



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1354 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**EDWARD ABRAHAM OTOPI.....CLAIMANT**

**VERSUS**

**CREATIVE CONSOLIDATED SYSTEMS LIMITED.....RESPONDENT**

**JUDGMENT**

By his statement of claim dated 30<sup>th</sup> July 2015 and filed on 5<sup>th</sup> August 2015, the claimant avers that the respondent terminated his employment unfairly. He prays for the following orders –

- i. A declaration that the termination of the Claimant’s employment was unfair.
- ii. An order directing the Respondent to pay the claimants the calculated sums as particularised below, with interest at court rates from the date of termination: -
  - a).. One month’s pay in lieu of notice..... Kshs.40,000
  - b).. Compensation for Unfair Dismissal
  - (40,000 x 12 months).....Kshs.480,000
  - Total** **Kshs.520,000**
- iii. An order directing the Respondent to issue a Certificate of Service to the Claimant in compliance with Section 51 of the Employment Act, 2007.
- iv. The costs of the suit with interest thereon at court rates.
- v. Any other relief as the Court would deem just and expedient to grant.

The claimant filed a witness statement together with the statement of claim in which he states that he was employed as a Driver and worked at the respondent’s depot at Kaloleni. The employment was on a one year contract and his salary was Kshs.40,000 per month. He was however never issued with any payslip to show if there were any deductions.

The claimant states that when he reported to work on 4<sup>th</sup> September 2014, he was informed by the Transport Manager, that he (the claimant) had damaged the truck that he was assigned to drive. He was directed to take 3 days leave. When he reported back on 8<sup>th</sup> September 2014 after the compulsory leave he was instructed by the Human Resource Officer to write a report on the state of repair of the truck. He complied and was given a return date. When he returned he was called to a meeting with the Chief Executive Officer and the Human Resource Officer and was thereafter informed that this services were no longer required.

The claimant testified that the lorry in question KBY 339J was driven by two drivers, one in the day and one at night. That he had reported severally to the Transport Manager that the vehicle had problems with the clutch and the complaints were recorded in the Occurrence Book as was the custom.

He states that the other driver was not sanctioned in any manner.

That during the 6 months he worked with the respondent he had not been accused at all of mismanaging the truck and had never been informed of any shortcomings.

He states that he was never issued with any show cause letter prior to termination and was never given an opportunity to defend himself.

The respondent filed a notice of appearance through Mugambi and Kariuki Company Advocates dated 7<sup>th</sup> and filed on 9<sup>th</sup> December 2015. The advocates did not file a defence.

On 24<sup>th</sup> May 2019, Migos Ogamba and Company Advocates filed another notice of appointment by the respondent. No defence was ever filed by the respondent.

At the hearing of the claim on 9<sup>th</sup> October 2019, the claimant adopted his witness statement as his evidence in chief. Under cross examination, he testified that he worked from 6 am to 6 pm., that he had a one year contract which he served for 6 months. He denied that he was ever drunk while on duty and stated he does not take alcohol at all. He further denied that the lorry he was driving which was of make MAN, had been hit severally.

The claimant testified that he was given leave of 7 days and then called to explain why the vehicle was damaged which he did. After explaining he was informed that his services were no longer required. That he was not issued with a letter of termination or given an opportunity to ask for the letter.

Under re-examination the claimant testified that there were two drivers for the lorry, one for the day and the other for the night. That he could not recall the name of the other driver who was new but was aware no disciplinary action was taken against the said driver.

The respondent having not filed any defence, did not call any witness.

### **Submissions**

Both parties filed written submissions. In the claimant's submissions, he reiterates the evidence and prayers.

For the respondent it is submitted that the claimant is only entitled to one month's salary as was held in the case of **Peter Wesonga Opaka v Hilltop Preparatory Schools and Another (2019) eKLR**.

On the issue of unfair termination, the respondent relied on the case of **Dede Esi Annie Amanor Wilks v Action Aid International (2014) eKLR** where the court observed that employers are entitled to have harmonious working relationship with their employees and are at liberty to weed out trouble makers, eccentrics and disruptive employees. That incompatibility is the inability on the part of the employee to work in harmony with other employees or fit in the employer's corporate culture.

The respondent submitted that the claimant reported to work intoxicated and on several occasions was reported by members of the public to be a reckless driver. That the lorry the claimant drove recklessly (KBY 339J) was written off and this was the cause of the termination of his employment.

### **Determination**

The claim herein is undefended as the respondent did not file a defence or call a witness at the hearing. The factual averments made in the submissions of the respondent about the claimant reporting to work late or driving recklessly and grounding the lorry he was driving; have no evidentiary value as they do not constitute evidence. Refer to **Fibre Link Limited v Start Television Productions Limited (2015) eKLR**, **Efil Enterprises Limited v Dickson Mathambayo Kilonzo (2018) eKLR** and **Beatrice Mbula Mutilu and 2 Others (2019) eKLR**.

The claim being undefended, the averments of the claimant that his employment was terminated without a show cause letter, a hearing or a letter of termination are uncontroverted and the court must assume that they form the factual position. This being the case, it is evident that the respondent did not comply with the requirements of Section 41 of the Employment Act or Section 43 on substantive fairness by proof of grounds for termination of employment. The termination of the claimant's employment was therefore unfair.

### **Remedies**

The claimant prayed for one month's salary in lieu of notice which he is entitled to by virtue of Section 49(1)(a) and I accordingly award him the same in the sum of **Kshs.40,000**.

The claimant further prayed for 12 months' salary as compensation. Taking into account that he had only worked for 6 months and also taking into account all the circumstances of his case including the manner in which his employment was terminated, I award him 2 months' salary as compensation in the sum of **Kshs.80,000**.

**The total award is thus Kshs.120,000.**

The respondent is further directed to issue to the claimant a certificate of service in compliance with Section 51 of the Employment Act as

prayed.

The respondent shall pay the claimant's costs of the claim and the decretal sum shall accrue interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**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, the 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 the 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.

**MAUREEN ONYANGO**

**JUDGE**