



REPUBLIC OF KENYA



KENYA LAW
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**Aende v Wire Products Limited (Employment and Labour Relations Cause
2305 of 2015) [2023] KEELRC 205 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 205 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2305 OF 2015**

J RIKA, J

JANUARY 31, 2023

BETWEEN

CYPRIAN ODOTE AENDE CLAIMANT

AND

WIRE PRODUCTS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on December 23, 2015, while the Respondent filed its Statement of Response on February 25, 2016.
2. The Claimant states that he was employed by the Respondent as a Truck Driver, through a contract commencing on or about October 16, 2013.
3. The contract was to run until December 15, 2015.
4. The Claimant was suspended by the Respondent on August 3, 2015. He was dismissed on August 26, 2015. He complains that dismissal was arbitrary, and founded on unsubstantiated allegations. His last salary was Kshs 22, 055 monthly.
5. He prays for Judgment against the Respondent for: -
 - a. Salary for August 2015 at Kshs 22,055.
 - b. Salary for the remainder of the contract period at Kshs 77,187.
 - c. Unremitted NSSF contributions for July 2014 at Kshs 400.
 - d. Annual leave at Kshs 34,200.
 - e. Severance pay at Kshs 9,327.Total Kshs 143,170.



- f. Costs.
 - g. General damages.
 - h. Interest.
 - i. Any other suitable relief.
6. The Respondent concedes that the Claimant was its Employee. He was employed on various fixed-term contracts, for 3 months on October 16, 2013, January 1, 2014, and April 1, 2014. He was subsequently employed for 4 months on August 1, 2014. His last contract was for 1 year commencing January 15, 2015, ending December 15, 2015.
 7. The last contract was prematurely terminated through summary dismissal, on August 26, 2015.
 8. On July 31, 2015, the Respondent received information that the Claimant had excess goods in his assigned motor vehicle, registration number xxxx. The goods exceeded what was shown in delivery notes and invoices to Customers.
 9. Investigations were carried out internally by the Respondent and by the Respondent's parent Company, Industrial Promotions Services [K] Limited. It was established that the Claimant ferried excess goods. There was 6 extra chain links loaded to his designated vehicle.
 10. The Claimant was suspended, issued letter to show cause, and taken through a disciplinary hearing. He was represented at the hearing by 2 Shop Stewards from his Trade Union, Kenya Engineering Workers Union. The Disciplinary Committee found him guilty, and he was summarily dismissed on August 26, 2015. The Respondent prays the Court to dismiss the Claim with costs.
 11. The Claimant restated his position in his evidence before the Court, on November 5, 2021. He emphasized that he was not responsible for loading. His duty was to drive. Cross-examined, he told the Court that the Respondent had Rules and Regulations, which were incorporated in the Claimant's contract of employment. He left while the goods were half-way loaded, to collect the loading sheet. It was not a must that he was there throughout, during loading. He depended on the Loading Clerk. He did not recall the name of the Clerk. The Shop Steward stated at the hearing, that it was important for the Claimant to be present, during the loading. 6 to 7 persons could load a vehicle. The Claimant could have taken excess goods back to the warehouse. The premises had CCTV cameras. The vehicle had tracking device. The Claimant was shown a CCTV clip by Security, 3 days after the incident. He confirmed that there was excess goods ferried by him. On redirection the Claimant reiterated that his duty was to drive, not to load.
 12. The 2nd Witness for the Claimant, Didmus Ong'amo gave evidence on February 22, 2022, when the Claimant closed his case. He worked with the Claimant. He was a Security Checker. He worked with about 6 other Clerks. On the material day, Didmus checked the Claimant's assigned vehicle and did not find any excess goods. The goods loaded were in accordance with the order placed. Excess would have been detected at the store. Didmus heard that there was excess, 3 days after the transportation. Loader, Supervisor, and the Security at the Gate confirmed the amount of goods leaving the Respondent's premises. The Driver was not involved in loading.
 13. Cross-examined, Didmus told the Court that he viewed CCTV footage. He recorded a statements upon viewing. The order was for 105 chain link rolls. In his statement, Didmus stated 111 rolls were loaded. He explained that he was relying on the CCTV footage. Didmus was dismissed alongside the Claimant. He sued the Respondent and was compensated. He did not have documents showing that



- he was compensated. Redirected, Didmus told the Court that he did not have a chance to count the rolls. He was merely informed by the one who counted.
14. Head of Respondent's Production, Aston Rondo, and Security Manager Oshel Hussein, gave evidence for the Respondent on July 6, 2022, when the hearing closed.
 15. Ashton confirmed that the Claimant was employed by the Respondent as a Driver, as pleaded in the Claim. The Claimant's assigned vehicle loaded 111 rolls of chain links, while the order was for 105. He was supposed to know the correct weight, and return to the Respondent excess if any. He did not return any. The Claimant was suspended, issued letter to show cause and heard in the company of his Union Representatives. His Union Representatives, confirmed to the Claimant that it was his responsibility to ensure he ferried the right amount of goods. He did not clear with the Respondent when asked to do so, and could therefore not receive his dues. Cross-examined, Rondo told the Court that there were instances when excess goods were loaded. He would be informed in such cases. He did not have a document showing excess loading. He was a member of the Disciplinary Committee.
 16. Hussein found the Claimant's assigned vehicle carrying excess rolls of chain link. The excess chain links were not returned to the Respondent. Hussein reviewed CCTV footage with the Claimant and the Loading Clerks. He gave the clip to the Respondent and the parent Company for investigations. The Claimant was dismissed after hearing. On dismissal, he caused a commotion at the premises, requiring the Respondent to call for additional security to contain him. Cross-examined, Hussein told the Court that he reviewed CCTV footage daily. He reviewed after loading not before. Didmus appeared at the hearing as a Witness for the Claimant. Hussein did not exhibit the CCTV footage in Court. Redirected, he told the Court that he supervised Security Guards. He summoned the Loading Clerks, the Claimant and his Turn Boy. He interviewed them, and prepared incident report. In case there is excess, the Driver ought to return excess to the Respondent. The Claimant did not do so.
 17. The issues are whether the Claimant's contract was terminated fairly, following a fair procedure, and for valid reason or reasons, in accordance with Sections 41, 43 and 45 of the *Employment Act*; and whether he merits the remedies pleaded.

The Court Finds: -

18. The Claimant was employed by the Respondent as a Driver. He was placed under various 3 month's contracts and eventually under 1- year contract, which commenced on January 15, 2015, and was to expire on December 15, 2015.
19. It was ended prematurely, on August 26, 2015, through a letter of summary dismissal issued by the Respondent.
20. The reason justifying termination is that the Claimant ferried out of the Respondent's premises, some 6 extra rolls of chain link. The order placed was for 105 rolls. 111 rolls were loaded.
21. The Claimant was suspended. He was asked to show cause why he should not face disciplinary action. He replied in handwriting, on August 18, 2015. His explanation was that it was not his responsibility to load. He was at the loading when the goods were half-way loaded. His absence at the loading had no effect on the loading. His Turn Boy, Loading Clerks and Supervisors were responsible.
22. The Respondent was not satisfied with the explanation, and convened a Disciplinary hearing. It is common evidence that the Claimant appeared before this Committee, where his Representatives from the Kenya Engineering Workers Union, agreed with his Employer, that it was the Claimant's responsibility to be present at the loading, and ensure that he ferried in his vehicle, the correct number of goods ordered for delivery.



23. The Court does not therefore agree with the Claimant, that his role was to just drive mechanically, without any concern about what he was carrying. His Union, and the Respondent's Security Personnel, confirmed that 6 excess rolls of chain link wire were loaded in the Claimant's vehicle. Investigations commissioned by the Respondent and its parent Company confirmed this. CCTV footage shown to the Claimant and other Loaders, confirmed this. Didmus's statement before the Court to the effect that there were no excess rolls loaded, was plainly false. He confirmed while shown the CCTV footage that the Claimant carried 111 rolls of chain link, against an order of 105 rolls. Didmus was dismissed alongside the Claimant, and his evidence before the Court, appears to have been given in furtherance of his cause against the Respondent.
24. Validity of reason, is given additional weight, in that even after it was shown that the Claimant carried excess rolls of chain link, he did not return the excess to the Respondent's premises. Failure to return the excess would only buttress the view, that the Claimant and his Loaders, converted their Employer's property to their own benefit. In plain language, they conspired to steal, and stole, their Employer's chain link.
25. There was clearly valid reason, or reasons, to warrant summary dismissal under the *Employment Act*.
26. Procedure was fair. The Claimant was taken through investigations. He was required to show cause why disciplinary action should not issue. He was heard by the Disciplinary Committee, in the presence of his Trade Union's 2 Shop Stewards. The decision to dismiss him was communicated, with the reasons for the decision clearly stated in the letter of summary dismissal.
27. The Court is satisfied that termination was fair, under Sections 41, 43, 45 and 47[5] of the *Employment Act*, 2007.
28. Salary for the remainder of the contract is not due, the Claimant's contract having been terminated lawfully, and in accordance with clause 8 of the last contract. The Claimant did not exit on redundancy, to warrant severance pay. There is no evidence of unremitted NSSF deductions, and in event such evidence, of Kshs 400 owed to the NSSF, has escaped the attention of the Court, the Claimant has the option of pursuing enforcement through the NSSF Act.
29. The Documents filed by the Respondent dated June 4, 2018, do not include the Claimant's Annual Leave records. Section 74 [1] [f] of the *Employment Act* requires Employers to maintain records of their Employees' Annual Leave entitlement, days taken and days due, specified in Section 28 of the Act. The Respondent has not exhibited such records. The contract commencing January 15, 2015, gave the Claimant 2 days of annual leave, per each completed month of service. He worked for 6 complete months, and earned 12 days of annual leave. He is granted annual leave pay, at Kshs 10,179.
30. He was in employment until August 26, 2015, when his contract was terminated. He is entitled to salary for August 2015, which is granted at Kshs 22,055.
 31. No order on the costs.
 32. Interest allowed at court rate, from the date of Judgment till payment in full.
33. The prayer for general damages was not explained in the evidence of the Claimant, and in his Closing Submissions. It is declined.

It Is Ordered: -

- a. The Respondent shall pay to the Claimant, annual leave at Kshs 10,179 and salary for August 2015 at Kshs 22,055 – total Kshs 32, 234.



b. No order on the costs.

c. Interest allowed at court rate, from the date of Judgment till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST
DAY OF JANUARY 2023.**

JAMES RIKA

JUDGE

