



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 198 OF 2018**

**LUKE JOAN OIGARA..... CLAIMANT**

**- VERSUS -**

**CONSOLBASE LIMITED....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 4<sup>th</sup> June, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.04.2018 through Muneke Katu & Associates. The claimant pleaded as follows. He was employed by the respondent on 10.12.2011 in the position of Heavy Commercial Driver and the letter of appointment dated 10.12.2011 is exhibited. As at November 2012 the claimant's consolidated monthly pay was Kshs.22, 305.00. On 19.08.2015 at about 0300Hrs the claimant was involved in an accident at Changamwe round about whereby he hit a port hole and the container he was shunting fell down. The following day on 20.08.2015 he reported at work as usual but was referred by the security personnel to the respondent's director where he was issued with a letter of summary dismissal dated 20.08.2015 and which is exhibited. The claimant's advocates wrote a demand letter dated 17.11.2017. At termination the respondent deducted unexplained Kshs. 5,300.00 from the claimant's wage. The claimant's case is that the summary dismissal was unfair because of the following grounds:

- a) The reason for termination was outside the operational requirements on a heavy commercial vehicle.
- b) The claimant was not accorded a hearing as per law.
- c) The procedure applied to dismiss was unfair.
- d) Even if the claimant was given a hearing, but which he says did not take place, he was not given a chance to appeal against the harsh and unpleasant dismissal decision.

The claimant prayed for judgment against the respondent for:

- 1) A declaration that his termination by the respondent on 20.08.2015 was procedurally unfair.
- 2) One-month salary in lieu of termination notice Kshs. 28, 428.00.
- 3) Maximum compensation for unfair termination Kshs. 341, 136.00.
- 4) Amount deducted Kshs. 5, 300.00.
- 5) Total Kshs. 374, 864.00.
- 6) Certificate of service.
- 7) Interest from the date of termination.
- 8) Costs and interest of the suit.

The memorandum of response was filed on 29.05.2018 through M/s Akanga & Company Advocates. The respondent pleaded as follows. The respondent employed the claimant effective 10.12.2011 and a variation of terms of service was dated 29.01.2011. The claimant was terminated from employment on 24.08.2015 per letter dated 20.08.2015. There was a meeting on 20.08.2015 attended by the respondent's Human Resource Manager, the claimant and one Mr. Digo. The claimant's failure to take due care and his negligence at work was discussed. Previous complaints had been made against the claimant about recklessness at work. The claimant admitted at the meeting of 20.08.2015 that in view of the complaints about the recklessness at work, his relationship with other employees had become untenable and irreconcilable and he needed to be terminated. The correctness and truthfulness of the reason for termination had been discussed and agreed upon at the meeting of 20.08.2015 and the claimant could not validly dispute the due process leading to termination. The respondent had issued a letter to show cause dated 19.08.2015 as exhibited and prior to the meeting of 20.08.2015. Further a certificate of service had been issued as exhibited and per the Employment Act, 2007. The main reason for termination was that the claimant had driven beyond the prescribed safety speed of 10-20KM/H thereby hitting a port hole and occasioning the accident. Notice to terminate had been given, compensation is not due, annual leave dues had been paid and severance pay was not due. The deduction as made was lawful. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case and the respondent's witness (RW) was Sauda Saidi, the Human Resource Manager. Final submissions were filed for the parties.

To answer the **1<sup>st</sup> issue** for determination the Court returns that there is no dispute that the respondent employed the claimant as a Heavy Commercial Driver effective 10.12.2011.

To answer the **2<sup>nd</sup> issue** for determination there is no dispute that the claimant's employment was terminated by the letter of summary dismissal dated 20.08.2015.

The **3<sup>rd</sup> issue** for determination is whether the claimant's summary dismissal was unfair. The claimant testified and confirmed that he received a letter to show cause and the dismissal letter the same day. He also testified that he attended a meeting with his superiors including the Human Resource Manager and the Court finds that his evidence shows that he admitted liability. He testified that after the accident on 19.08.2015 at about 03.00pm he was summoned to the office and the management had told him that Kshs.100, 000.00 would be deducted from his salary. He further testified that he had agreed to pay the side mirror of the other car which had been damaged in the accident. He testified that he agreed to pay for the side mirror because he wanted to be allowed to have his salary. The Court finds that to the extent that the claimant accepted to pay for the side mirror of the other car damaged in the accident, the same shows that he admitted being liable for the occurrence of the accident. The claimant has admitted that he received a letter to show cause and termination letter the same day. The Court has considered the claimant's entire account and finds that after the accident, the parties met, the issue was discussed, and although the letter to show cause and termination letter issued the same day, there is no doubt that claimant at the meetings held after the accident had admitted liability.

The Court finds that under section 44(1) of the Act the respondent was entitled to dismiss with a shorter notice than the statutory or contractual notice period on account of the gross misconduct. Thus the Court finds that as urged and submitted for the respondent substantially complied with section 41 on notice and hearing and the procedure leading to termination is found not to have been unfair. Per section 45(7) of the Act, the Court finds that the respondent has discharged the burden of showing that the reason for termination, namely significantly occasioning the accident in issue, sufficiently justified the summary dismissal. Indeed, the Court finds that by his own evidence during re-examination, the claimant admitted that he knew the truck had defective locks but he had nevertheless driven it. The Court has considered that evidence and returns that in any event, the claimant significantly contributed to his predicament.

As submitted for the respondent and as per the claimant's own evidence, the claimant voluntarily agreed to pay the Kshs. 5, 300.00 towards repair expenses for the other motor vehicle involved in the accident. The claim and prayer for the refund will fail.

As per the termination letter, under section 44(4) (a) of the Act, an employee who willingly neglects to perform any work which it was his duty to perform or carelessly and improperly performs any work from its nature it was his duty, under his contract, to have performed carefully and properly, is liable in gross misconduct. The Court has found that in the instant case, the respondent has established the gross misconduct against the claimant. As submitted for the respondent, clause 3 (c) of the contract disentitled the claimant to notice or pay in lieu of termination notice.

The respondent admitted that the claimant was entitled to a certificate of service and one had already been issued as exhibited in Court.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4<sup>TH</sup> JUNE, 2021**

**BYRAM ONGAYA**

**JUDGE**