



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 562 of 2012**

**SHANKAR SAKLANI .....CLAIMANT**

**VERSUS**

**DHL GLOBAL FORWARDING (K) LIMITED..... RESPONDENT**

**JUDGMENT**

This is the Judgment in the case of the Claimant Shankar Saklani against the Respondent DHL Global Forwarding (K) Limited. The Claimant's Memorandum of Claim was filed on 3<sup>rd</sup> April, 2012 through Ongicho – Ongicho & Company Advocates. The Respondent's memorandum of Defence was filed on 12<sup>th</sup> June, 2012 through Kaplan & Stratton Advocates.

The Claimant is praying for judgment against the Respondent for -

1. A declaration that the Respondent's letter dated 26<sup>th</sup> January, 2012 summarily dismissing the Claimant from its employment unlawful and hence null and void.
2. The Respondent be ordered to reinstate the employee and treat him in all respects as if the Claimant's employment had not been terminated; or
3. The Respondent re-engage the employee in work comparable to that in which the Claimant was employed prior to his dismissal or other reasonably suitable work at the same wage.

In the alternative to the demand for reinstatement of the Claimant, the Claimant prayed for payment of:-

1. Terminal due including:-
  - (a) 12 months for compensation – US\$73,200.00
  - (b) 3 months salary in lieu of the notice for termination – US\$18,300.00
  - (c) Relocation costs – US\$6,000.00
  - (d) Withheld salary due to underpayments – KShs.193,871.13
  - (e) Statutory entitlements.

The Respondent pleaded that the Claimant was not entitled to the reliefs sought and prayed that the Claimant's case be dismissed with costs to the Respondent.

On 31<sup>st</sup> October, 2012 the case came up for hearing and Counsel for the Claimant informed the Court that the Claimant resides in Dubai and the Claimant's case would proceed without adducing oral evidence. Counsel for the Respondent informed the Court that she wished to proceed by way of written submissions. The Court directed the parties to file their written submissions and to make oral submissions thereafter with a view to making clarifications as they deemed necessary. The Claimant's written submissions were filed on 7<sup>th</sup> November, 2012. On 16<sup>th</sup> November, 2012, Counsel for the Respondent made oral highlights of the written submissions while Counsel for the Claimant stated that he fully relied on the written submissions and the pleadings on record. This case therefore proceeded on the basis of the documents filed for the parties. This procedure is provided for in Rule 21 of the Industrial Court (procedure) Rules, 2010 which states that the Court may, subject to an agreement determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.

The facts of this case are as follows. By the letter dated 15<sup>th</sup> August, 2010 at folio 8 on the memorandum of claim, the Respondent offered the Claimant employment in the position of Trade Lane, India and to serve a probationary period of 3 months. The parties concluded the letter of appointment dated 16<sup>th</sup> August, 2010 at folio 9 of the memorandum of claim. Clause six of the letter provided for remuneration and benefits to include:-

- (a) Salary of USD 4,000 per month.
- (b) Medical cover provided by the Respondent.
- (c) Transport allowance on USD1,000 per month.
- (d) House allowance of US 1,000 per month.
- (e) Telephone allowance of USD 100 per month.

Clause 10 on termination stated, thus,

***“This employment may be terminated by mutual agreement or by the Company's service of 3 months written notice or payment of 3 months basic salary in lieu of notice. Should your employment cease through termination then the company will pay salary for three months in lieu of notice, however if the termination is due to summary dismissal then the Company reserves the right to serve notice of termination of employment. Notice of termination must be given in writing.”***

Clause sixteen on jurisdiction provided that the employment contract was subject to the laws of Kenya and the Kenyan Court of law shall have exclusive jurisdiction to adjudicate on any disputes arising from it.

On 25<sup>th</sup> January, 2012, the Claimant was addressed a show cause letter. The letter at folio 17 of the memorandum of claim stated as follows:-

***“25<sup>th</sup> of January, 2012  
Shankar Saklan;  
Trade Lane Manager India  
DHL Global forwarding (K) Ltd  
NAIROBI***

**RE: SHOW CAUSE LETTER**

***Shankar,***

**We refer to the various discussions you had with the under signed, regarding your performance. During these meetings it was pointed out to you, that you have persistently failed to meet performance standards set by the management. We have provided you with 2 warning letters on 27<sup>th</sup> of July and 24<sup>th</sup> of January.**

**We refer to several occasions where you have not been on duty without permission or reasonable cause. This has impacted negatively on your performance as an employee.**

**In view of the above, you are required to show case sick leave document for Monday 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> of January. In addition provide your detailed report of the different sales meetings you had from Thursday 12<sup>th</sup> of January onwards until Tuesday 24<sup>th</sup> of January. Provide this all in writing by close of business day why appropriate disciplinary action should not be taken against you.**

**DHL GLOBAL FORWARDING (K) LTD**

**Eva Mattheeussen  
HR Manager Kenya**

**C.C. Country Manager - Kenya**

**C.C. Sales Manager – Kenya”**

The Claimant replied to the show case letter by his e-mail at folio 18 of the memorandum of claim stating crucial issues including:-

- (a) That he was to resume office on the 9<sup>th</sup> of January but fell sick due to viral for which he had provided a medical certificate. The Court has seen the patient's sick sheet by Social Service League of M.P. Shah Hospital at folio 2 of the Respondent's memorandum of Defence. It shows that the Claimant was suffering from low back pain viral and was not medically fit to attend employment. He was granted 2 days off duty and to be reviewed on 12<sup>th</sup> January, 2012. The sick sheet is dated 11<sup>th</sup> January, 2012.
- (b) The Claimant set out elaborate details of the sales meetings from Thursday 12<sup>th</sup> January to 25<sup>th</sup> January, 2012.
- (c) He concluded by stating thus

**“Saying that I shall make sure that I have a tighter grip over my accounts and there should be no room for complacency. I am confident and assured, that you shall have no more complains about me henceforth for any reasons at all.”**

By the letter dated 26<sup>th</sup> of January 2012 at folio 23 of the memorandum of claim the Respondent summarily dismissed the Claimant. The letter stated as follows:-

**“26<sup>th</sup> of January, 2012.**

**Shankar Saklani**

**Trade Lane Manager India**

**DHL Global Forwarding (K) Ltd**

**NAIROBI**

**RE: SUMMARY DISMISSAL**

**Shankar,**

***We acknowledge receipt of your show cause letter whose content we have noted and find to be unsatisfactory.***

***The Company has lost confidence in you as an honest and devoted employee and hereby summarily dismisses you from employment as from 31<sup>st</sup> of January.***

***Please handover any Company property that could be in your possession to HR and submit a duly complete clearance certificate after you will be paid your final dues.***

***Pending holidays (5 days transferred from 2011, 2 days accrued in January, 1 day absent of duty without permission) = 6 days.***

***Yours Sincerely,***

***DHL GLOBAL FORWARDING (K) LTD***

***Eva Mattheussen***

***HR Manager Kenya***

***SIGNED***

***CC: COUNTRY MANAGER – KENYA***

***CC: Sales Manager – KENYA”***

The issues for determination in this case are two:

1. Whether the summary dismissal was fair and lawful.
2. Whether the Claimant is entitled to the remedies claimed for in the memorandum of claim.

On the first issue it was submitted for the Claimant that the wording of the show cause letter was such that it would not be reasonably conceived that an action as drastic as summary dismissal was eminent and further that the Claimant was entitled to principles of natural justice, good faith and fair dealings together with good practice of proper industrial relations. That when an action as drastic as summary dismissal is undertaken, justice has to both be done and seen to be done. The Claimant's submission was that he was not given an oral opportunity to orally defend himself against the allegations raised as against the Claimant. Counsel for the Claimant cited Article 47 of the constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Article further provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Counsel submitted that the Claimant was not at any time given an opportunity to orally defend himself against the accusations leveled against him by the Respondent and the Claimant was condemned unheard contrary to the Natural justice rule of *audi alteram partem*, the principle that no person should be judged without fair hearing in which each party is given the opportunity to respond to the evidence against them.

For the respondent it was submitted that the patient sick sheet furnished by the Claimant in response to the query was dated 11<sup>th</sup> January, 2012. The sick sheet made reference to off-duty for 2 days which would fall on 11<sup>th</sup> and 12<sup>th</sup> January. The Claimant's absence on the 9<sup>th</sup> and 10<sup>th</sup> of January was thus not explained and no explanation has been given even to the Court. Counsel for the Respondent therefore concluded that the evidence before the Court confirms an unexplained absence for the 2 days and the summary dismissal was justified. It was submitted for the respondent that under Section 44 (4) of the Employment Act, 2007 an employer may dismiss an employee summarily when the employee has by his conduct indicated he has fundamentally breached his obligations arising under his contract of service. Further, it was submitted that under Section 44(4) (a) summary dismissal would issue where

without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work. In addition, summary dismissal would issue, under Section 44(4)(b), where an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly perform any work which from its nature it was his duty, under his contract to have performed carefully and properly.

The Court considers that under Section 44(3) of the Employment Act, 2007 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 main issue for determination before the Court in this case is whether in cases of summary dismissal, a hearing and notification are mandatory and necessary. This issue had been simmering in previous cases. The Court stumbled on the issue in the case of Linus Barasa Odhiambo – Vs Wells Fargo Limited, Industrial Court Cause No. 275 of 2012 at pages 11 – 12 of the Court typed judgment. In that case the Court stated as follows:-

***“The Court has carefully considered this point and find that summary dismissal is a dismissal which the employer is entitled to dismiss without notice. In particular sub Section 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 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 instance 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 notification and hearing was necessary.”***

The Court upheld that position in the case of KUDHEIHA Workers Union – vs- Board of Governors, Kerugoya Boys Secondary, and Industrial Court Cause No. 1040 of 2010 at Nairobi.

This simmering issue comes to boil in this case and the Court is required to determine whether in cases of summary dismissal the employer must serve a notice and hear the employee. The need for a hearing and notification is prescribed in Section 41 of the Employment Act, 2007. The Section provides as follows:-

***“41. (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 this 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.”***

In view of the wording and provisions of the section the Court finds that the provisions are mandatory in scope and application and in particular the Court holds that:-

- (a) a hearing and notification on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on the grounds of misconduct, poor performance or physical incapacity of the employees;
- (b) “gross misconduct” that justify summary dismissal under section 44 (4) and conduct amounting to a fundamental breach of an employee’s obligations as envisaged in Section 44(3) of the Act are “misconduct” for which a notification and hearing are necessary as envisaged under Section 41 of the Act;
- (c) Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.

It was submitted for the Claimant that the respondent contravened Article 47 of the Constitution by arriving at a decision that was manifestly unfair, unlawful, unreasonable and procedurally unfair. The Court is in agreement with that submission and upholds the findings in *Kenneth Njiru Njorani – versus Dodhia Packaging Limited, Cause No. 431 of 2010 at Nairobi, at pages 7* of the typed Court judgment in which the Court stated:

***“In making this finding the Court recognizes termination has constitutional basis as provided for in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. The Constitution breaks the curtains and it does not matter whether the employer is in public service or private sector. The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values include human rights. Thus, in the instant case, the respondent was bound to accord the claimant the right to a fair administrative action through observation of the rules of natural justice and as expressly envisaged in Section 45 (5) of the Act.”***

To drive the submission home, counsel for the Claimant cited and quoted Lord Greene M.R. in *Associated Provincial Picture Houses Ltd – Vs – Wednesbury Corporation (1947)1 KB 223* where it was stated:

***“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as***

***a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warnington L.J. in Short – Versus – Poole Corporation (1926) ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”***

In the instant case, a warning letter by the respondent against the claimant was issued on 24<sup>th</sup> January, 2012. The show cause notice was issued on 25<sup>th</sup> January, 2012 and the Claimant replied promptly on the same date. On 26<sup>th</sup> January, 2012, without hearing the Claimant as prescribed under Section 41 of the Employment Act, 2007, the Claimant was summarily dismissed. The Court finds that the Respondent acted unreasonably by failing to take into account matters that were relevant, namely, complying with the statutory requirement to hear the Claimant. Thus, the dismissal was unfair as it was in contravention of the express statutory provisions.

While making this finding the Court has considered the Respondent’s submission that the sick sheet made reference to off duty for 2 days which fell on 11<sup>th</sup> and 12<sup>th</sup> January and the Claimant’s absence on 9<sup>th</sup> and 10<sup>th</sup> of January was not explained. The Court has considered that submission and finds that conduct of the employee may not be viewed as sufficiently serious to justify immediate termination of employment with notice shorter than the one prescribed by statute or agreed upon by the parties. It is the opinion of the Court that in considering the alleged fundamental breach attributable to an employee’s conduct as justifying the statutory summary dismissal, all circumstances of the case must be taken into consideration. In the instant case the Claimant was denied his entitlement to be heard in self defence. The reason for the Claimant’s absence following the two days absence was ill health. A hearing would have accorded the Claimant to explain his absence and the Respondent did not submit on any serious losses or injury that occurred flowing from the Claimant’s two days’ absence. The Claimant was the Respondent’s top manager with international jurisdiction but serving within the Respondent’s domestic territorial supervision. The Claimant had a leeway and a considerable range of discretion in his service delivery. He reported to Head of Trade Lane – India and the contract stated thus,

***“you are subject to all the company’s policies, schemes and procedures and copies of these and all other documents referred to in this letter, are available from the Human Resource Department where there is any conflict between this letter and the aforementioned policies, schemes and procedures, this letter will prevail.”***

Clause 2.1. of the letter of appointment simply stated that the Claimant would be based at the Respondent’s office in Nairobi Kenya. The contract was not clear and did not state that the Claimant was required to report to the office on daily basis or on specified days and hours. Being answerable to Head of Trade Lane India and the Claimant’s contract of appointment being silent on the days and hours of work, the Court finds that the alleged unexplained absence from the office for two days, without evidence of any loss or injury to the Respondent attributable to the absence, was not a reason sufficiently serious to justify immediate termination of employment with a notice shorter than the contractual notice and, in circumstances whereby the Claimant served under a strict confidentiality clause and was not reporting to the persons or staff of the Respondent who were making demands of explanations from the Claimant. The same findings apply to the issues of alleged poor performance. First, it was necessary to have a hearing with the Claimant to establish the veracity of the alleged poor performance.

Secondly, in matters of performance it is very useful and important to demonstrate that the employer’s officer charged with supervising the employee has specifically made an adverse performance report. In this case, the Claimant’s supervisor who by contract was designated as Head of Trade Lane – India did not make any representations on the Claimant’s performance. All these deficiencies in the manner the

Respondent handled the case is evidence of absence of misconduct on the part of the Claimant that would justify summary termination of the contract of employment.

The next issue for determination is whether the Claimant is entitled to the remedies as prayed for. The Court makes the following findings:-

(a) As the Claimant has prayed for 12 months compensation for loss of employment due to the unfair summary dismissal. Section 49(1) (c) of the Employment Act, 2007 provides that in event of unjustified summary dismissal, the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal may be payable by the employer to the employee. The contractual gross monthly salary in this Cause was USD.6,100.00 comprising of USD.4,000 as basic salary, transport allowance of USD.1,000 per month, housing allowance of USD.1,000 per month and telephone allowance of USD.100 per month. The Court finds that the Claimant is entitled to the USD.73,200.00 as prayed for. The Court was referred to the case of Wanjohi – versus – Mitchell Cotts Kenya Limited (2002)2 KLR at pages 33, 42 and 43 for the position that allowances should not be included in computing terminal dues. However, the Court finds that the decision and holding does not apply anymore in view of the express provisions of Section 49(1) (c) of the Employment Act, 2007.

(b) The Claimant has prayed for 3 months pay in lieu of notice as per the terms of the contract. The contract provided thus, ***“This employment may be terminated by mutual agreement or by the company’s service of 3 months basic salary in lieu of notice.”*** The basic monthly salary was USD4,000.00 and the Court finds that the Claimant is entitled to **USD 12,000.00** being three months pay in lieu of notice.

(c) The Claimant has claimed relocation costs of USD.6,000.00. This issue is not specifically covered in the contractual terms. However, at paragraph 14 of the memorandum of defence, the Respondent has pleaded that it has at all times been willing to pay the Claimant reasonable relocation costs equivalent to one month’s salary but which the Claimant has not collected. The Respondent has produced appendix 7 on the defence showing **USD.4,000.00** was offered as the reasonable relocation costs and the Court finds that the Claimant is entitled to the USD.4,000.00 for relocation costs.

(d) The Claimant has prayed for Kshs.193,871.13 being withheld salary arising out of underpayments due to inaccurate dollar exchange rates when he was paid in the Kenyan currency. It is not in dispute that the contractual payment rates were expressed in dollars. The pay slips attached to the memorandum of defence show that the Claimant had been paid in the Kenyan currency. In view of the evidence on record, the Court finds that the Claimant is entitled as prayed taking into account the computation at folio 32 on the memorandum of claim. The Court finds that the Claimant is entitled to **Kshs.193,871.13/=** as prayed for.

(e) As submitted by counsel for the Respondent, the claim for other statutory entitlements shall fail as it is an ambiguous claim, without basis and for which the Claimant has not made any submissions. Further the other prayers will fail because they were in alternative to the award of payment.

In conclusion judgment is entered for the Claimant against the Respondent for:-

- (a) a declaration that the summary dismissal was unfair,
- (b) The respondent to pay the Claimant USD.89,200.00 plus Kshs.193,871.13 together with interest at court rates from the date of the judgment till full payment, and
- (c) Respondent to pay costs of the case.

Signed, dated and delivered in court at Nairobi on the 23<sup>rd</sup> day of November, 2012

**Byram Ongaya**

## Judge