



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 131 OF 2016**

**BETWEEN**

**HAMISI MZEE.....CLAIMANT**

**VERSUS**

**SIMZIA KENYA LIMITED.....RESPONDENT**

Rika J

Court Assistant: Andrew Mwabanga

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Oyugi Kitoo & Company Advocates for the Claimant

Oloo & Chatur, Advocates for the Respondent

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 16<sup>th</sup> February 2016. He states, he was employed by the Respondent as a Driver, in April 2012. His salary was Kshs. 25,000 monthly. He never went on annual leave. He was involved in a road traffic accident while driving back to Mombasa from Kampala, Uganda on 22<sup>nd</sup> August 2015. He lost his right arm, causing him permanent disablement.

2. The Respondent thereafter terminated the Claimant's contract, without notice and reason. He prays the Court to declare that termination was unfair, and order the Respondent to pay him: notice at Kshs. 25,000; annual leave over a period of 3 years at Kshs. 52,500; service over a period of 3 years at Kshs. 37,500; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 300,000 – total Kshs. 415,000. He prays also for Certificate of Service to issue, costs, interest and any other suitable relief.

3. The Respondent filed its Statement of Response on 9<sup>th</sup> March 2016. Its position is that the Claimant was engaged on casual basis. He was not paid a monthly salary of Kshs. 25,000. He was paid on the basis of availability of work. He was not entitled to annual leave. He was involved in a traffic accident while driving back from Kampala. He drove contrary to express workplace rules and regulations by: driving in the darkness after the set hours; carrying unauthorized passenger, Vincent Odhiambo Osalo, who was also injured in the accident; and illegally transporting a consignment of maize in the vehicle, without authority. Police found the Claimant responsible for the accident. The Respondent found him to have engaged in an act of gross misconduct, under Section 44 [4] of the Employment Act 2007. The Respondent suffered loss as a result of the accident, and is exposed to third party claims.

4. The Respondent states, it acted in good faith, by taking care of part of the Claimant's medical expenses, and by promising to reengage the Claimant, once he was healed. The Claimant rebuffed the offer, opting instead, to pursue this litigation. The Respondent urges the Court to dismiss the Claim with costs.

5. The Claimant gave evidence and rested his case, on 15<sup>th</sup> October 2019. Operations Manager, Oscar Kimatu Musee, gave evidence on 9<sup>th</sup> October 2020, closing the hearing.

6. The Claimant told the Court, he is presently unemployed. He adopted as his oral evidence, the contents of his Statements of Claim and

Witness, on record. He was not to blame for the accident. A front tyre burst, causing the accident. The Respondent terminated his contract for no valid reason, and without notice. Cross-examined, the Claimant told the Court that he was employed in April 2012. He worked in continuity. He did not leave immediately after the accident. He was recuperating for about 5 months. He did not get his salary for this period. He went to ask for it after about 6 months. He did not get it, and went back home. There were no complaints against the Claimant communicated by the Respondent. He was not told that he had carried unauthorized passengers. Redirected, he told the Court that he was not paid any salary or other benefits from the date he was injured. He was told by the Respondent to keep off the workplace.

7. Musee told the Court that the Claimant worked on casual basis initially, but was regularized later. He had an accident at Nakuru, while driving from Kampala to Mombasa. He was advised to seek treatment. He came after 1 month and was advised to be reporting at Respondent's yard for light duty. His hand was injured. He did not report. He was carrying 2 unauthorized passengers at the time the accident occurred. Cross-examined, Musee restated that the Claimant was initially in casual employment. He was not charged with a traffic offence after the accident. Police Abstract Form indicates PUI- pending under investigation. The Claimant did not leave employment on account of gross misconduct.

**The Court Finds: -**

8. The Claimant was employed by the Respondent as a Driver in April 2012. He was, on 22<sup>nd</sup> August 2015, involved in an accident, while driving back from Kampala in Uganda, to his workplace in Mombasa. He was seriously injured, losing an arm, resulting in permanent disablement. His salary was Kshs. 25,000.

9. There is nothing from the evidence of the Parties, to conclude that the Claimant was in casual, rather than regular employment, for the period worked between April 2012 and August 2015. The Claimant worked as a Driver, transporting goods for the Respondent, a role which was core to the business carried out by the Respondent. In the Port Movement / Access Card Application Form, the Respondent acknowledges that the Claimant was its Employee. His job description is given as a 'Driver.' Port access was sought to enable the Claimant perform official duty. The Court does not think that the Respondent would be applying for access to the Port on behalf of an Employee engaged for 24 hours. This was an Employee recruited to perform a regular and core function, in Respondent's business. The Respondent's Witness told the Court that the Claimant was initially in casual employment, without saying, when the Claimant was regularized. It is safe to conclude that the Claimant was a regular Employee, from 2012 to 2015.

10. It is agreed that after the Claimant was injured, he did not work again for the Respondent. It is not possible that he would continue driving, while deprived the use of one arm. The Respondent states it offered the Claimant light duties at its yard, but the Claimant did not take up the light duties. The Claimant states he was told he could not continue working with the Respondent, and was denied his salary for about 5 months he was out recuperating.

11. The Court's impression is that the Claimant was injured while in the course of his employment. The Respondent did not establish that it made effort at reasonably accommodating the Claimant, by adjusting his duties. There is no evidence that the Claimant was invited and declined to take up light duties. The Respondent appears to have laid the blame for the accident on the Claimant. It is the position of the Respondent that the Claimant acted in breach of traffic laws as well as workplace regulations. The Claimant holds that the front tyre of Respondent's vehicle burst, causing the accident.

12. There is no record of investigation report of the accident, made by the Respondent, which was exhibited in Court. There was no internal process, establishing the allegations of negligence made by the Respondent against the Claimant. The external investigation was carried out by the Police. The abstract exhibited from the Police before the Court, indicates no conclusive report was made about the accident. What was presented before the Court was a report saying " PUI," police lingo for "pending under investigation." There is no process, internal or external, which would support the allegations made against the Claimant by the Respondent, that the Claimant was to blame for the accident at Nakuru.

13. The accident appears to have been the reason, in the mind of the Respondent, which justified termination. Although not conceding that it terminated Claimant's contract, the Respondent specifically slams the Claimant for careless driving, which it alleges, caused the accident, resulting in loss to the Respondent and exposure to lawsuits from third parties. The accident was the tacit reason the Respondent terminated the Claimant's contract.

14. It was as suggested above, unproven reason and therefore an invalid reason, under Section 43 of the Employment Act 2007. The Claimant was not subjected to disciplinary proceedings. He was advised to keep away. Termination was at the instance of the Respondent. It was unfair, lacking in substantive justification, as well as procedural fairness, under Section 41 and 45 of the Employment Act.

15. The Claimant was in employment for 3 years, and about 4 months, from April 2012 to August 2015. There is nothing on record to suggest he was a poor performer. He was injured, and lost his job owing to the resultant disablement. The Respondent did not reasonably accommodate him after the accident, or hear him out before terminating his contract.

**16. He is allowed compensation for unfair termination, equivalent of his 10 months' salary at Kshs. 250,000.**

**17. He is granted the prayer for notice, equivalent of 1- month salary at Kshs. 25,000.**

18. The Respondent did not make an attempt to show that the Claimant utilized his annual leave entitlement. The Respondent was content to say that the Claimant was in casual employment, a position that the Court has not endorsed. No leave records were availed to the Court, to discount the oral evidence of the Claimant on unpaid leave. **The prayer for annual leave is allowed over a period of 3 years, at statutory minimum of 21 days annually, totalling 63 days x [Kshs. 25,000 divide by 26 working days] = Kshs. 60,576.**

19. Similarly, the Respondent did not subscribe the Claimant to N.S.S.F or other Social Security regimes, on the ground that the Respondent

considered the Claimant to be in casual employment. According to the Respondent, because the Claimant was in casual employment, he did not deserve statutory protections and guarantees, due to a regular Employee. Having concluded that the Claimant was in regular employment, and in the absence of evidence of active subscription to N.S.S.F, ***the Court allows the prayer for service, at 15 days' salary for each of the 3 complete years of service, under Section 35 [5] of the Employment Act, at Kshs. 43,269.***

**20. Certificate of Service to issue.**

**21. Costs to the Claimant.**

**22. No order on the interest.**

**IN SUM, IT IS ORDERED: -**

**a. It is declared that termination was unfair.**

**b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent of 10 months' salary at Kshs. 250,000; notice at Kshs. 25,000; annual leave at Kshs. 60,576; and service at Kshs. 43,269 - total Kshs. 378,845.**

**c. Certificate of Service to issue.**

**d. Costs to the Claimant.**

**e. No order on the interest.**

**Dated and delivered at Mombasa this 5<sup>th</sup> day of November, 2020**

**James Rika**

**Judge**