



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 963 of 2012**

Statutory obligation to hear employee before termination/dismissal

Section 41 of Employment Act

Natural justice in employment contracts

**CLAIMANT**

**JORAM GAKUMO**

**RESPONDENT**

**THIKA COFFE MILLS LIMITED**

**AWARD**

**Background**

1. The Claim was filed on 6 June 2012 by Joram Gakumo (hereinafter the Claimant) against Thika Coffee Mills Limited (hereinafter the Respondent). On 8 June 2012 the file was placed before Justice Kosgei (as he then was) who assigned the Cause to Justice Chemmutut (as he then was). Justice Kosgei directed that the Cause be mentioned on 3 July 2012 and directed the Registrar to notify the parties.
2. On 26 June 2012 the firm of Mbugwa, Atudo & Macharia Advocates filed a Notice of Appointment of Advocates on behalf of the Respondent.
3. On 3 July 2012, Mr. Odongo appeared for the Claimant while a Miss Owino appeared for the Respondent. The Judge fixed the Cause for hearing on 24 September 2012 at 10 am in the presence of both Advocates.
4. On 24 September 2012, the Cause was placed before me and when it was called for hearing, only Mr. Odongo for the Claimant was present. There was no appearance for the Respondent.
5. Having satisfied myself that the hearing date was given in the presence of both parties, I allowed the Claimant to proceed with his case.

**Claimants Case**

6. The Claimant gave his evidence under oath and was led by his Counsel Mr. Odongo.
7. It was his evidence that he was employed by the Respondent as a driver with effect from 1 June 2006 vide letter of appointment dated 21 June 2006 which was annexed to his Memorandum of Claim and marked as 'JG 1'. He further testified that he served the Respondent with loyalty and dedication and received several letters of appreciation and merit until 20 January 2012 when he was summarily dismissed vide letter of even date. The letter was marked as 'JG 2' and annexed to the Memorandum of Claim.
8. The letter of summary dismissal indicates that the Claimant was being dismissed because he had '*showed disrespect and used unpalatable language to your senior in total disregard of whoever was within the vicinity.*' The Respondent treated this as an act of insubordination.
9. In his evidence the Claimant gave a different narration to that encapsulated in the Respondent's letter. According to the Claimant, on 20 January 2012 at about 5 pm he was requested by the Respondent's Operations Manager, a Mr. Njenga to get a truck but the said truck failed to start as a result of which he called a mechanic to check it out. The mechanic could not check the truck out the same day and told him he would look at it the next day. The Claimant thereafter informed Mr. Njenga about this and Mr. Njenga told him to return the truck keys and go home and return to work the next day.
10. The next day, 21 January 2012, while on his way to work in the Respondents' staff bus, the bus was stopped at the gate by a security guard who ordered the Claimant out and then gave him the dismissal letter referred to above. He processed his clearance after receipt of the dismissal letter.
11. In his statement of claim, the claimant alleges that he was not accorded a hearing prior to the summary dismissal. He was not allowed to make any representations before the decision to dismiss him was reached.
12. As a result the Claimant is claiming from the Respondent wages for days worked in January 2012, unpaid leave days, leave travel allowance, overtime for 318 hours and 12 months compensation for unlawful dismissal.
13. At the time of dismissal the Claimant was earning a gross salary of Kshs 23,322 made up of Basic salary of Kshs 17479, House Allowance of Kshs 5243 and lunch Allowance of Kshs 600 per month. Salary slips for November and December 2011 were exhibited to the Memorandum of Claim.

### **Analysis/Evaluation of Claimant's case**

#### ***Unlawfulness of termination***

14. It is not in dispute that the Respondent was summarily dismissed vide letter dated 20 January 2012 for what the Respondent referred to as 'insubordination'.

15. Section 44 (4) of the Employment Act has laid out clearly the matters which if committed by an employee would attract summary dismissal. Of relevance to the issue at hand is Section 44(4)(d) which provides that an employee may be dismissed summarily if:

*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.*

16. However, before invoking the provisions of Section 44(4) of the Employment Act, an employer is under a statutory obligation pursuant to Section 41(2) to give an audience to the employee who is subject to the dismissal so that the employee can make representations and which representations the employer should consider before making a decision to dismiss the employee.

17. This is what is universally referred to as procedural fairness within the industrial relations legal

framework. Within the Administrative law regime it has for centuries been expressed in the maxim, ***audi alteram partem***.

18.Procedural fairness has its antecedents in the rules of natural justice. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing.

19.But it appears that this rule or procedural fairness has not always been part of the employment or contractual relationship in Kenya or of the common law if I may say so. For example in *Rift Valley Textiles Limited v Edward Onyango Oganda, Civil Appeal No. 27 of 1992* and cited in *Kenya Ports Authority v Silas Obengele [2008]e KLR*, the Court of appeal held that the breach of rules of natural justice would have no application to a simple contract of employment unless provision was made for it by the parties themselves in the contract. In fact in the *Edward Onyango Oganda* decision (supra), the Court of Appeal boldly stated that the rules of natural justice were irrelevant and could not found a cause of action under an employment contract unless specifically incorporated into the contract. An examination of the law reports would appear to suggest that there has been a see-saw contestation between the Court of Appeal and the High Court on the applicability of the rules of natural justice in respect to employment relationship.

20.Well, the Employment Act, 2007 has caused a fundamental, if not radical shift from the jurisprudential debate on the applicability of the rules of natural justice in the employment arena in Kenya.

21.Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct

22.In the instant case, the Respondent did not plead that it gave the Claimant the opportunity to make any representations nor is there evidence that it extended to the Claimant the opportunity to make representations and therefore there is no other conclusion I can reach except that the dismissal of the Claimant was procedurally unfair. The rules of natural justice were not observed.

### ***Unpaid salary for January 2012***

23.The Claimant was sent off with effect from 20 January 2012.He was earning Kshs 23,322/- gross per month at the time of dismissal. A copy of his payslip for December 2011 was annexed to the Memorandum of Claim and produced in Court. In his tabulations in the Memorandum of Claim, he calculated that he was entitled to Kshs 15,046/-.In the absence of evidence to the contrary, I award him this sum of Kshs 15,046/- being wages earned for the period 1 January 2012 to 20 January 2012.

### ***Unpaid leave days and leave travel allowance.***

24.There is a claim for Kshs 23,322/-.It appears this is equivalent to the Claimant's gross monthly pay. The Claimant did not lay before me the policies of the Respondent on this aspect of the Claim. Indeed the issue of leave would ordinarily be part of the employment letter/contract or company staff policies. The Claimant only exhibited page 1 of his letter of appointment. I don't know if this was a deliberate omission or not.

25.I therefore have to revert to the Employment Act, which has provided the irreducible minimums. Section 28 of the Act lays the irreducible minimum in terms of annual leave after 12 months consecutive service as 21 working days with full pay.

26.The gross pay of the Claimant included a lunch allowance of Kshs 600/-.I am not certain that the Respondent would be entitled to a lunch allowance while on leave. The Claimant did also not inform the Court when his leave year commenced though he testified he had not gone on leave in the year 2011.

27. A claim for unpaid leave should be capable of precise mathematical calculation. It should be pleaded specifically and proved strictly. This type of claim is akin to special damages, its payment and calculation depends on the length of service during the leave year and any accrued days.

28. Noting that it is only the Claimant's testimony I have, because the Respondent did not file a Response nor attend Court during the hearing, I do grant this claim in the sum of Kshs 22,722.

29. There was also a claim for leave travel allowance of Kshs 2,400/- The Claimant did not establish through his testimony or through the documents he relied on that he was entitled to this allowance. The Employment Act, 2007 does not allude to this allowance at all. I know that under the Regulation of Wages Orders made under the Labour Institutions Act, within certain industries, provision has been made for payment of leave travelling allowance. For example the Regulation of Wages (Motor Engineering Trades) Order, regulation 11 makes provision for payment of Kshs 200/- leave travelling allowance. The Claimant's testimony fell short of the threshold of proving this aspect of claim on a balance of probabilities. It was his case and the duty was upon him and his Counsel to offer as much information to the Court as he could. He did not.

30. My attention was not drawn to any particular Order which covered the Claimant and therefore again I decline to grant this aspect of the Claim.

### ***Overtime of 318 hours***

31. There is a claim for Kshs 28,506/- being overtime for some 318 hours allegedly worked by the Claimant. A claim for overtime must be based on the law and/or the contract of employment entered into between an employer and an employee. The Employment Act, 2007 prescribes that the hours of work shall be regulated by the employer in accordance with written law. The Claimant produced an overtime sheet which was marked as Exhibit 9. The overtime sheet is written at the top 'Thika Coffee Mills. The overtime sheet covered the period July to December 2011. I am satisfied that the Claimant has proved this head of his Claim and award the sum of Kshs 28,506/-

### ***One month salary in lieu of Notice***

32. The Claimant claims Kshs 23,322/- being one month's salary in lieu of notice. The letter dismissing the Claimant did not refer at all to whether the Claimant was to be paid any salary in lieu of notice. I have already found that the termination of the Claimant was procedurally unfair and I have no hesitation in granting his claim for one month salary in lieu of notice in the sum of Kshs 17,479/- being his basic pay at the time of dismissal.

### ***12 months salary as compensation for unfair termination***

33. There is a claim for Kshs 279,864 being 12 months compensation for unfair termination under the provisions of Section 49(1) (c) of the Employment Act. The Claimant did not refer me to any decided cases which have attempted to lay down any principles to be considered in making a maximum award of 12 months wages compensation.

34. I have found that the termination of the Claimant was procedurally unfair. A termination of employment may also be challenged on the ground of substantive unfairness. This would be for the reasons mentioned in section 46 of the Employment Act. The Claimant did not lay a proper basis however for an award of the maximum 12 months compensation. He did not lead any evidence on his age or retirement age. Indeed it appears that this was not just an omission because the Claimant did not even exhibit all the pages of his letter of employment but only page 1.

35. In the circumstances because of lack of enough information on the mentioned aspects which are material, I award the Claimant 6 months compensation for the unfair termination in the sum of Kshs 139,932/-

## Orders

36. In the final analysis I do declare that the termination of the Claimant was procedurally unfair and do award the following reliefs:-

(i)	Unpaid salary for January 2012	Kshs 15,046
(ii)	Unpaid leave	Kshs 22,722
(iii)	Overtime	Kshs 28,506
(iv)	One months payment in lieu of Notice	Kshs 17,479
(v)	6 months compensation	Kshs 139,932
	<b>TOTAL</b>	<b>Kshs 223,685</b>

37. The Claimant will have the costs of the Claim.

Dated and delivered in open Court at Nairobi this 26th day of October 2012.

Justice Radido Stephen

**Judge**

## **Appearances**

Mr. Odongo instructed by the firm of

Ameli Inyangu & Partners Advocates For Claimant.

Mbugwa, Atudo & Macharia Advocates For respondents but did not appear at the hearing