



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**CAUSE NO. 48 OF 2018**

**NICHOLAS OMBOKO KINYUA.....CLAIMANT**

**VERSUS**

**SBI INTERNATIONAL HOLDINGS KENYA.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the respondent on 17.11.2011 as a Bulldozer (D8) Operator. His net monthly salary according to him was KShs 45,700. The contract of service was however, not reduced into writing. He averred that from April to July 2016 he was paid only KShs 10000 per month while from January 2017 – April 2018 he was paid KShs 125 per day.

2. He worked until, 6.4.2018 when he was summarily dismissed by Mr. Vlada Mitrovic (Respondent's Project Manager) for alleged offence of siphoning fuel from the Bulldozer 10.11.017. He averred that the dismissal was unfair because he did not commit the offence and he was not accorded fair hearing before the dismissal. Therefore, he brought this suit on 7.6.2018 seeking the following reliefs:-

- a. A declaration that the termination of the claimant's employment by the respondent was unfair, unlawful and unprocedural.
- b. Damages as set out hereunder
  - i. Damages for unlawful termination of employment
  - ii. Payment in lieu of Notice of Termination
  - iii. Payments in lieu of annual leave for period the between **November 2013 - November 2015.**
  - iv. Unpaid salary balance for the period between **April 2016 – July 2016.**
  - v. Underpaid salary for the period between **January 2017 – 6<sup>th</sup> April 2018**
- c. Order of Mandamus directing the respondent to issue the claimant with a certificate of Service.
- d. Costs of the Suit.
- e. Interest on the damages from the date it became due and the costs of the suit.
- f. Any other relief the court may deem fit to grant.

3. The Respondent filed its defence on 25.9.2018 admitting that it employed the claimant and later dismissed him from service.

However, it denied that the dismissal was unfair contending that it was justified to dismiss the claimant after grossly misconducting himself by siphoning fuel from the Bulldozer on 6.4.2018 between 9.12 am and 9.18 a.m. It further averred that the claimant was given an opportunity to defend himself before a committee on 23.5.2018 but failed to explain how the machine could consume 20 liters of diesel in 6 minutes. Consequently, it suspected that the claimant was liable for siphoning the fuel from the machine, which amounted to gross misconduct.

4. On 30.1.2019, parties agreed to dispense with oral testimonies and instead chose to dispose of the suit by written submissions.

### Evidence

5. The claimant filed a written statement dated 7.6.2018 as his testimony and further filed among other documents, a copy of termination letter dated 7.4.2018 whose effective date was backdated to 6.4.2018. The reason cited for the termination was siphoning fuel from bulldozer 10-11-017. The letter referred to a hearing at the office on 6.4.2018 in which the claimant gave his defence but the same was found to be unsatisfactory.

6. However, in his written statement, the claimant denied the alleged siphoning of fuel from the machine and contended that the issue was never reported to the police or in any other way investigated. He contended that for six and half years he had a clean record of discipline. He also contended that he was dismissed without prior notice and he was never given any chance to defend himself. Furthermore, he was not issued with a certificate of service and he was not paid his terminal dues.

7. The respondent filed two witness statements and a bundle of documents including show cause letter and Fuel Drain Report as its evidence. The first statement was by the respondent's transport manager Mr. Bernard Sang in which he stated that on 6.4.2018 between 9.12 and 9.18 AM, the fuel gadget sensors indicated that 20 litres of fuel had been drained from the Bulldozer 10-11-017 which was being operated by the claimant. The fuel sensor signaled the control office and then investigations commenced.

8. Mr. Sang was among the members of the investigations committee, which also received a report of the fuel draining from the fuel control office. The committee served the claimant with a show cause letter and he appeared before the committee but he requested for more time to prepare his defence. A second show cause letter was served on him to appear before the committee on 23.5.2018 to explain how the Bulldozer could consume 20 litres of diesel in 6 minutes, but he failed to give a satisfactory explanation. As a result he was dismissed summarily from service for gross misconduct.

9. The second statement was by the respondent's site Accountant Mr. Lawrence Kabochi who confirmed that he had worked with the claimant for a long time. He stated that on 6.5.2018, the claimant was served with a show cause letter after fuel sensors of the Bulldozer he was operating indicated a drain of 20 litres of fuel at the time when the claimant was in possession of the Bulldozer.

10. Mr. Kabochi contended that there is no way the bulldozer could consume 20 litres within 6 minutes. He also contended that when the claimant was invited for the hearing he was explained the reason for the intended dismissal and he sought for more time to prepare his defence. On 23.5.2018 he was invited to another hearing but the defence he gave was not satisfactory and he was dismissed for the offence of siphoning fuel from the machine he was operating contrary to the company policy.

### Submissions

11. The claimant submitted that he was dismissed from employment unfairly contrary to section 45 of the employment Act. He contended that the respondent had no valid reasons for dismissing him and contended that the fuel drain report and other computer-generated exhibits are not admissible because the respondent has not produced a certificate of authenticity as required under section 106B(4) of the Evidence Act.

12. Besides, the claimant submitted that he was dismissed without being accorded any hearing as required under section 41 of the employment Act. He maintained that the show cause letters produced by the respondent were only made after he filed this suit in order to fabricate some evidence. He reiterated that he was dismissed without being given any opportunity to defend himself and without being served with a prior notice.

13. In supporting of the above submissions, he relied on the case of **Mary Chemwesho Kiprui v Kenya Pipe Line Company Limited [2014] e KLR** and **Alphonse Machanga Mwachanga v Operation 680 Ltd [2013] e KLR** which discussed the principles of fair termination as provided under section 45 of the employment Act. He then urged the court to award him the reliefs sought.

14. On the other hand, the respondent submitted that the dismissal of the claimant was grounded on a valid reason and therefore no prior notice was required. It further submitted that the evidence on record clearly confirms that the claimant siphoned 20 litres of fuel illegally from the Bulldozer 10-11-017 he was operating on 6.4.2016 between 9.12 a.m and 9.18 a.m.

15. It maintained that there is no way the machine could consume 20 litres of fuel in six minutes. It relied on the fuel drain report and normal fuel consumption graph produced as evidence to prove that the company lost 20 litres of fuel through unscrupulous ways while the machine was in the claimant's possession.

16. The respondent submitted that it acted in good faith and its decision was based on reasonable suspicion of the misconduct by the claimant following an alarm raised by the fuel sensor installed in the machine he was operating and the said fuel reports. For emphasis, it relied on **Bamburi Cement Limited v William Kilonzo [2016] e KLR** and **Mary Clemweno Kiptui case, Supra**.

17. The respondent further submitted that the dismissal of the claimant was fair as the claimant was accorded a fair hearing as required by section 41 of the employment Act. It submitted that the claimant was invited for a hearing on 6.4.2018 at 4 PM to explain how 20 litres of fuel was consumed by the Bulldozer within 6 minutes but when he attended he requested for more time to prepare his defence.

18. The respondent contended that the claimant was again called for hearing on 23.5.2018 and he attended and defended herself. Therefore, the respondent maintained that the dismissal was fair and the claimant does not deserve any damages for unfair termination. Likewise it denied the claim for unpaid salary and described the same as wishful and lacking merits.

## Issues for Determination Analysis

19. The issues arising from the pleading, evidence and submission, filed are:-

- a. Whether the dismissal of the claimant was grounded on a valid and fair reason.
- b. Whether fair procedure was followed.
- c. Whether the reliefs sought should be granted.

## Reasons for the dismissal

20. Section 43 (2) of the employments Act defines the reason for dismissal as:

**“...the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.**

21. In this case the reason for termination was that on 6.4.2018, 20 liters of diesel was drained from the Bull dozer that was being operated by the claimant in circumstances that left the respondent to reasonably believe that the fuel was siphoned illegally from the machine.

22. The claimant denied the offence and contended that the employer has not proved the offence against him. He contended that the documentary evidence produced by the employer is inadmissible because the documents are computer generated and no certificate has been filed in court as required under section 106 B of the Evidence Act.

23. Evidently the respondent did not file any certificate to counter the submission by the claimant. However, it submitted that 20 liters of diesel was drained from the Bulldozer on 6.4.2018 within 6 minutes between 9.12 a. and 9.18 a.m., as a result, of which the fuel gadget sensor on the Bulldozer raised an alarm to the control room.

24. The respondent did not explain how the system works. However, it has laid a proper basis upon which it reasonably suspected that the claimant committed the offence of siphoning of fuel from the machine.

25. The claimant did not deny that he had in his possession the Bull dozer on 6.4.2018 and that 20 liters was drained from the machine between 9.12 a.m. and 9.18 a.m. He did not show how that fuel was lost and he did not state whether the machine had defects. He also did not deny that the machine had a sensor, which could relay information to the control room. Therefore I find and hold that the respondent had a valid reasons for dismissing the claimant from service.

26. Section 44 (4) (g) of the employer Act entitles the employer to summarily dismiss his employee if:

**“(g) An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property.”**

27. In this case, I am satisfied that the employer’s suspicion that the claimant was engaging in criminal activity against it was reasonably aroused by the fact that 20 liters of diesel was drained from the machine he was operating within 6 minutes. The abnormal fuel drainage raised alarm to the control room and investigations were done and data was collected which led the employer to reasonably believe that 20 liters of diesel was siphoned from the Bulldozer which was in the control of the claimant. Such conduct by the claimant was incompatible with the employment relationship between him and the respondent and it had the effect of taking away the trust between the two.

## Procedure Followed

28. Section 41 of the Employment Act provides that:-

**“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.”**

29. In the case of **Mary Chemweno Kiprui v Kenya Pipe Line Company Limited [2014] e KLR** and **Alphonnce Machanga Mwachanya v Operation 680 Ltd [2013] e KLR** the court held that the above provision of section 41 of the Employment Act is couched in mandatory terms and if the employer breaches the same, the consequences are dire as the employee may be awarded compensatory damages or reinstatement under section 49 of the Act.

30. In this case, the claimant was allegedly served with a show cause letter inviting him for a disciplinary hearing on 6.5.2016 at 4 PM. It was further alleged that he sought for more time to prepare his defence. He was again allegedly served with a second show cause letter dated 23.5.2018 and this time he attended the hearing and photo of the meeting was produced as exhibits. It was alleged by the respondent that the claimant declined to sign on the show cause letter to acknowledge receipt contending that he would only do so in presence of his lawyer.

31. The above evidence is not factual because first the show cause letter was dated 6.4.2018 and not 6.5.2018. Secondly, the show cause letter dated 23.5.2018 was written way after the termination letter by the project manager dated 6.4.2018. Having considered the evidence on record, I find and hold that the dismissal of the claimant was not done in accordance with a fair procedure as envisaged under section 41 of the employment Act. He was not accorded a fair hearing in the presence of another employee of his choice or served with a prior notice as provided under section 35 (1) ( c ) of the Act.

**Relief**

32. Having found that the dismissal of the claimant was not done in accordance with fair procedure, I declare the same to be unfair and unlawful.

33. From the foregoing reason, the claimant is entitled to salary in lieu of notice and salary compensation for unfair dismissal by dint of section 49(1) of the Employment Act based on daily wage of Kshs 1370 per day. He had no written contract and therefore I award him one month salary in lieu of notice as provided by section 35 (1) ( c ) of the Act. He will also have 3 months' gross salary as compensation for the unfair termination considering that he served the respondent for over six years and that he contributed to the termination through misconduct.

34. The claims for unpaid salary and leave lacks proper particulars and supporting evidence. Consequently, I decline to award the same.

35. Finally, the claim for certificate of service is granted since it is a right under section 51 of the Act.

36. In conclusion I enter judgment for4 the claimant as follows: -

<b>Notice</b>	<b>Kshs 41,100</b>
<b>Compensation</b>	<b><u>Kshs 123,300</u></b>
<b>Total</b>	<b>Kshs 164,400</b>

37. The award is subject to statutory deductions but in addition to costs and interest at court rates from the date of judgment.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10<sup>TH</sup> DAY OF MARCH, 2022**

**ONESMUS N. MAKAU**

**JUDGE**

**Order**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**