



**Kinanga v Deepa Industries Limited (Cause 1603 of 2016)
[2021] KEELRC 1328 (KLR) (2 July 2021) (Judgment)**

Jared Monari Kinanga v Deepa Industries Limited [2021] eKLR

Neutral citation: [2021] KEELRC 1328 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1603 OF 2016**

J RIKA, J

JULY 2, 2021

BETWEEN

JARED MONARI KINANGA CLAIMANT

AND

DEEPA INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 12th August 2016. He states he was employed by the Respondent around the year 2003. It is not stated in the Evidence, Statement of Claim or Witness Statement, in what position the Claimant was employed.
2. He however pleads that he was confirmed as Transport Supervisor in the year 2015, earning a salary of Kshs. 38,500 monthly, as at the time he left employment.
3. His contract was terminated by the Respondent on or about 13th June 2016. He avers that there was no notice or just cause. He was not paid notice, outstanding wages, severance and vacation pay. He holds that termination was unfair and unlawful.
4. The Claimant prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 1- month salary in lieu of notice at Kshs. 38,500.
 - c. Annual leave pay at Kshs. 57,750.
 - d. Unpaid salary at Kshs. 55,440.
 - e. Compensation at equivalent of 12 months' salary at Kshs. 462,000.



- f. Punitive and aggravated damages for breach of the Claimant's constitutional rights.
 - g. Costs.
5. The Respondent filed its Statement of Response on 27th January 2017. It is conceded that the Claimant worked for the Respondent as a Transport Supervisor prior to termination, and earned monthly basic salary of Kshs. 32,083 and house allowance of Kshs. 6,417 – total Kshs. 38,500.
 6. It was his role to ensure accurate and timely loading and offloading of goods. He was to ensure goods match delivery notes, and that vehicles were clean and well-maintained. He was to monitor diesel stock, among other duties.
 7. On 25th May 2016, the Claimant added 20 cartons of goods that were to be delivered to a Customer. There was no documentation. He advised the relevant Driver to leave the premises, until the goods were loaded.
 8. He was on 9th June 2016, issued notice to show cause why he should not face disciplinary action. He chose to ignore the notice, leaving the Respondent with no option, but to invite the Claimant for disciplinary hearing. The invitation letter is dated 10th June 2016. He was advised of his right to have the company of a colleague during the hearing.
 9. The Claimant was heard on 11th June 2016. He told the disciplinary panel that he was not aware about the loading of 20 undocumented cartons. He had delegated the role of confirming the number of loaded cartons to his Helper, one Nicholas. The Driver Njoroge, gave evidence at the hearing, implicating the Claimant. It was concluded that the Claimant had colluded with a Turn Boy, and loaded 20 cartons of potato crisps without following the standard operating procedures. It was decided that the Claimant's contract is terminated.
 10. The Claimant and Respondent's Human Resource Manager Claudio Otieno, gave evidence on 12th February 2021, closing the hearing. The matter was last mentioned in a virtual session on 8th April 2021, when Parties confirmed filing of their Submissions, and Judgment date issued [not Ruling date, as erroneously indicated on the record].
 11. The Claimant adopted in his Evidence, the contents of his Statement of Claim, Witness Statement and Documents on record. He added that he was not given an opportunity to be heard. He was not accompanied by a colleague of his choice to the hearing. Cross-examined, he told the Court that he had been supplied with his job description. It included oversight of loading and offloading of goods. The Respondent had a Standard Operations Procedure [SOP]. Njoroge the Driver, did not accompany the Claimant at the hearing as a colleague chosen by the Claimant. He was a Witness called by the Respondent. It was alleged that 20 cartons were added to the consignment to be delivered by Njoroge. The Claimant was quizzed about the extra cartons. Nicholas had loaded the 20 cartons by error. The Claimant insisted he did not know why he was dismissed. He was aware disagreement with the Respondent was over the loading of the 20 cartons. He told the disciplinary panel that Nicholas should explain about the 20 cartons. The Claimant stated that Nicholas, not the Claimant, should explain the extra cartons. The 20 cartons had a value of about Kshs. 20,000. The Respondent stood to lose this amount. Redirected, the Claimant told the Court that he did not receive the letter to show cause, and the letter inviting him to the disciplinary hearing. The Driver had invoices and the Respondent could know about the 20 cartons, from such invoices.
 12. Claudio Otieno gave his evidence based on Claimant's personnel file, having joined the Respondent on 14th August 2017, after the Claimant left employment. He adopted his Witness Statement on record. He confirmed that that the Claimant worked for the Respondent as Transport Supervisor, and was



dismissed by the Respondent following irregular loading of 20 cartons of crisps, destined to one of the Respondent's Customers. He was issued letter to show cause. He did not respond. He was invited to the disciplinary hearing. He did not sign the letter of invitation. He was heard, and attempted to shift the burden of explaining the loading of 20 cartons, to the Turn Boy Nicholas. The buck stopped with the Claimant as per his job description. He was given the reason for dismissal. The Claim has no foundation.

13. Cross-examined, Otieno conceded he joined the Respondent after the Claimant left employment. He based his evidence on the Claimant's personnel file. The Claimant did not sign the letter to show cause, and the disciplinary invitation. Otieno was not there when the letters were served upon the Claimant. The minutes do not say if the Claimant was advised to call a Witness. Head of Logistics would confirm loading of goods. He attended the disciplinary hearing, and is not recorded to have said anything. Logistics retained loading and offloading documents. Otieno did not get the invoices for the 20 cartons. Redirected, Otieno told the Court that the Claimant did not raise issues on the constitution of the disciplinary panel. His role was overseeing of loading and offloading. He attended hearing. He must have had notice.

The Court Finds: -

14. There is no dispute that the Claimant worked for the Respondent as Transport Supervisor, up to 13th June 2016, when his contract was terminated by the Respondent. His combined salary was Kshs. 38,500 monthly.
15. The letter of termination, dated 13th June 2016, refers to disciplinary hearing held on 11th June 2016. It is stated that in the disciplinary meeting, the Claimant admitted he knew about the 20 cartons which were irregularly loaded.
16. The disciplinary hearing was preceded by a letter to show cause dated 9th June 2016, to which there was no response. The Claimant states, he did not receive this letter. He similarly states he did not receive the invitation to the disciplinary hearing.
17. The balance of probability leads the Court to conclude that the Claimant received both letters. He did not complain about not receiving any letter at the hearing. He attended the hearing, which would suggest he must have had notice of the hearing. At the hearing he shifted blame on his Helper Nicholas. The Driver Mike Njoroge gave evidence against the Claimant, which placed the Claimant at the heart of activities that clearly amounted to gross misconduct.
18. Rather than be loaded in the morning, Njoroge's vehicle had already been loaded at an unusual hour and was seen leaving, having been loaded on the instructions of the Claimant. The Claimant was seen frantically communicating on his mobile phone, in his mother tongue, to the Turn Boy, at the parking lot. Communication ordinarily was through radio. The Claimant opted to use his mobile phone. A guard at Morris & Sons, where Njoroge had been instructed to deliver by the Claimant, enquired why delivery was being done out of the standard procedure. Njoroge disclosed to the disciplinary committee that these kinds of shady transactions had been happening at the workplace.
19. The Claimant had a job description, which did not leave him any room, to shift blame for his misadventure, to the staff under him, or those above him in logistics. It was his obligation to ensure accurate and timely loading and offloading of consignments; he was to reconcile consignments to delivery notes; he was to ensure compliance with all SOPs; he was to monitor diesel use; and monitor fleet movement.



20. He was at the centre of irregular loading of the extra 20 cartons of crisps, worth Kshs. 20,000. He exposed the Respondent to loss of this product. He was the Transport Supervisor, so much so, that even had he not been actively involved in the loading and movement of the 20 cartons of crisps, questions would be raised about his failure to supervise those who loaded, and ferried the cartons irregularly.
21. In the eyes of the law, the Claimant would be liable under Section 44 [4] [c] and [g] of the *Employment Act*, of acts of gross misconduct. He was a Supervisor. He discharged that role carelessly and improperly, allowing irregular loading and movement of 20 cartons of crisps. At worst, he was actively involved in the loading and movement of those cartons, which simply put would mean he participated in attempted theft and sale of his Employer's product, which is an act of gross misconduct under Section 44[4] [g]. There was valid reason, warranting summary dismissal. The letter to show cause specifically invoked both the above provisions of the *Employment Act*.
22. Termination was procedurally fair. There was a letter to show cause, specifying the allegations and the provisions of the law, the Claimant was said to have infringed. He was given time to respond. He did not respond. He was invited to the disciplinary hearing through the letter dated 10th June 2016. He was advised of his right to be accompanied to the hearing. He attended the hearing on 11th June 2016. He complains that he was not given an opportunity to defend, a complaint not backed by the minutes of that meeting. Njoroge was of course a colleague of the Claimant, but was not at the hearing at the invitation of the Claimant. He was invited by the Respondent, and it was his evidence which the Respondent relied upon, to condemn the Claimant to summary dismissal. This does not mean that the Claimant was denied the right to be accompanied to the hearing by a colleague of his choice or a trade union representative. He was advised of his right but chose not to exercise it. He did not complain about this right, or inadequate opportunity to defend, at the hearing. He was heard and a decision made and communicated to him. The minimum standards of procedural fairness were observed.
23. The Claimant pleads annual leave pay at Kshs. 57,750. He does not state in his Pleadings, Evidence or Submissions, what period this annual leave pay, relates to. He had been in employment for over 15 years. Similarly, he pleads Kshs. 55,440 as unpaid salary, without disclosing the period when this salary was earned. He has not disclosed specific constitutional rights, infringed by the Respondent, warranting redress by way of punitive and aggravated damages. The Court is not able to accede to these items.

It is ordered: -

- a. The Claim is declined.
- b. The Claimant shall meet the Respondent's costs, restricted to filing fees and disbursements.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 2ND DAY OF JULY 2021.

JAMES RIKA

JUDGE

