



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 657 OF 2015**

**SHADRACK MWANIKI MUSYOKA.....CLAIMANT**

**v**

**ECART SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

1. Shadrack Mwaniki Musyoka (Claimant) was offered employment as Head of Fleet by Ecart Services Kenya Ltd (Respondent) through a contract dated 20 November 2014. The contract was subject to three-month probation.
2. Around 16 December 2014, the Respondent's Managing Director sent an email to the Human Resources Manager instructing her to start the process of searching for a replacement for the Claimant.
3. In a response on the same day, the Human Resources Manager sought for the reasons for the contemplated decision to replace the Claimant. The Managing Director gave the reasons as performance-related.
4. On 23 December 2014, the Managing Director sent another email to the Human Resources Manager to give an update on the Claimant's replacement.
5. On 25 February 2015, after an annual performance review for 2014, the Respondent appointed the Claimant to the position of Pick-Up Manager.
6. The Claimant did not last long as Pick-Up Manager, for on 17 March 2015, the Head of Human Resources wrote to him to notify him of the termination of his contract.
7. The reason(s) given for the decision was *errors in creation of runs and overwriting the same*.
8. The Claimant moved the Court on 22 April 2015 alleging unfair termination of employment.
9. The Respondent filed a *Response* on 26 May 2015 and the Cause was heard on 4 June 2019 and on 2 December 2019.
10. The Claimant, the Respondent's Human Resources Manager and IT Manager testified.
11. The Claimant filed his submissions on 16 December 2019 while the Respondent filed its submissions on 29 January 2020.
12. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as identified by the Claimant in his submissions.

**Unfair termination of employment**

**Procedural fairness**

13. The Claimant's contract was subject to probation of three months and the probation was expected to end around 20 February 2015.
14. However, the Respondent did not notify the Claimant whether probation had been extended. Even the letter of 25 February 2015 appointing the Claimant to the new position of Pick-Up Manager did not indicate whether the Claimant had successfully completed

probation.

15. The Respondent's Human Resource Manager stated that the Claimant was put through a disciplinary process by being invited to a hearing.

16. Pressed under cross-examination, the witness indicated that there were email communications attesting to the hearings.

17. The Claimant denied being put through any disciplinary hearing.

18. A disciplinary hearing, in a formal setting, is normally triggered with what is loosely called a *show-cause notice* or letter. The notice informs the employee of contemplated disciplinary action and the allegations to confront and calls upon the employee to respond. If possible or provided for, an oral hearing may be held.

19. The Court has gone through the emails filed by the Respondent. The emails show that Respondent's Managing Director had already made up his mind that the Claimant be dismissed by 16 December 2014 when he gave instructions to find a replacement.

20. By that date, there was no evidence that the Claimant had been informed unequivocally that the termination of his probationary employment was on the cards.

21. The meeting of 16 March 2015, if at all it amounted to a disciplinary hearing was a sham to confirm the intention of the Respondent's Managing Director. And if there was a genuine hearing, not even the names of the person who attended were disclosed. Even minutes were not produced.

### **Substantive fairness**

22. The Respondent was required to discharge the burden imposed on it by sections 43 and 45 of the Employment Act, 2007 to prove that the Claimant was responsible for overruns/overwriting the delivery module system.

23. The Respondent presented an IT Manager to testify on the system.

24. The witness stated that employees who had access to the system had passwords. His evidence was general and did not link the Claimant with any overruns/overwriting of the system. He did not disclose whether the Claimant's electronic footprints were traced to the overruns.

25. The Court concludes that the termination of the Claimant's employment was unfair.

### **Compensation and salary in lieu of notice**

26. The Claimant served the Respondent for about 3 months and the Court is of the view that salary in lieu of notice, rather than compensation would be appropriate (salary was Kshs 150,000/-).

27. The Claimant was offered 1-month salary in lieu of notice and nothing turns on this relief.

### **Accrued leave**

28. Annual leave is a statutory entitlement. The Claimant sought Kshs 43,750/- on account of 8 leave days which he had pending by time of termination of employment.

29. The Respondent did not produce the leave records as envisaged by section 10(3) of the Employment Act, 2007, and the Court will allow this head of the claim.

### **Unlawful deduction from salary**

30. The Claimant alleged that the Respondent deducted Kshs 2,051/- from his salary without any lawful cause.

31. The Respondent contended that the deduction was as a result of losses attributable to the Claimant and particulars were given.

32. The law allows an employer to surcharge an employee for loss for which the employee is responsible.

33. The Court finds the deduction was lawful.

### **Conclusion and Orders**

34. From the foregoing, the Court finds and declares that the termination of employment was unfair.

35. The Claimant is awarded

(a) Salary in lieu of notice	Kshs 150,000/-
(b) Accrued leave	Kshs 43,750/-
<b>TOTAL</b>	<b>Kshs 193,750/-</b>

36. If the Respondent had paid the Claimant salary in lieu of notice, the same to be deducted from the award herein.

37. Claimant to have costs on half scale.

**Delivered, dated and signed in Nairobi on this 2<sup>nd</sup> day of March 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Merichi instructed by Koceyo & Co. Advocates

For Respondent Ms. Muguro instructed by Genevieve Wasonga & Co. Advocates

Court Assistants Lindsey/Judy Maina