



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 172 OF 2016**

**JOSEPH OTIENO.....CLAIMANT**

**VERSUS**

**BABUBHAI CONSTRUCTION COMPANY LIMITED...RESPONDENT**

**JUDGMENT**

1. The suit was filed on 21/6/2016 by the claimant Joseph Otieno, against the respondent Babubhai Construction Company Limited seeking the following reliefs:

- (a) Reinstatement to work and payment of salary up to date from 4<sup>th</sup> March, 2016.
- (b) One month salary in lieu of notice.
- (c) Compensation for wrongful dismissal.
- (d) Costs and interest.

2. The suit was defended by a Memorandum of response on 4/8/2016 in which the respondent admits that the Claimant was its employee and denies all other particulars of claim and puts the claimant to strict proof thereof.

3. C.W.1, the claimant testified in dholuo vide an interpreter Mr. Wycliffe Ochieng, a duly authorized Court Assistant, Interpreter.

4. C.W.1 stated that he was a driver, was employed by the respondent but was no longer employed. C.W.1 adopted a witness statement dated 17/6/2016 as his evidence in Chief. C.W.1 also produced exhibits '1' to '3' in support of his case.

5. C.W.1 stated that the responded employed him in the year 2005 as a driver and worked in that capacity continuously until 14/3/2016 when his employment was unfairly terminated without any notice nor a warning. C.W.1 stated that he was not given opportunity to be heard and was simply told to leave the premises on the same day.

6. C.W.1 testified that on 4/3/2016, he had gone to Mumias to transport cement and when he returned his employment was verbally terminated. C.W.1 was told to hand over the lorry keys. C.W.1 said he earned Kshs.12,000 a month. C.W.1 said he was given no reason for the termination.

7. C.W.1 said that he had a good record at work throughout the period he served the respondent.

8. C.W.1 said that the termination was unlawful and unfair and he seeks compensation. C.W.1 said he was neither given a notice to show cause and was not called to a disciplinary hearing.

9. C.W.1 said that his advocate wrote a letter of demand dated 8/4/2016 to the employer. C.W.2 produced his National Social Security Fund (NSSF) statement. C.W.1 produced the delivery note to Mumias duly signed and acknowledged receipt of cargo. C.W.1 also produced a receipt dated 3/3/2016 indicating that he delivered all the cement blocks and did not steal or lose any cargo. C.W.1 said that he received no complaint at all before his employment was terminated.

10. Under cross-examination by Mr. Odeny, advocate for the respondent, C.W.1 said he was dismissed on alleged theft. C.W.1 stated that he did not receive any show cause letter or any letter of suspension produced by the respondent. C.W.1 insisted that he was not given

opportunity to defend himself. C.W.1 insisted that he delivered all the load he had carried to Mumias. C.W.1 denied he was suspended first. He insisted that he was simply dismissed upon arrival from Mumias. C.W.1 said he did not get any letter of dismissal. C.W.1 said he was dismissed by a clerk.

11. C.W.1 stated that he no longer wished to be reinstated because he was unjustly accused of a serious offence of theft. C.W.1 said he wished to be paid his dues for the unlawful dismissal.

12. C.W.1 denied that he had received a letter of dismissal dated 7/3/2016. He insisted that he was verbally dismissed on 4/3/2016 and on 8/4/2016 he wrote a letter of demand.

13. R.W.1 John Igamba Kagwai testified for the respondent. He said that he was an accountant of the Respondent and did book keeping and management duties. R.W.1 stated that he knew the claimant who worked as a driver for the respondent previously. R.W.1 stated that the claimant earned Kshs.12,000 a month. That around March, 2016, the claimant went to deliver materials at a construction site. That the claimant off-loaded blocks and cement and sold along the way. That the respondent followed him secretly following a tip. That the claimant had been doing that regularly. That the respondent wrote the claimant a letter of suspension and a notice to show cause. R.W.1 produced this as exhibit '1'. R.W.1 testified that the claimant was given 48 hours to show cause why he should not be summarily dismissed.

14. R.W.1 stated that on 7/3/2016, the claimant was summarily dismissed on grounds of theft of company property, and insubordination for failure to respond to the notice to show cause.

15. R.W.1 testified that the claimant was paid Kshs.20,000 when he left. R.W.1 produced a salary voucher dated 5/3/2016 marked exhibit '3'. R.W.1 stated that the suit is misconceived and lacks merit and same be dismissed with costs.

16. On cross-examination by the advocate for the claimant, R.W.1 told the Court that he did not go to the field. R.W.1 stated that the respondent did not report theft of cement and blocks to the police and the claimant was not arrested.

17. R.W.1 stated that he signed the letter of suspension and the one of dismissal. R.W.1 said that the claimant acknowledged receipt of the notice to show cause and the letter of dismissal though the letters did not show that.

#### Determination

18. The issues for determination are: -

(a) Whether the dismissal of the claimant was for a valid reason following a fair procedure.

(b) Whether the claimant is entitled to the remedies sought.

19. The Court has carefully considered the evidence adduced by the claimant *vis a vis* that adduced by R.W.1 and the Court is persuaded by the testimony by R.W.1 that, the claimant was caught red handed off-loading cement and blocks from the lorry he drove for sale along the way to Mumias Construction Site, where the claimant had been assigned to deliver the materials.

20. R.W.1 told the Court that the respondent had closely monitored the claimant along the trip following a tip that the drivers of the respondent sold company material along the way.

21. The claimant did not specifically cross examine R.W.1 on the incident of theft. The Court is satisfied that the claimant was served with a notice to show cause and suspension dated 4/3/2016 in which he was alleged to have on 3/3/2016 whilst on his way to Shikunga site stopped "**midway and**" offloaded cement and blocks then proceeded to sell to a hardware shop nearby.

22. The Court is also satisfied that the claimant failed to respond to the show cause letter within the period he had been requested to do so.

23. The Court is satisfied that upon failure to respond to the show cause letter, the respondent was justified to summarily dismiss the claimant by a letter dated 7/3/2016.

24. In the said letter of dismissal produced in Court, the claimant was given two reasons for summary dismissal being theft by servant on 3/3/2016 and insubordination in that on 4/3/2016, upon being suspended by management from work and requested to show cause in writing within 48 hours why he ought not to be dismissed for theft of company cement and blocks, the claimant declined to respond to the show cause letter.

25. The Court finds the testimony by the claimant that he did not receive letter of suspension in which he was asked to show cause within 48 hours untruthful. The testimony by the claimant lacked credibility and honesty and the Court rejects his testimony in this respect.

26. Accordingly, the Court finds the respondent has sufficiently demonstrated that the respondent adhered to Section 41, 43, and 45 of the Employment Act, 2007, in that it had a valid reason to summarily dismiss the claimant, from his employment as a driver.

27. That the respondent had followed a fair procedure in dismissing the claimant from work.

28. The respondent also paid the claimant terminal benefits due to him upon termination.

29. The suit by the claimant lacks merit and is dismissed in its entirety.

30. Taking into account that the claimant was still without employment at the time of hearing this suit, and considering the service he had given to the respondent before he became errant, the Court finds this an appropriate case for each party to bear their own costs of the suit.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF APRIL, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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> March 2020, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

M/s Anyango for claimant

Mr. Odeny for Respondent

Chrispo: Court clerk.