



**Musasia v Arm Engineering Company Limited (Cause 18 of 2018)
[2023] KEELRC 731 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 731 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 18 OF 2018
L NDOLO, J
MARCH 23, 2023**

BETWEEN

JOSEPH MUSASIA CLAIMANT

AND

ARM ENGINEERING COMPANY LIMITED RESPONDENT

RULING

Introduction

1. By a Statement of Claim dated January 11, 2018 and filed in court on even date, the Claimant brings a claim against the Respondent, alleging unlawful and unfair termination of employment.
2. The Respondent filed a Response on February 5, 2018 but did not attend the trial in spite of due notification. The Claimant testified on his own behalf. This judgment is therefore based on the parties' pleadings plus the Claimant's testimony before the Court.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Driver, at a monthly salary of Kshs 45,000.
4. The Claimant's employment was terminated by letter dated December 14, 2017, which he claims to have received on December 22, 2017. He states that from December 13, 2017, he was not assigned any duty although he kept reporting to work until December 22, 2017.
5. The Claimant points out that the termination letter alleged that he was not able to account for money given to him for fuel in respect of motor vehicle registration No KCN 904C.



6. The Claimant denies ever receiving cash to fuel any motor vehicle and states that whenever he needed to refuel the motor vehicle assigned to him, he would drive to the nearest petrol station where the Respondent would pay for the fuel by M-pesa, directly to the petrol station.
7. The Claimant states that he had operated the motor vehicle, which he claims was a prime mover bigger than his regular motor vehicle, for only six days.
8. He adds that he duly explained to the Respondent the fuel consumption of motor vehicle registration No KCN 904C but the Respondent proceeded to terminate his employment.
9. The Claimant's case is that the termination of his employment was unlawful and unfair for want of valid reason and violation of due procedure. He points out that the Respondent breached both the law and its own human resource manual.
10. The Claimant's claim is as follows:
 - a. General damages;
 - b. 12 months' salary in compensation;
 - c. 3 months' salary in lieu of notice;
 - d. Pay in lieu of accumulated overtime;
 - e. Pay in lieu of accumulated leave;
 - f. Certificate of service;
 - g. Costs plus interest.

The Respondent's Case

11. In its Response dated February 1, 2018 and filed in court on February 5, 2018, the Respondent admits having employed the Claimant as pleaded in the Statement of Claim.
12. The Respondent further admits terminating the Claimant's employment and states that the termination letter was dated a day after a disciplinary meeting was held since during the deliberations, the Claimant was not working as no duties were assigned to him pending the outcome of the disciplinary meeting.
13. The Respondent asserts that the Claimant was expected to wait for communication from the management after reviewing the report and recommendations of the disciplinary panel.
14. The Respondent accuses the Claimant of defrauding it by having the Respondent pay for fuel that was not being used in the Respondent's motor vehicle but for the Claimant's own use and/or business.
15. The Respondent claims that complaints had been made by its human resource personnel as the fuel expenditure was abnormally high.
16. The Respondent maintains that the Claimant was involved in stealing, through payments claimed as fuel expenditure. The Respondent states that the Claimant failed to explain to the satisfaction of the disciplinary panel how and why his fuel expenses were high.
17. In response to the claims for overtime and leave pay, the Respondent states that the Claimant did not work overtime and that he took all his leave days.
18. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.



Findings and Determination

19. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

20. The Claimant's employment was terminated by letter dated December 14, 2017 stating as follows:

“Dear Joseph,

Re: Termination Of Your Employment

We regret to inform you that your employment with Arm Engineering Company Limited has hereby been terminated effective immediately. We wish to refer to meeting held on December 13, 2017 which was attended by you, the General manager and Managing Director.

The subject of the meeting was about the high fuel consumption of the vehicle KCN 904C which you have been assigned with reference to the letter dated December 11, 2017. In your response, you were not able to account for the money given to you for fuel. It was therefore concluded that you were engaging in theft in the course of your employment.

We consider that your actions constitute gross misconduct warranting summary dismissal. You will be paid your accrued entitlements and any outstanding pay up to and including your last day of employment, any amount still owing will be deducted from your final pay.

Regards

(signed)

Managing Director

ARM Engineering Company Limited.”

21. This letter accuses the Claimant of failure to account for money given to him for fuel, leading to the conclusion that he was engaging in theft in the course of his employment.
22. The Claimant denied ever receiving cash for fuel, stating that the practice was for the Respondent to pay for fuel directly to the petrol station. Further, the Claimant pointed out that he had duly explained the fuel consumption of the subject motor vehicle and given corrective measures, including fitting of a fuel surveillance system and a car tracking device.
23. On December 11, 2017, the Respondent wrote to the Claimant, asking him to explain the fuel consumption with respect to motor vehicle registration No KCN 904C. The Claimant responded by his letter dated December 8, 2017.
24. It would appear that upon receiving the Claimant's response, the Respondent decided to terminate his employment. Although the termination letter itself refers to a prior meeting held on December 13, 2017, there was no evidence that this was a disciplinary meeting.
25. It is therefore safe to conclude that the Claimant was not subjected to any disciplinary hearing, as contemplated under Section 41 of the [Employment Act](#).



26. The allegations made against him were therefore not proved at the shop floor and there was no valid reason for the termination as required by Section 43 of the Act.

Remedies

27. Consequently, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's unlawful conduct in terminating the employment.

28. I further award the Claimant one (1) month's salary in lieu of notice.

29. The claims for general damages, accumulated overtime and leave pay were not proved and are disallowed.

30. In the end, I enter judgment in favour of the Claimant as follows:

- a. 6 months' salary in compensation.....Kshs 270,000
- b. 1 month's salary in lieu of notice.....45,000
- Total.....315,000

31. This amount will attract interest at court rates from the date of judgment until payment in full.

32. The Claimant is also entitled to a certificate of service plus costs of the case.

33. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MARCH 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Onindo for the Claimant

No appearance for the Respondent

