



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 281 OF 2017**  
**BETWEEN**  
**JOHN OGWENO AWAA.....CLAIMANT**  
**VERSUS**  
**MACKENZIE MARITIME [E.A] LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*A.I. Hayanga & Associates, Advocates for the Claimant*

*Oloo & Chatur, Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 19<sup>th</sup> April 2017. He states, he was employed by the Respondent as Transport Supervisor from 29<sup>th</sup> November 2011 to 3<sup>rd</sup> January 2017 when his contract was unlawfully terminated. He was summoned for disciplinary hearing on 15<sup>th</sup> December 2016. He was alleged to have been involved in theft of a container. He was issued a letter of summary dismissal on 3<sup>rd</sup> January 2017. His last salary was Kshs. 50,000 per month. He states, he was not in charge at the time theft of the container took place. He was arrested by Port Police, but released after investigations. The Driver of the Truck which ferried the container, was arrested and charged. The Claimant prays the Court to find termination was unfair and unlawful and grant him Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 50,000.
- b. Wages not exceeding 12 months, based on gross monthly wage at the time of dismissal.
- c. Unpaid overtime 2011 -2016 at Kshs. 3,998,400.
- d. Members Pension Scheme Benefits at Kshs. 301,168.
- e. Anticipatory salary to the age of retirement, at Kshs. 7,200,000.
- f. Costs.
- g. Interest.

2. The Respondent filed its Statement of Response on 18<sup>th</sup> May 2017. It is conceded that the Claimant was employed by the Respondent in the position of Transport Supervisor. He was a member of MJ Group Staff Pension Scheme. He was responsible for ensuring security of Respondent's property at all times. There was theft of a container on or about 15<sup>th</sup> November 2016, while the Claimant was on duty. The Claimant was suspended and taken through a disciplinary process. He was found culpable of negligence and dereliction of duty and summarily dismissed. He was given specific reasons justifying termination. He lodged an internal appeal against the decision which was

rejected. He was advised he would be paid his terminal dues upon clearing. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified, and rested his case on 29<sup>th</sup> November 2019. He restated details of his employment with the Respondent, as outlined in his Statements of Claim and Witness. Theft of the container took place on 14<sup>th</sup> November 2016 at 3.00 a.m. The Truck was loaded at midnight. It went through scanning and exited the Port at around 3.15 a.m. The Claimant was not on duty at the time. The day shift Driver, informed the Claimant on 15<sup>th</sup> November 2016 at 8.00 a.m. that the night shift Driver had disappeared with the container. The Claimant searched and did not trace the Truck at the Port. The runaway had turned off his mobile phone and could not be reached by the Claimant. The Claimant later learnt that the missing container was loaded with hospital drugs.

4. The Claimant visited Container Freight Station [CFS] where entry and exit of Trucks is registered. He found the particular Truck never went the CFS. He reported the incident to the Operations Manager. The Truck could not be traced. Its tracking system had been interfered with 2 weeks before. Operations Manager called the General Manager, who invited the Police. They searched various places but could not trace the Truck.

5. The Claimant was arrested on 16<sup>th</sup> November 2016. He made a statement at the CID Office. He was released. He was not charged, because he was not on duty when the incident took place.

6. On 17<sup>th</sup> November 2016, he was suspended for 7 days. The container was recovered after 4 days, minus the drugs. The Driver was later arrested in Migori County, and charged in Court.

7. The Respondent did not have a proper system of handing over from one Supervisor to the other, at the end of a shift. The night shift Supervisor was responsible when the container was stolen.

8. The Claimant was invited to a disciplinary hearing. The Respondent decided to terminate Claimant's contract. He was paid nothing by way of terminal benefits. He worked excess 10 hours daily. He received his pension and does not wish to pursue the prayer for pension. He was 48 years when his contract was terminated. He ought to have worked until retirement at the age of 60 years. His last salary was Kshs. 50,000 a month.

9. Cross-examined, the Claimant told the Court, he was issued a letter of employment with specified job description. He was in charge of Trucks, their Drivers and Turn Boys. The reasons for dismissal were disclosed in the letter of termination. They were shown in the letter of suspension. There was no system of handing over at the end of each shift. The Claimant reported for duty at 8.00 a.m. on 15<sup>th</sup> November 2016. The Truck in question was allocated to the Claimant. He was allocated 6 Trucks in all. The letter to show cause states the Claimant failed to collect the hand over report.

10. He was assigned other duty. He was not a Messenger. He went to collect a letter between 8.00 a.m. and 12.00 o'clock, on 15<sup>th</sup> November 2016. It was an urgent letter. The Respondent had a Messenger. The Claimant reported the Truck was missing to his Employer, after searching for it in various places. It had been allocated to the Claimant on 14<sup>th</sup> November 2016. That is why he went looking for it. He reported the loss to his Supervisor at around 3.30 p.m. He attended disciplinary hearing accompanied by his workmate Emmanuel. He was not fairly heard. His workmate turned against him at the hearing. Emmanuel feared his bosses and turned around. The Claimant seeks anticipatory salary up to the age of 60. He worked overtime and made demands for compensation. Redirected, the Claimant clarified that he was asked by the Coordinator Edward to pick a parcel from the bus station. It was an urgent parcel. It was easier for the Claimant, rather than the Messenger, to collect the parcel because the Claimant had a car.

11. Zainab Salim Chingabwi, an Advocate of the High Court of Kenya, and Respondent's Legal Officer, gave evidence for the Respondent on 23<sup>rd</sup> September 2019, closing the hearing.

12. She adopted her Witness Statement on record. On 15<sup>th</sup> November 2016, a Truck carrying a container went missing. It was not discovered to be missing, until 3.45 p.m. The Claimant stated he reported for duty at 8.00 a.m. that morning. The Driver who was assigned the missing Truck that morning went to the yard, and did not find the Truck. He went to the Port and did not find the Truck. He reported to the Claimant he could not find the Truck.

13. The Claimant was responsible for monitoring the Truck. He would rely on night Clerks, to piece together the events of the previous night.

14. He assigned Trucks to Drivers that morning, without finding out what happened at night. The Claimant explained he did not look into what went on at night, because he was sent to collect a parcel at the bus station that morning. He explained that the bus did not arrive until midday on 15<sup>th</sup> November 2016.

15. He only reported about the missing Truck, to Respondent's Management, at 3.45 p.m. Dismissal was on the ground that the Claimant ignored his primary responsibility of supervising transport, and went to pick a parcel. He did not bring it immediately to the attention of Management that the Truck, with the container was missing. The Truck was found later, with all the medical supplies in the container missing.

16. The Claimant was suspended. He was issued letter to show cause thereafter. He was invited to a disciplinary hearing. He was heard in the company of a workmate of his choice. Zainab chaired the disciplinary panel. The Claimant gave his account as captured in the minutes of the meeting on record. He was found negligent and summarily dismissed.

17. The Claimant was given an opportunity to appeal. He appealed. He alleged that when he was at the bus station waiting for the parcel, he fell ill and sought medical attention at Pandya Hospital. The allegation was investigated. The Respondent did not find any evidence of illness

or visit to any Hospital.

18. Cross-examined, Learned Counsel Zainab, testified she deals with legal business at the Respondent. She was not there when the Truck went missing. The Driver named Obonyo, was arrested over the incident. The Claimant looked for the Truck physically. He did not find it. He only reported the loss to Management at 3.45 p.m. It was not wrong for the Claimant to visit the bus station. The Respondent did not imply that the Claimant was a thief. He was arrested but not charged. He was not dismissed for theft. The Respondent investigated and found that the Claimant did not visit Pandya Hospital. Redirected, Zainab told the Court she got her information on the incident from the employment records.

**The Court Finds:-**

19. It is not contested that the Claimant was employed by the Respondent, on 29<sup>th</sup> November 2011. His contract of even date is exhibited. He held the position of Transport Supervisor. He was suspended on 17<sup>th</sup> November 2016 for 7 days, to enable the Respondent conduct investigations, after its Truck, carrying a container loaded with medicines, went missing on 15<sup>th</sup> November 2016. The Claimant was invited for disciplinary hearing, which he attended in the company of his workmate. He was heard, and a decision to dismiss him made. He appealed and the decision was upheld. He testified he was paid pension. **The prayer for pension at Kshs. 301,168, under paragraph 14 [d] of the Statement of Claim shall therefore be treated as withdrawn.**

20. On the night of 14<sup>th</sup>/15<sup>th</sup> November 2016, a Truck belonging to the Respondent, loaded with a container full of medicines, driven by Respondent's Driver Horace Obonyo, went missing.

21. The Claimant, whose role included monitoring and control of transport activities and to address any problems within his area of operation, reported for duty at 8.00 on 15<sup>th</sup> November 2016.

22. Without ascertaining the physical availability of the Truck driven by Obonyo that night, the Claimant assigned the Truck to a day shift Driver Yusuf Bawa.

23. He then left the workplace, to pick a parcel at Coast Bus station. He was there from around 8.00 a.m. to 12.30 o'clock. He was not able to say during the disciplinary hearing, why Respondent's Messenger, who was seized of a motorcycle, could not pick the parcel.

24. During the Claimant's absence, or detour at the bus station, the Truck was drained of its contents- medicines which must have been destined to some patients, somewhere in the country. The medicines were probably diverted to the burgeoning black market.

25. Bawa reported to the Claimant that he was not able to find the Truck assigned to him, driven by Obonyo the previous night. Report was made at midday.

26. The Claimant did not bring the incident to the attention of the Management, until 3.45 p.m. The Claimant acknowledged at the disciplinary hearing that Respondent's Trucks had tracking devices. He stated at page 4 of the minutes, that he did not utilize the tracking device in searching for the Truck.

27. He told the Court he went physically searching for the Truck, before informing Management. He failed to explain to the disciplinary panel, why he avoided use of the tracking device, and opted for physical search. The workmate chosen by the Claimant to accompany him to the disciplinary hearing, appears to have agreed with the rest of the panel that, the Claimant was aware the Trucks were fixed with tracking devices and ought to have consulted tracking personnel, to immediately trace the Truck. This is a significant view, expressed by the Claimant's own representative at the disciplinary hearing.

28. The Claimant in the end was dismissed for gross negligence rather than stealing. The Court would agree with the Respondent that the Claimant acted negligently. He did not justify his suspicious trip to Coast bus to pick a parcel while there was a Messenger assigned that role. He did not justify his prolonged stay at the bus station. He did not in particular explain his delay in informing Management about the loss. He failed to explain why the tracking device was not immediately put to use, in tracing the Truck. He had a clear job description. He did not act in accordance with the demands of his supervisory role. During his period of inactivity, medicines were lost, and the Respondent exposed to material and reputational damage.

**29. Termination was justified under Section 44[4] [c] of the Employment Act, read with Sections 43 and 45 of the Act.**

30. The procedure was well documented, and its fairness cannot be faulted. The Respondent took time to investigate. The Claimant was called upon to show cause, why he should not be disciplined. He was suspended. He was presented specific charges. He was invited to the disciplinary hearing in writing. He was heard in the company of a workmate of his choice. His representations and those of his workmate, were given consideration. A decision was made to dismiss the Claimant with clear reasons given in the letter of dismissal. He was given the opportunity to appeal, which he fully utilized. He was heard on appeal. **Procedure was fair in accordance with Sections 41 and 45 of the Employment Act.** The Respondent must be lauded for carrying out a model, fair termination process.

**31. The prayers for notice and compensation, under paragraph 14 [a] and [b] of the Statement of Claim, are declined.**

32. The Claimant's contract, clause 4, regulated his hours of work. It states that the Claimant could be called to work reasonable hours, outside the standard working hours. The consolidated salary for his post, the contract states, included an allowance to cover these hours of work. The Claimant has no reason to seek overtime pay, in light of clause 4 of his contract. **Prayer 14 [c] of the Statement of Claim, on overtime pay, is rejected.**

33. The contract does not have a clause on retirement age. It is not clear from which contract, policy, or law, the Claimant adopts 60 years as his expected age of retirement. Even if he was to validly retire at the age of 60, and was unfairly dismissed before retirement, there would be no factual or legal ground to warrant payment of salary to the age of retirement. His recourse for unfair termination would be in compensation. He has been paid pension. He would not merit salary to the age of retirement, even had he convinced the Court that there was an age of retirement applicable under his terms and conditions of employment, and shown that he was unfairly dismissed.

**IT IS ORDERED:-**

*a. The Claim is dismissed.*

*b. No order on the costs.*

**Dated and delivered at Mombasa this 7<sup>th</sup> day of February 2020.**

**James Rika**

**Judge**