



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1168 OF 2017

CYRUS KITOLO MWILU.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant filed in this Court a statement of claim, a witness statement and list of documents all dated 31st May, 2017.
2. The respondent neither entered appearance nor filed a response in answer to the statement of claim. The claimant produced an Affidavit of Service sworn by Alfred Nderitu wherein he deponed that he had effected service of the statement of claim and summons to enter appearance upon the respondent.
3. Subsequently, the matter proceeded for formal proof on 29th July, 2021 with the claimant giving testimony in support of his claim.
4. The facts of the case as presented by the claimant is that he was employed as a driver by the respondent with effect from 2nd February, 2012. He stated that he was initially employed as a light vehicle driver and later promoted to a heavy commercial driver. It was his testimony that at the time of his termination, he was driving delivery trucks of the respondent and in particular, he was assigned to drive motor vehicle registration number KAZ 828B.
5. The employment relationship ran into headwinds when the claimant was accused of siphoning fuel from the truck he was assigned to drive at the time. This led to his termination. He denied the allegations levelled against him and maintained that the same were untrue given that the motor vehicles were never fueled to full capacity hence the fuel was only limited per trip. He further stated that the motor vehicles were fitted with a tamper proof seal after every fueling and that the fuel tank was padlocked thus eliminating any chance of pilferage.
6. It was also his testimony that he was taken through a disciplinary process whose outcome he disputes.
7. The claimant made the following prayers;
 - i. General damages for illegal and unlawful dismissal;
 - ii. One month salary in lieu of notice;
 - iii. Salary arrears;
 - iv. 2016 salary bonus;
 - v. Unclaimed leave; and
 - vi. Interest and costs of the suit.
8. As indicated herein, the respondent did not tender a response to rebut the claimant's assertions and in particular, the reason for his termination.

Claimant's case

9. The claimant produced an internal memo dated 22nd August, 2012 issued to him by the respondent's human resource manager and

through which his appointment was confirmed. This was following completion of his probationary period. He also produced a copy of a letter dated 30th December, 2016 through which he was given 7 days' notice to show cause why disciplinary action should be taken against him for fuel pilferage.

10. The particulars of the charge were that there was an instant drop in the fuel level in the tank by approximately 176 litres on 16th November, 2016 between 01.08.39 and 01:57:14 hours and also on 14th December, 2016 between 01:35:17 and 00:57:14. The claimant acknowledged receipt of the show cause letter on 4th January, 2017 by appending his signature thereon. The claimant further confirmed that he responded to the show cause letter and denied the allegations levelled against him. He produced a response dated 4th January, 2017 to that effect. The claimant further averred that he was invited for a disciplinary hearing which was scheduled for 11th January, 2017. Through the invitation letter, he was asked to bring along a shop steward or a witness if he so wished. Lastly, the claimant produced a dismissal letter through which his services were terminated.

Analysis and determination

11. The claimant has proved that he had a subsisting employment relationship with the respondent. This can be discerned from the confirmation of appointment of the claimant and the correspondence leading up to his termination.

12. The claimant also produced a pay slip for the month of December, 2016 which indicates that he was earning salary in the sum of Kshs 30,388/= , house allowance in the sum of Kshs 4,558.20/= and travelling allowance in the sum of Kshs 3,700/= . I have noted that the other payments appearing in the said pay slip, are in respect of overtime and arrears hence not standard earnings to constitute the claimant's monthly gross salary.

13. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. Further, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and fair that related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

14. Therefore, besides taking an employee through a disciplinary process, it is imperative that there should be a reason for termination and which reason must be valid and fair.

15. In the instant case, the dismissal letter annexed to the claim gave reasons for the claimant's termination. However, the law requires the employer to prove that such reason was fair and valid. This was not done. The respondent failed to participate in the trial process hence the reasons for the claimant's termination could not be interrogated and determined in light of the provisions of section 45(2) of the Employment Act.

16. Therefore, in as much as the respondent undertook a disciplinary process within the requirements of section 41(1) of the Employment Act, it failed to discharge its burden under the law by proving that the reason for the claimant's dismissal was valid and fair.

17. In view of the foregoing, I find that the termination of the claimant was unfair within the provisions of section 43 (1) read together with section 45(2) of the Employment Act.

18. I now turn to the remedies payable to the claimant.

Remedies

19. Having found the claimant's termination to be unfair, I award him four (4) month's salary as compensatory damages. In making this award, I have considered the claimant's years of service with the respondent.

20. I further award the claimant one (1) month's salary in lieu of notice.

21. I will not award salary arrears and salary bonus for 2016 as the same have merely been alleged but not proved.

22. As regards, the claim for leave, I will also decline to make any award as no leave records were produced by the claimant to justify the entitlement.

23. In the final analysis, I enter judgment in favour of the claimant as follows:

a) 4 months' salary in compensation.....Kshs154,548.80

b) 1 month's salary in lieu of notice.....Kshs 38,646.20

Total.....Kshs 193,231.00

24. The award will be subject to interest at court rates from the date of judgment until payment in full.

25. The respondent shall also bear the costs of this claim.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Nyaga for the Claimant

No appearance for the Respondent

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE