



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1964 OF 2015**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**GEORGE NJENGA KINYUA.....CLAIMANT**

**VERSUS**

**CHINA ROAD AND BRIDGE CORPORATION.....RESPONDENT**

**JUDGMENT**

1. By a statement of claim dated 4<sup>th</sup> November 2015, the Claimant sued the Respondent for salary in lieu of notice unpaid salary for 1<sup>st</sup> – 23<sup>rd</sup> September 2014, unpaid house allowance, compensation for unfair termination, interest and costs of the suit, all totalling to Kshs.435,938. The Claimant averred that he was employed as a truck driver by the Respondent on 1<sup>st</sup> September 2014 and was unfairly and wrongly terminated by word of mouth and without notice on 21<sup>st</sup> August 2015.

2. The Respondent on the other hand averred that it employed the Claimant as a Driver on 25<sup>th</sup> September 2014 as opposed to 1<sup>st</sup> September 2014. It averred that the appointment letter dated 1<sup>st</sup> September 2014 was cancelled to pave way for the letter of 25<sup>th</sup> September 2014 and the agreement dated 25<sup>th</sup> November 2014. It further averred that all its truck drivers including the Claimant had an upper limit of fuel consumption capped sixty (60) litres for every 100 km. That the Claimant's truck Registration KCC 918N had an average consumption rate of 61.8 and on one occasion its fuel consumption stood at 63.9 litres, that the Claimant defiantly refused to respond to accusations of fuel siphoning and was rude. That the Claimant was dismissed in consonance with the requisite procedure and was accorded a fair hearing in the presence of an official of the Kenya Building, Construction, Timber and Furniture Industries Employees Union and that all his dues were duly paid.

3. Issues for Determination

- (i) Whether the Claimant was employed on 1<sup>st</sup> September 2014 or 25<sup>th</sup> September 2014.
- (ii) Whether the Claimant's termination was fair.
- (iii) Whether the Claimant is entitled to the reliefs sought.
- (iv) Costs of the suit and interest.

4. On the date of employment and terms of engagement, the Claimant avers that the Respondent engaged him on 1<sup>st</sup> September 2014 and both parties signed the letter of appointment. The monthly salary under the contract was Kshs.28,000. Other documents relied upon by the Claimant show that the parties signed another contract on 25<sup>th</sup> September 2014 as well as the agreement of employment dated 25<sup>th</sup> November 2014 under which the Claimant was entitled to Kshs.1,028 per day for eight hours, monthly transport allowance of Kshs.1,500 and house allowance at 20% of normal working hours. Any work beyond 8 hours was payable as overtime and subject to taxation. This is corroborated by the documents relied upon by the Respondent. Two of the documents were entitled "Probation Employment Letter". The one signed on 25<sup>th</sup> November 2014 was entitled "Agreement of Employment". Both parties executed both contracts. The Claimant relied on the first letter of appointment exclusively, a fact the Court found odd since he had provided a copy of the Agreement of Employment as well.

5. In simple legal parlance, a contract is a legally binding agreement made between two or more parties. It imposes upon the parties thereto enforceable rights and obligations. The binding nature of a contract ceases when it is discharged in any of the various ways recognised by law. Since the Respondent provided no evidence to show how the contract dated 1<sup>st</sup> September 2014 was discharged, this Court finds and holds that the Claimant was an employee of the Respondent from 1<sup>st</sup> – 23<sup>rd</sup> September 2014 under the first letter of appointment and from 25<sup>th</sup> September 2014 when the second letter of appointment was signed, as well as the agreement signed on 25<sup>th</sup> November 2014 and remained an employee until 21<sup>st</sup> August 2015 when the Claimant was terminated. The subsequent contracts superseded the earlier one.

Consequently, the Respondent was bound to honour its obligations under the various contractual engagements. The Court finds and holds that the Claimant was entitled to remuneration from 1<sup>st</sup> – 23<sup>rd</sup> September 2014 and subsequently under the successive arrangements.

6. On dismissal on 21<sup>st</sup> August 2015, the Claimant avers that the same was oral, unfair and without notice. He testified that he was not invited for any disciplinary hearing before termination. He testified that he refused to sign a show cause letter implicating him in fuel siphoning from Truck Registration No. KCC 918N as the Driver, on the day he was dismissed. The Claimant's Advocate submitted as much and urged the Court to find that the termination was unfair for want of compliance with the principles of natural justice and contravention of the provisions of the Employment Act, 2007. He submitted that neither a letter of invitation to the disciplinary hearing nor the minutes of the proceedings were on record.

7. The fact that the Claimant declined to sign a show cause letter did not explicate the Respondent from its cardinal obligation to ensure that the dismissal was in compliance with the provisions of the Employment Act. In addition, the fact that the Claimant was aware of the allegations of siphoning fuel from Truck Registration No. KCC 918N did not abrogate the Respondent's duty to subject the Claimant to a fair disciplinary process.

8. In the premise, the Court finds and holds that the Claimant's termination on 21<sup>st</sup> August 2021 was procedurally defective for noncompliance with the provisions of the Employment Act, 2007. (**Walter Ogal Anuro v Teachers Service Commission, Cause No. 955 of 2011**).

9. On siphoning of oil from Truck Registration No. KCC 918N, the main justification of termination, the Claimant denied the allegations. He testified that the excessive fuel was attributable to the to the weight of the load, roads sued, and the sticky cotton soil which occasionally stuck on the bed of the truck and had to be removed. The Claimant's Advocate submitted that the differential consumption of fuel by the trucks could be explained variously including weather conditions at the time as well as the manner/mode of driving. Further, it was submitted the Respondent had not taken the Claimant through any specialised driving course on efficient utilization of fuel. Finally, it was submitted that the differential consumption of fuel between the dumping trucks was not substantiated or demonstrated by an engineer or other expert. The Respondent's case was that comparatively, Truck Registration No. KCC 918N, which the Claimant was driving was consuming more fuel than some other trucks. The Respondent thus concluded that the Claimant was siphoning fuel from the truck.

10. The Court is of the view that mere comparison of consumption of fuel by different trucks driven by different drivers shows the consumption levels but does not explain the reason(s). The burden of proof lay with the Respondent.

11. In a nutshell, this Court finds and holds that the Claimant's denial to the allegation of siphoning fuel from Truck Registration No. KCC 918N was uncontroverted. Consequently, the Claimant's dismissal was unfair for noncompliance with the provisions of Section 45 of the Employment Act, 2007 (**Kenfright (EA) Ltd v Benson Nguti [2016] eKLR**).

12. Regarding the reliefs sought, this Court find as follows: -

(a) The Claimant is entitled to remuneration for the days worked in September 2014 and salary in lieu of notice for unfair termination.

(b) The agreement of employment signed by the parties on 25<sup>th</sup> November 2014 provided for house allowance at 20% of the normal working hours. It was anticipated that the Respondent fulfilled its part of the bargain and appears to have done so. The Claimant furnished no evidence that house allowance was not paid as per the agreement.

(c) Having found that the Claimant's dismissal was unfair, and in consideration of the length of service, the Court is of the view that the equivalent of three (3) months' salary will be fair.

(d) The claim for house allowance was unproven.

13. The upshot is that the claim succeeds and the Claimant is awarded as follows: -

- (i) Unpaid salary 1<sup>st</sup> – 23<sup>rd</sup> September 2014..... Kshs.21,538
- (ii) Pay in lieu of notice  
(based on highest salary earned).....Kshs.46,708
- (iii) Compensation for unfair termination equivalent to three (3) months.....Kshs.140,124
- Total Award.....Kshs.208,370**

The award is subject to statutory deductions.

(iv) Costs of the suit.

(v) Interest shall accrue at Court rates from date of judgment till payment in full.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF AUGUST 2021**

**DR. JACOB GAKERI**

**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> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

**DR. JACOB GAKERI**

**JUDGE**