



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 442 of 2012**

**DICKSON CHAHENZA ADEYA ..... CLAIMANT**

**VS**

**TOTAL SECURITY SURVEILLANCE LTD .....RESPONDENT**

**JUDGEMENT**

The claimant herein Dickson Chahenza Adeya filed his memorandum of claim dated 8<sup>th</sup> March 2012 through the firm of Kiriba & Company Advocates. His contention is that he was unlawfully and wrongfully terminated from employment by the Respondent herein.

He also gave oral evidence in court. He stated that he worked for the respondent as the Human Resource and Administrative Manager from 22<sup>nd</sup> November 2010. He was to be on a two year contract and his monthly pay was a consolidated amount of 45,000/=. He was also entitled to other benefits such as car allowance, medical insurance cover, airline allowance and pension. The claimant avers that after completion of the said probation period, he was promised a salary increment and was to be paid Ksh.8000/=. This promise was never fulfilled and on 13<sup>th</sup> August, 2011, the respondent terminated the claimant's employment claiming that his performance never met the expected standards and targets agreed upon.

The claimant avers that the Respondent claimed that the claimant was still under probation at the time and so could not be given more than 15 days notice which parties on probation are required to give.

The claimant avers that he discharged his duties diligently and professionally for the time he worked for respondent and could not understand the allegations of non performance from the respondent. The claimant further avers that at the time of employment, he was not given any job description and therefore is at a loss as to how respondent arrived at the decision while they did not conduct any appraisals or even give him a warning on his performance at work. They also never conducted any performance review on the claimant.

The claimant also avers that the Respondent failed to give him a chance to respond to the allegations which is against the provision of the Employment Act of 2007 and rules of natural justice and morality. The claimant submits that his termination was unlawful and wrongful as it does not fulfill the threshold of law required for such especially Section 41(1) of Employment Act 2007. He therefore seeks prayers as enumerated in his statement of claim totaling 6,294,250/=.

The claimant told court that he had never undergone any evaluation programme with Respondent as this was to be initiated with one's supervisor. There is also a place the supervisee fills to acknowledge that the evaluation has been done. He referred to the Respondent's Exh.20 to 23 which was some evaluation from

the period 22<sup>nd</sup> November 2010 to 22<sup>nd</sup> February 2011. It is signed by the Chief Executive Officer, however, the person who did the appraisal does not indicate the date he filed the form. In reference to a letter dated 10<sup>th</sup> January, 2012 to him by the General Manager, he indicated that he never received it and it is not signed nor acknowledged by him. He also referred to some letters dated 15<sup>th</sup> September 2011 complaints by some employees. He said that he left the company on 17<sup>th</sup> August, 2011 and so these would not have formed the basis of his dismissal. He also told court that before he joined the Respondent, he had worked with Fells Fargo in various divisions and had also worked for Ashton Apparels (EPZ) as an Administrative Executive responsible for Human Resource Procurement, Insurance and Security and also had worked with Megy Garments as Human Resource Manager. He indicated that when Respondent dismissed him they gave him Ksh.64,221/= being, 1 month salary in lieu of notice, leave earned 22.5 days.

In cross examination, claimant indicated he has some training and holds a BA from Moi University. He further told court that he was given a contract of employment and was on probation initially for 3 months though he was never given any job description. He says he used his medical cover from May, 2011. He told court that he had been promised 80,000/= salary but it was verbally communicated. He says he was given 30 days salary in lieu of notice as 15 days was for work on probation. He submits that the Managing Director had no reason to terminate his services.

The Respondent on the other hand filed their memorandum of response on 4<sup>th</sup> May, 2017, through the firm of Ahmednasir, Abdikadir & Company Advocates. They also called 1 witness who told court that the respondent employed the claimant as Human Resource from 15<sup>th</sup> November, 2010. Claimant was on probation for 3 months.

However they say that the claimant's performance was below what was expected. He also has a poor relationship with other workers and they declined to extend his probation period and relieved him of his duties.

I have considered evidence from both parties plus submissions from both parties. The issues for determination are as follows:

1. Whether the dismissal of the claimant by the Respondent was justified.
2. If not, what remedies the claimant is entitled to.

From the evidence on file, the claimant was employed on 22<sup>nd</sup> November, 2010. He was to be on probation for 3 months. This is as per his contract of employment. This probation period was to end on 22<sup>nd</sup> February 2010. However on 7<sup>th</sup> March, 2011, the claimant was notified of an extension of this probation period for another 3 months with effect from 3<sup>rd</sup> April, 2011. This would in effect have ended on 3<sup>rd</sup> July, 2011. By the time of dismissal on 13<sup>th</sup> August, 2011 the claimant had worked for 8 months.

For all purposes and intend, the claimant was now a permanent employee, having not been notified of the intention to terminate him on 3<sup>rd</sup> July, 2011. He was already a member of the employees' medical scheme and could not be dismissed as an employee on probation. Indeed when the Respondent terminated him, they gave him 1 month salary in lieu of notice as was done to other permanent employees as per the contract of service. The contention of the Respondent is that the claimant's performance was below expectation. No report of the performance appraisal was produced before this court. The end result is that a decision was made to terminate him without the appraisal being done as expected and without giving him a hearing. This is Clause Section 41(1) of the Employment Act 2007 which states as follows:-

***“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.”**

This is also contrary to ILO recommendation 119 which is couched in similar terms as follows:

**“A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation to appeal within reasonable time, against that termination with the assistance where the worker so requests, of a person representing him to a body established under a Collective Agreement or to a neutral body such as a court of arbitration, an arbitration committee or a similar body”.**

Given this scenario, I find that the dismissal of claimant by Respondent was unfair and wrongful.

I therefore find for claimant and order that:

1. He be paid 12 months’ salary for wrongful termination. This is equivalent to: 45000 x 12 = Ksh.540,000/=
2. Claimant should also be issued with a certificate of service.
3. Respondent will pay costs of this suit.

Signed, dated and delivered in court at Nairobi this 17<sup>th</sup> day of December, 2012.

**HELLEN WASILWA  
JUDGE**

**Appearances:**

Onyango holding brief for Muchoki

of Kiriba & Company Advocates

for Claimant

Webale of Ahmednasir, Abdikadir

& Company Advocates

for Respondent

Ms Rachel Gichuki

Court Clerk