



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 345 OF 2018**

**DANIEL MUSYA MUIA.....CLAIMANT**

**VERSUS**

**DODWELL & COMPANY (EAST AFRICA) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed his Statement of Claim on 23<sup>rd</sup> May 2018, seeking compensation for unfair termination of employment, plus payment of terminal dues.
2. In response, the Respondent filed a Statement of Response on 30<sup>th</sup> November 2018, after which the Claimant filed a Reply to Statement of Response, on 11<sup>th</sup> December 2018.
3. The matter went to full trial where the Claimant testified on his own behalf, with the Respondent calling its Deputy Manager, Lawrence Mwamtsi. Both parties further filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Tractor Driver on 1<sup>st</sup> November 2014. He earned a basic monthly salary of Kshs. 25,566 plus a housing allowance of Kshs. 9,978. At the time of leaving employment the Claimant's monthly salary had risen to Kshs. 43,914.
5. The Claimant claims to have worked continuously, until 15<sup>th</sup> June 2017, when he was confirmed as a permanent employee.
6. The Claimant worked for the Respondent until 21<sup>st</sup> July 2017, when his employment was terminated. He terms the termination as unlawful and unfair.
7. The Claimant explains that on 21<sup>st</sup> July 2017, while on duty at 4.00 am, he was instructed by the Respondent, to deliver a 40 feet container at the Kenya Ports Authority, using his assigned Tractor Registration Number KTCB 325H.
8. The Claimant avers that after making the delivery, he was directed by the Kenya Ports Authority security staff to use Gate 18 to exit the Port, as there was traffic at the other gates. While heading back to the Respondent's Yard, the Claimant was stopped by the Respondent's Deputy Manager, who asked him where he was coming from.
9. The Claimant claims to have been summoned to the Respondent's Manager's office, later in the day, upon which his employment was terminated.
10. The Claimant accuses the Respondent of failure to give a valid reason for the termination as well as violation of due procedure.
11. The Claimant claims to have worked overtime, for an aggregate period of 12 hours per week, for which he was not compensated. He further claims to have worked during public holidays without compensation.
12. The Claimant also claims that he was made to work on 23 leave days. He adds that in the course of his employment, he made monthly

contributions which were not refunded to him, upon termination of his employment.

13. The Claimant now seeks the following from the Respondent:

- a) 2 months' salary in lieu of notice.....Kshs. 87,828.00
- b) 48 hours monthly unpaid overtime.....481,909.50
- c) 23 unpaid public holidays.....74,281.00
- d) 54 accrued leave days.....73,897.20
- e) Monthly pension contribution.....38,856.90
- f) 12 months' salary in compensation.....526,968.00
- g) Certificate of service
- h) Costs plus interest

#### **The Respondent's Case**

14. In its Statement of Response dated 29<sup>th</sup> November 2018 and filed in court on 30<sup>th</sup> November 2018, the Respondent admits that the Claimant was its employee. The Respondent further admits that the Claimant's monthly salary was Kshs. 43,914.

15. The Respondent states that on 20<sup>th</sup> July 2017, the Claimant was caught siphoning fuel from his assigned Tractor Registration Number KTCB 325H.

16. The Respondent further states that the Claimant was asked to explain why he had diverted the Tractor from the designated route and he gave his defence statement dated 20<sup>th</sup> July 2018.

17. The Respondent adds that the Claimant's response was found to be unsatisfactory and he was therefore summarily dismissed, on account of gross misconduct.

18. The Respondent maintains that the Claimant's dismissal was substantively and procedurally fair, as he was given an opportunity to respond to the charge of siphoning fuel but his explanation was found to be unsatisfactory.

19. In denying the claim for overtime, the Respondent states that it runs a shift schedule where employees work for 8 hours in 6 days. Regarding the claim for public holidays, the Respondent states that employees, including the Claimant, were given days off to compensate for working during public holidays.

20. The Respondent avers that at the time of leaving employment, the Claimant had utilised his leave days, save for 17.5 days, for which he was paid at termination.

21. The Respondent further avers that the Claimant's pension, calculated at Kshs. 86,994 was paid to the Claimant upon dismissal.

#### **Findings and Determination**

22. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

#### **The Dismissal**

23. The Claimant claims that he was not issued with a termination letter. The Respondent however produced a dismissal letter dated 26<sup>th</sup> July 2016 addressed to the Claimant as follows:

*"Dear Mr. Muiya,*

**RE: SUMMARY DISMISSAL.**

*We refer to our discussions with you on 20<sup>th</sup> July 2017 and your subsequent statement dated the same day. You were caught by one*

of our senior staff involving yourself in siphoning diesel from Tractor Reg No. KTCB 325H which had been allocated to you. In your defence statement, you alleged that you had gone to deliver medicine for your mother and thus the reason why you had gone off the normal route from the port. Evidence in our possession which has been shared with you indicates otherwise. You realize that your action is against the very core values of our organizations on honesty and integrity. This is not acceptable.

In light of the foregoing and the evidence in our possession, it's clear that you have committed a gross misconduct which warrants severe disciplinary action.

Therefore, management is left with no option but to summarily dismiss you from employment in accordance with Section 44 (g) of Employment Act 2007. The said dismissal is effective 26<sup>th</sup> July 2017.

You are instructed to handover all company assets and property that may be in your possession to your manager. After satisfactory handover, our finance department will proceed in computing your dues as follows:

1. Days worked up to and including 26<sup>th</sup> July 2017

2. Any accrued and utilized (sic) leave days (17.5)

3. Any other dues that may be applicable.

Yours Faithfully,

**Dodwell and Company E.A Limited**

(signed)

**Sanjeev Sukumaran**

**GENERAL MANAGER-Kenya.**"

24. The dismissal letter filed by the Respondent accuses the Claimant of involvement in siphoning of diesel from his assigned Tractor Registration Number KTCB 325H.

25. While the Claimant admitted having made a detour from the usual route from the Port to the Respondent's Yard, he denied the accusation of involvement in siphoning of diesel, which was the reason cited by the Respondent for dismissing him.

26. The Claimant told the Court, and the Respondent's Assistant Manager, Lawrence Mwamtsi, confirmed that the day the Claimant was intercepted on the way from the Port, is the same day he was summoned for a meeting, following which he was dismissed.

27. The Claimant testified that he was not given time to respond to the charges against him and this is borne by the record. What is more, there was no evidence that the specific charge, upon which the Claimant was dismissed, was put to him at the shop floor.

28. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR Radido J* stated the following:

***"The ingredients of procedural fairness....within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.***

***Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.***

***Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."***

29. In its decision in *Rebecca Ann Maina and 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* this Court held that for an employee to effectively respond to allegations made against them by the employer, they must be given an explicit notice of the charges and allowed adequate time to prepare their defence. This is the import of the procedural fairness requirements of Section 41 of the Employment Act.

30. According to the Respondent's witness, Lawrence Mwamtsi, the Claimant was intercepted in the wee hours of the morning of 20<sup>th</sup> July 2017 and on the same day, he was summoned and asked to record a statement and later on the same day, a decision was made to dismiss him. This kind of guillotine procedure has no place in our employment law.

31. Moreover, by its own evidence, the Respondent contradicts itself as to the mode of the Claimant's exit from employment. On the one hand, the Respondent produced a dismissal letter citing gross misconduct on the part of the Claimant. On the other hand, the Respondent

filed a Staff Pension Scheme Withdrawal Calculation Sheet showing the reason for exit as voluntary resignation.

32. This stark contradiction, which the Respondent did not bother to explain, put the Respondent's line of defence into serious question and the Court did not know what to believe. What is clear is that the Respondent so violated the procedural fairness edicts set out in law, that no reason for dismissal was established.

**Remedies**

33. The Claimant is therefore entitled to compensation and I award him the equivalent of six (6) months' salary in this regard. In arriving at this award, I have considered the Claimant's length of service, coupled with the Respondent's unlawful conduct in bringing the employment to an end.

34. I further award the Claimant two (2) months' salary in notice pay as provided in clause 11 of his contract of employment.

35. The claims for unpaid overtime and public holidays, being in the nature of special damages, ought to have been specifically proved, a burden that the Claimant did not discharge. These claims therefore fail and are dismissed.

36. The Claimant's claim for 54 accrued leave days is based on his averment that he was only allowed to take 12 days' annual leave, leaving a balance of 18 days. Looking at clause 8 of the employment contract however, leave could only be carried forward with approval by the Managing Director. The Claimant did not provide any such approval and the claim for leave pay therefore fails.

37. From the evidence on record, the Claimant was paid his pension benefit and the claim thereon is thus without basis.

38. In the end, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 263,484
- b) 2 months' salary in lieu of notice..... 87,828
- Total.....351,312**

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

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

41. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF MAY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kalimbo for the Claimant

Mr. Tsofwa for the Respondent