



**mamita v SS Mehta and Sons Limited (Cause 986 of 2015)
[2024] KEELRC 644 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 644 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 986 OF 2015
B ONGAYA, J
MARCH 15, 2024**

BETWEEN

SAMUEL MURAYA MAMITA CLAIMANT

AND

SS MEHTA AND SONS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed on 09.06.2015 the memorandum of claim dated 20.05.2015 and through Iseo Omariba & Co. Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the Respondent's refusal or inordinate delay in recalling the claimant back to work amounts to constructive dismissal of the claimant's employment, which dismissal unfair and inhumane.
 - b. A declaration that the claimant is entitled to payment of terminal dues and damages as prayed.
 - c. An order for the Respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs 932,000/= plus interest thereon.
 - d. Cost of this suit plus interest thereon.
2. The claimant's case was that she was employed by the respondent in January 2009 as a Driver for a salary of Kshs 48,000/= per month.
3. That on 31st March 2015 he received a letter from the respondent informing him that his services had been terminated claiming that the claimant was intoxicated while on duty.
4. That the dismissal was unfair on grounds that:

The claimant had done nothing wrong to warrant disciplinary action being taken against him.



- a. No hearing ever took place after the decision to dismiss the claimant was reached.
 - b. The claimant was dismissed for unknown and undisclosed reasons.
 - c. Due process was not adhered to in arriving at a decision to dismiss the claimant.
5. That in light of the above he alleges that he is entitled to payment of his terminal dues and damages and calculated as follows:
- i. Three months' salary *in lieu* of notice salary Kshs 144,000/=.
 - ii. Service pay for every completed year Kshs 288,000/=.
 - iii. Damages for illegal and unfair dismissal from employment Kshs 500,000/=.
6. The claimant also demands to be issued with a certificate of service.
7. The claimant filed a statement alongside his claim and stated that on 9th March 2015 he was deployed with other five drivers to go and work at Murang'a site.
8. That the other five drivers were released to go while he was told to remain behind because some stuff was to be loaded in his assigned truck.
9. That after waiting until around 12 noon, he was released and told to start the trip because that the things that were to be loaded in his car were not ready.
10. That he got to Murang'a around 5p.m and passed by the house he was to be moving to before proceeding to the site.
11. That when he got to the site, one Mr. Sammy started quarrelling him and told him that he had red eyes and looked drunk.
12. That it is then that Mr. Sammy asked him to leave which he did.
13. That when he came back the following day to report to work, Mr. Sammy did not talk to him and instead told his secretary to write a letter to the claimant.
14. The Respondent's response to claim was dated 15.07.2015 and filed through Taibjee & Bhalla Advocates. The respondent prayed that the claim be dismissed with costs. It was pleaded for the respondent as follows:
- a. The claimant earned Kshs 35,122/= per month which included basic pay and house allowances.
 - b. The claimant was procedurally and lawfully dismissed for gross misconduct. The respondent's project manager found the claimant driving the company vehicle while intoxicated.
 - c. That upon questioning the claimant, he absconded from duty and abandoned the company vehicle he was driving on the road.
 - d. The respondent invited the claimant for disciplinary hearing on 26th March 2015 in which the claimant attended with one Mr. Joseph Nderitu.
 - e. That it was confirmed during the hearing that the claimant was driving while intoxicated and nearly caused an accident when he abandoned the company vehicle.
 - f. That it is from the findings of the disciplinary hearing that the respondent summarily dismissed the claimant in accordance with section 44 of the [Employment Act](#).



- g. That the respondent computed the claimant's terminal dues to the tune of Kshs 44,405.25, which the claimant has refused to collect together with his certificate of service.
- h. The respondent also pleaded that the claimant is not entitled to the reliefs sought and put the claimant to strict proof.
15. The respondent prayed that the suit against it is not based upon true factual basis and should therefore be dismissed with costs.
16. The parties filed their respective submissions. The court has considered the parties' respective cases and all material on record. The Court makes finding as follows.
17. To answer the 1st issue the Court returns that the parties were in a contract of service. The respondent employed the claimant as a truck driver from in January 2009.
18. The 2nd issue is whether the claimant was constructively dismissed or he was dismissed by the letter of summary dismissal. The mutual evidence for the parties is that on 09.2015 the claimant was deployed to drive respondent's truck registration number KCC 401H from the respondent's head office to a site in Muranga where the respondent was involved in a road construction project. It is that the claimant was dispatched from the head office together with other five truck drivers also assigned accordingly and who arrived at the Murang'a site earlier than the claimant did. It is the respondent's case and evidence that the claimant did not arrive at the site even belatedly and the reason was that he had intoxicated- himself of alcohol during the trip. Intoxicated. The claimant testified that he had not arrived on time like other five drivers because he had been withheld at the head office until noon upon being advised that his truck would be loaded but which did not happen. He also testified that he carried personal households on the assigned truck for delivery at his new abode in a room in Murang'a at a shopping centre known as Karega. It was his testimony that he stopped at the centre before going to the destination site to offload the households. He also testified that he informed his boss that the truck was losing power. His testimony was that respondent's policy did not permit him to carry his personal belongings as he says he had done. While having testified that his truck had not been loaded, the claimant testified thus, "I was to transport conveyor and other things. I was then given the items. Conveyor is a belt. Is not heavy. That day I was migrating to my room at the centre. I received dismissal letter." He further testified that on 26.03.2015. The Court has considered the claimant's testimony and as submitted for the respondent it is incoherent and inconstant so that it cannot be trusted at all. The claimant has attempted to explain why he did not arrive at the destination site through feigning being required to start late, the truck losing power, and, that he was (against the company policy) delivering his household items to a new abode at the alleged centre.
19. The Court returns that there is no reason to doubt the respondent's account. The claimant was assigned a truck to proceed to Murang'a site. It was on 09.03.2015. The project manager found the claimant driving while drunk in breach of the code of conduct for drivers. When reprimanded by the manager, he did not make an explanation but he ran away leaving the truck unattended. The workshop supervisor from the site drove the truck to its proper destination. The respondent received the report from the project manager on 11.03.2015. The claimant received the letter to show cause dated 11.03.2015 to answer allegations of being intoxicated while drunk. The claimant made his undated statement about the events. In the statement he alleges he went to his new room after offloading his household items at the centre and upon returning he found Ibrahim had taken the truck. He does not explain how he parted with the truck's ignition key. He must have taken off as explained for the respondent. While purporting to deny the minutes of the disciplinary hearing on 26.03.2015, the Court finds that the minutes are valid as true record of the proceedings. The minutes show that the claimant and a casual labourer one Joseph Nderitu attended. The account is that the project manager



found the claimant drunk while on the road purporting to drive the truck as he had been assigned. On 10.03.2015, he was cited for gross misconduct. On 11.03.2015, the head office issued the letter to show cause. The claimant was put on 12 days' annual leave until the hearing of the disciplinary case on 26.03.2015. That the claimant and the said Joseph Nderitu did not sign the minutes cannot invalidate the record of the disciplinary panel. The letter of summary dismissal was dated 31.03.2015 and exhibited by the claimant.

20. The Court returns that there is no established fundamental breach of the contract of service on the part of the respondent to justify the alleged constructive dismissal. The claimant has by himself exhibited all relevant documents leading to his dismissal. He was found intoxicated while on duty. He was given a letter to show cause. He made his statement and attended disciplinary hearing. He was remorseful but the misconduct was found gross per section 44 of the *Employment Act*, 2007. The Court finds that the summary dismissal was upon valid reason per section 43 of *the Act*; the reason was fair as it related to claimant's conduct, compatibility and respondent's operational requirements per section 45 of *the Act*; and, the respondent has shown the reason was justified per section 47(5) of *the Act*. The summary dismissal was not unfair.
21. The 3rd issue is on remedies. The Court finds that the claimant has failed to establish his case of alleged constructive unfair termination. There is no established justification for the claims and remedies prayed. The suit is liable to dismissal with costs.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

