



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1310 OF 2017**

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

**STEPHEN MUSEMBI MUSAU.....CLAIMANT**

**VERSUS**

**DELMONTE KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent via a statement of claim dated 6<sup>th</sup> July 2017 and filed in Court on 11<sup>th</sup> July 2017. He alleges that he was unfairly terminated on 1<sup>st</sup> August 2014 after 16 years of service.

2. The Claimant prays for –

(a) 12<sup>th</sup> months' salary in terms of Section 49(1)(c) (wrongly stated in the statement of claim as Section 49(12)(c) (Kshs.88,047 x 12) = Kshs.1,056,575.

(b) Payment in lieu of leave earned but not taken for 168 days Kshs.493,063.20

**Total Kshs.1,549,638.20**

3. The Respondent filed its response the statement of claim on 12<sup>th</sup> September 2017 denying that the Claimant was unfairly terminated and prayed for dismissal of the suit with costs.

**Claimant's Case**

4. The Claimant avers that he was employed by the Respondent as a driver and rendered services diligently until 1<sup>st</sup> August 2014 when he was unfairly dismissed from employment. That his gross salary at the time was Kshs.88,047.92 per month. He avers that his services were terminated by the Respondent purportedly for driving its motor vehicle without due care and diligence and thereby causing an accident along the Thika-Garissa road.

**Respondent's Case**

5. The Respondent admits the contents of paragraph 4 of the statement of claim out avers that the Claimant was summarily dismissed from employment for driving company land cruiser equipment number 4403 without due care and diligence and causing an accident as a result of which the vehicle was extensively damaged beside exposing himself he serious risk of injury. It further avers that the Claimant is not entitled to compensation for unfair dismissal because the termination was in accordance with Section 44(4)(c) of the Employment Act, 2007 and Clause 11(e) of the Kenya Plantation Worker's Union (KPWU) CBA. Finally the Respondent avers that it was not served with any demand and notice of intention to sue.

**Evidence**

6. **CW1 Mr. Stephen Musembi Musau** testified that he was a former employee of Del Monte (Kenya) Limited where he served as a Lead man but was initially engaged as a driver of a tipper and served the Respondent for 16 years. That on 2<sup>nd</sup> July 2014, he was assigned motor vehicle registration number KBP 641V (but changed by the witness to 212V in the course of examination in chief) to transport planting seeds to field 5788 Island along the Thika-Garissa Road. He testified that at about 1.30 pm he was requested him to take the vehicle to Ndula for

handover to the second shift driver due to report at 2.00 pm and did so. That as he was leaving for his house, his Supervisor one Jacinta instructed her to use the Departmental Land Cruiser and take the Irrigation Manager home (Makongeni) approximately 15 km away.

7. That as a diligent driver, he scrutinised the motor vehicle to ascertain it had insurance and speed governor certificates. That he drove to Makongeni but on his way back, near Makahawa Dam the vehicle developed mechanical problems on the front wheel and as he tried to stop, he was attacked by bees that had entered the vehicle through the right window that was faulty as it could neither close nor open. That in the process he lost control of the motor vehicle and landed in a ditch. He was not injured but was treated at Gatuanyaga Dispensary for the attack by the bees. He testified that the vehicle had previously been involved in an accident at Makongeni and he was using it for the first time after the accident.

8. He further testified that on 7<sup>th</sup> July 2014, he received notice to show cause from the Human Resource Manager requiring him to show why disciplining action should not be taken against him for driving “*at very high speed without due care and diligence causing an accident that extensively damaged the vehicle ...*” That the careless and improper performance of his duties amounted to gross misconduct. The Claimant was accorded 24 hours to respond and did so by a handwritten letter dated 10<sup>th</sup> July 2014 where he narrated what transpired on the material day. He testified that the land cruiser had a speed governor to show the speed it was being driven at and the police did not investigate the accident.

9. That he attended a disciplinary hearing on 30<sup>th</sup> July 2014 and defended himself and was terminated on 1<sup>st</sup> August 2014 for driving a company vehicle equipment no. 4403 without due care and diligence.

10. **RW1 Mr. Simon Wachira Mwangi** testified that he was the Security Officer of the Respondent Company and was conversant with the facts of the case. He told the Court that the Claimant was engaged by the Respondent on 24<sup>th</sup> October 1998 and worked till 1<sup>st</sup> August 2014 and was dismissed summarily for careless performance of his duties as a driver of motor vehicle registration number KBP 641V on 2<sup>nd</sup> July 2014. He further testified that at the time of the accident the Claimant was driving at a high speed of 140 km and the vehicle stopped 70 meters off the road.

11. He testified that he estimated the speed of the motor vehicle and confirmed that the accident was not reported as required by law. He confirmed on cross examination that he was not a trained accident investigator but had received in service training as a security officer.

12. He confirmed that the Respondent constituted a committee which investigated the accident and gave a report a copy of which is on record. The report of the investigation dated 4<sup>th</sup> July 2014 was signed by two of the seven members of the Committee. He confirmed that the Claimant had no warning letter previously.

13. The investigation report concluded that the accident was caused by an unsafe act of “*over speeding*” (*very high speed by the driver*). That the driver lost concentration on the road by either dozing off, became obstructed or was in a hurry to attend to other personal errands. The report recommended that serious disciplinary action be taken against the driver. The witness confirmed that this was a “*preliminary investigation*” based on the facts on the ground.

## Submissions

14. The Claimant’s Counsel submitted that the termination was unfair because the Respondent failed to prove that it had a fair and valid reason to terminate the Claimant. Reliance was made on Section 45 of the Employment Act, 2007.

15. On substantive fairness Counsel also cited Section 43(2) of the Act on the reason for termination and relied on the decision in **Peter Wangai v Egerton University [2019] eKLR** for the proposition that the reason for termination must be what an employer genuinely believes to exist. That in this case, the employer had no genuine reason for termination.

16. Firstly, an accident does not *ipso facto* signify carelessness, other circumstances may have contributed. The attack by bees near Makahawa Dam. Reliance was made on the decision in **Charles Kavai (Suing as the Administrator of the Estate of the Late Kevin Kioko Charles) v Bonface Mutunga & Another [2020] eKLR** where the Court relied on **Simpson v Peat (1952) 1 All ER 447** and **Rambhai Shivabhai Patel & Another v Brigadier-General Arthur Corrie Lewin [1943] 10 EACA 36** in holding that errors of judgment do not amount to careless driving and the mere fact that an accident occurs it does not follow that a particular person has driven dangerously or without care and attention, there must be reasonable evidence of negligence.

17. That the Respondent has not furnished evidence of negligence or carelessness. The termination was therefore unfair.

18. On the alleged speed of 140 km/h, Counsel contended that this was a mere opinion of the security officer and members of the investigation committee. That the Respondent did not calculate the speed in a scientific manner and relied exclusively on opinions of untrained investigators who simply estimated the distance of the motor vehicle from the Thika-Garissa Road and estimated its speed at the time of the accident yet speed is a function of distance and time, Counsel submitted. In sum, the opinion on speed was not a firm basis on which to terminate the Claimant. Reliance was made on the decision in **Andrew Moche Muthemba v Texcal House Service Station [1998] eKLR** where it was held that the Plaintiff’s opinion could not establish that the defendant was driving at a high speed. In **G. M. Daya v R [1964] EA 529** it was held that a person cannot be held liable of negligence or careless driving solely on opinion evidence of his speed.

19. Reliance was also made on the Claimant’s evidence that the motor vehicle in question had a speed governor which restricted the maximum speed it could attain. The alleged speed was too high.

20. Counsel further submitted that the Respondent was duly bound to ensure a safe working environment for the Claimant. In this case equipment 4403 had defective windows thus exposing the Claimant to danger. Negligence should be imputed, Counsel submitted.

21. Reliance was made on the decision in **John Barasa Wasike & Another v Devki Steel Mill Ltd [2013] eKLR** where the Court held that employers are obligated at common law and statutory law to provide safe working conditions and take reasonable care to ensure the health and safety of employees. That it was unfair for the Respondent to blame the Claimant of the accident yet equipment 4403 was faulty.

22. Finally, it is submitted that the Respondent should have been more lenient in the sanction imposed on the Claimant, a written warning would have sufficed considering that the Claimant had served for 16 years. Counsel relied on the decision in **Peter Wangai v Egerton University (supra)** where the Court observed that –

*“Where there is no genuine reasons leading to termination of employment, to proceed and dismiss the employee such amounts to unfairness as there is no valid or fair reason existing to justify the same. Even where all procedural requirements are followed, such does not negate the lack of a substantive reasons leading to termination of employment.”*

23. On leave days, it is submitted that under the CBA, the Claimant was entitled to 32 leave days per year. That he had 168 untaken leave days and had testified to that effect and since the Respondent provided no evidence of record of annual leave, the Claimant was entitled to payment for the days amounting to Kshs.493,063.20. Reliance was made on the decision in **Titus Sanya Angwenya v Westbuild General Contractors Ltd [2021] eKLR**.

24. On compensation for unfair termination, Counsel relied on the length of service by the Claimant of 16 years, clean record and the Respondent’s negligence and prays for 12 months’ compensation. Reliance was made on the decision in **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR** where the Court awarded 12 months’ compensation.

### **Analysis and Determination**

25. I have carefully considered the pleadings, evidence on record and submissions by Counsel. The issues for determination are: -

(a) Whether the Claimants termination was fair;

(b) Whether Claimant is entitled to the reliefs prayed for.

26. On termination, the Employment Act has detailed provisions on how a fair termination should be effected Sections 35, 40, 41, 43, 44 and 45 among others constitute the statutory bedrock of termination of employment.

27. As consistently held by courts, for a termination to be deemed fair, it must be substantively and procedurally fair. The reason(s) for termination must not only be valid but fair as must be the procedure employed by the employer. (See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**).

28. Section 43(1) provides that –

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

29. Section 43(2) provides that –

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

30. On the reason for termination, the dismissal letter dated 1<sup>st</sup> August 2014 states that *“It was established that you drove a company equipment no. 4403 without due care and diligence, causing an accident where the vehicle was extensively damaged beside exposing yourself to serious risk of injury. That careless performance of any work ... is a dereliction of duty.”*

31. The Claimant testified that on the material day, he had completed his shift and was about to leave for his house when his Supervisor, one Jacinta instructed him to take the Irrigation Foreman, Mr. Mwangi home at Makongeni using company equipment no. 4403, which was not his regular vehicle. He was a tipper driver. He testified how the accident occurred, the problem with the front tyre of the motor vehicle and the attack by bees as he attempted to stop the vehicle and the defective driver’s window which was open at the time. Fortunately, he was not injured but was stung by bees. He testified that the equipment had a previous accident and he had not driven it since and was driving at a moderate speed of 60 km per hour.

32. The Respondent’s witness asserted that the equipment was moving at a high speed of 140 km per hour before it veered off the road and stopped 70 meters off the road. It is unclear how he arrived at the alleged speed. He admitted he was not a trained investigator. Similarly, the Accident Investigation Committee report blames what it states as *“over speeding” (very high speed by the driver)*.

33. It is important to note that the Committee also found that on 30<sup>th</sup> June 2014, equipment no. 4403 had been taken to the workshop with the following problems: -

(i) Service

- (ii) Faulty front right head lump
- (iii) Faulty front and rear right indicators
- (iv) Wobbling front left wheel and
- (v) Faulty front driver's window

34. In addition, the equipment was wobbling at a speed of 60 km per hour. Relatedly the Committee confirmed that there was a colony of bees near the scene of the accident. For unexplained reason, the accident was not reported to the police to conduct an investigation nor was a qualified investigator engaged to infuse professionalism into the investigation. All conclusions made on the likely speed of equipment no. 4403 before that accident were by observation by some members of the Committee who visited the scene. It is unclear whether the equipment had been in use between 30<sup>th</sup> June 2014 and 2<sup>nd</sup> July 2014. The Committee reported that the equipment was found parked at Ndula Yard on 2 July 2017 ready for use. It is unclear whether it had been repaired. Finally, the Claimant's allegation that the equipment had a special governor was not controverted.

35. Evidence on record shows that the investigation committee established by the Respondent to investigate the accident of equipment 4403 ref no. KBP 641V on 2<sup>nd</sup> July 2014 comprised persons not trained in accident investigation notwithstanding the fact that the task and the findings were of a technical nature. How for instance did the Committee determine that the equipment was moving at a very high speed? What is the probative value of opinion in such a case? Was the Claimant negligent? Other than the alleged high speed, the Claimant has no other accusation. The Investigation Committee concluded that "*the accident was caused by an unsafe act of over speeding (very high speed by the driver)*". Other possible causes were speculative. Since the Committee had no technical capacity to investigate the accident, it relied on personal opinions of members exclusively.

36. It would appear that the Respondent authorised the Claimant to use defective equipment and at the same time blamed him for an accident arguably attributable to some of these defects. The Court is persuaded by the decision in **John Barasa Wasike & Another v Devki Steel Mill [2013] eKLR** cited by the Claimant's Counsel on the employer's duty of health and safety of employees as well as **Peter Wangai v Egerton University (supra)** on the giving of an employee the benefit of doubt and imposing another form of sanction.

37. For the foregoing reasons, the Court is satisfied that the Respondent has not on a balance of probabilities established that it had a valid and fair reason to dismiss the Claimant summarily.

38. On the procedure employed by the Respondent, evidence on record shows that the Respondent issued a notice to show cause on 7<sup>th</sup> July 2014 through a letter received by the Claimant on 10<sup>th</sup> July 2014. The letter gave the Claimant 24 hours to respond failing which appropriate disciplinary action would be taken without further reference to him. The Claimant responded in writing by letter dated 10<sup>th</sup> July 2014 received by the Human Resource Department on 15<sup>th</sup> July 2014.

39. Subsequently, the Claimant was invited for a disciplinary hearing on 30<sup>th</sup> July 2014 by a letter dated 28<sup>th</sup> July 2014. The letter informed him that he had the right to have another employee or shop floor union representative of his choice at the hearing.

40. The hearing took place on 30<sup>th</sup> July 2014 with 12 attendees including the Deputy Chief Shop Steward, Mr. Raphael Muli. Handwritten minutes of the meeting are on record. Although the minutes state that the meeting ended at 12.45 pm and all participants but one signed, the minutes have neither conclusion nor recommendation. It is unclear when and by whom the decision to terminate the Claimant was made.

41. Finally, Section 3(ii) of the Collective Bargaining Agreement between Delmonte Kenya Limited and the Kenya Plantation & Agricultural Workers Union (10<sup>th</sup> July 2013 – 30<sup>th</sup> June 2015 entitled procedure on disciplinary matters provides that –

*"Any employee of the company who has been dismissed or upon whom a penalty has been imposed in respect of a disciplinary matter shall have an individual right of appeal to management at a higher level than the member of management who dismissed him or impose the penalty."*

42. The letter of dismissal dated 1<sup>st</sup> August 2014 made no reference to the Claimant's right to appeal the decision and thus had no opportunity to exercise the right. The Court cannot speculate how the outcome would have been or whether the Claimant would have exercised the right. The Respondent's duty was to inform the Claimant that he had the opportunity to appeal and to whom. It did not.

43. From a panoramic view, the Respondent appears to have complied with the procedural requirements attendant to a fair termination.

44. Having found that the Respondent has not discharged the burden of proof imposed by the Employment Act, as pertains the reason(s) for termination, it is the holding of this Court that the Claimant's termination was unfair for want of substantive fairness.

45. I now turn to the reliefs sought. The Claimant prays for –

**(a) The equivalent of 12 months' salary under Section 49(20(c) of the Employment Act, a total of Kshs.1,056,575.**

46. From the evidence on record, it is undisputed that the Claimant worked for the Respondent from 24<sup>th</sup> October 1998 to 1<sup>st</sup> August 2014, a duration of about 15 years, 9 months and 7 days and wished to continue. The Claimant had served diligently and had risen to the level of Lead man and was trusted by his Supervisor which underscores the instruction to take the Irrigation Manager home on the material day and had a clean record. It is also not in dispute that equipment no. 4403 had an accident on 2<sup>nd</sup> July 2014 and the Claimant was in control which led to his termination.

47. Taking these circumstances in the context of Section 49(4) of the Employment Act, the equivalent of six (6) months' salary is fair compensation. Since the gross pay on the pay slip for July 2014 includes leave earnings not payable every month, the sum of Kshs.36,993.75 is deducted to make the gross pay Kshs.51,054.17. **Total Kshs.306,235.02.** The 6 months' salary award is comparable to **OI Pejeta Ranching Ltd v David Wanjau Muhoro [2017] eKLR** where the Court of Appeal awarded 6 months to an employee who had served for 25 years. The Trial Court had awarded 12 months' salary.

**(b) Payment in lieu of leave earned but not taken for 168 days Kshs.493,063.20**

48. Under the CBA between the Respondent and the Kenya Plantation and Agricultural Workers Union, 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2015, the Claimant had a leave entitlement of 32 days every 12 months of continuous service. The 168 days, the Claimant prays for means that the Claimant had not proceeded on leave for 5 years and 3 months.

49. Regrettably, the prayer does not specify the period when the days accrued and no evidence was led to demonstrate the circumstances in which the days accrued. The Claimant's statement dated 22<sup>nd</sup> June 2018 is silent on the period when the days accrued and made no reference to the same in oral testimony contrary to Counsel's submissions. In addition the payslip on record for July 2014 has leave earnings amounting to Kshs.36,993.75. The issue arose on cross examination and the Claimant was unable to explain the payment. The claim for leave earned but not taken is declined for lack of proof.

**50. In conclusion, judgment is entered in favour of the Claimant for Kshs.306,325.02 with interest at Court rates from the date of judgment till payment in full.**

51. Costs of this suit are awarded the Claimant.

52. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF NOVEMBER 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**