 of 20 hours, and overtime balance from previous month of 20 hours from 23/05/2011 to 31/05/2011.

Accordingly judgment is entered for the claimant against the Respondent for:

- (a) a declaration that the respondent's termination of the claimant's employment was unfair;
- (b) the respondent to pay the claimant a sum of Ksh.200,898.00/= inclusive of the one month basic salary in lieu of notice, twelve months gross salary for unfair termination, and terminal dues as computed by the respondent;
- (c) interest on (b) above at court rates from the date of the judgment till full payment; and
- (d) the respondent to pay costs of the cause.

**DATED** and **DELIVERED** at Nairobi this 28<sup>th</sup> day of September, 2012.

**Byram Ongaya**  
**JUDGE**