



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO 601 OF 2017**  
**THOMAS NGII NDUNGANI.....CLAIMANT**  
**VS**  
**DIKUS TRANSPORTERS LIMITED.....RESPONDENT**  
**JUDGMENT**

**Introduction**

1. This claim is brought by Thomas Ngii Ndungani against his former employer, Dikus Transporters Limited. The claim is documented by a Memorandum of Claim dated 18<sup>th</sup> July 2017 and amended on 18<sup>th</sup> October 2017. The Respondent filed a Memorandum of Response and Counterclaim on 18<sup>th</sup> December 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Managing Director, Diba Boru. The parties further filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a long distance commercial truck driver from March 2010 until 6<sup>th</sup> October 2015 when his employment was terminated. At the time of leaving the Respondent’s employment, the Claimant earned a monthly salary of Kshs. 25,000.

4. The Claimant states that the termination of his employment was unjustifiable and in violation of due procedure. He adds that throughout his employment period, he never went on leave. He therefore claims leave pay. Additionally, the Claimant claims house allowance and service pay.

5. The Claimant avers that in the course of his employment he was forced to work an average of three extra hours throughout the week without any compensation.

6. The Claimant’s detailed claim is as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 25,000.00
- b) Service pay.....125,000.00
- c) Leave pay for 5 years and 7 months.....97,500.00

- d) House allowance for 5 years and 7 months.....251,250.00
- e) 12 months' salary in compensation.....300,000.00
- f) Unpaid dues for October 2015 (6 days).....5,000.00
- g) Cumulative overtime (weekdays).....513,812.25
- h) Cumulative overtime (weekends).....411,049.80
- i) Certificate of service
- j) NSSF, NHIF and PAYE dues
- k) Punitive damages
- l) Costs plus interest

### **The Respondent's Case**

7. In its Memorandum of Response and Counterclaim dated 8<sup>th</sup> December 2017 and filed in court on 18<sup>th</sup> December 2017, the Respondent denies having employed the Claimant from March 2010.

8. The Respondent states that the Claimant's employment was terminated on account of gross misconduct particulars being that the Claimant switched off/disconnected the OBC gadget fitted in the truck assigned to him. The Respondent further states that tests carried out at the Kenol Kobil depot confirmed that the Claimant's PMS loaded truck was contaminated with kerosene. The product did not pass validation and verification and the customer rejected it.

9. The Respondent avers that the Claimant siphoned the product and contaminated it by topping up with kerosene. The Respondent thus suffered damage including loss of business and risk of being delicensed.

10. By way of counterclaim, the Respondent claims to have suffered loss and damage as a result of the Claimant's theft and/or criminal activities. The Respondent therefore claims the following from the Claimant:

- a) Kshs. 3,000,000 being cost of PMS
- b) Kshs. 1,000,000 being penalty imposed by the customer
- c) Cost of disposing of the contaminated product
- d) Damages for loss of business due to suspension for 3 months
- e) Injury to reputation

### **Findings and Determination**

11. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

## The Termination

12. The Claimant's employment was terminated by letter dated 6<sup>th</sup> October 2015 stating thus:

*"Dear Sir,*

***REF: TERMINATION OF EMPLOYMENT***

*The above subject matter refers.*

*Subsequent to your request for employment and the interview conducted, you were considered for the position of driver.*

*The management regrets your conduct while on duty and as you well know, OBC disconnection is totally unacceptable as per the company policy and punishable by termination. On 22<sup>nd</sup> September 2015, you drove your truck at night while the OBC gadget was disconnected. Furthermore, your PMS-loaded truck was tested on 29<sup>th</sup> September 2015 at the depot and found to be contaminated.*

*Please Note with reference to the company policies and procedure, the above cannot be condoned at any given time and hence, we are left with no option than to dispense your (sic) services effective the date therein.*

*Kindly sign below to acknowledge receipt of this letter and thereafter proceed to handover any company properties in your possession.*

*Yours Faithfully,*

*(Signed)*

*Mr. Diba Boru*

*Managing Director"*

13. This letter accuses the Claimant of several acts of misconduct ranging from disconnecting an On Board Computer (OBC) tracking and monitoring unit to adulteration of petroleum product. These charges fall within the category of gross misconduct which renders an employee liable to summary dismissal. Gross misconduct must however be proved on a balance of probability as required by Section 43 of the Employment Act.

14. I find it necessary at this stage to reiterate that the burden placed on the employer by Section 43 is to demonstrate a valid reason for bringing the employment relationship to an end and this must be done at the shop floor (see *Feroz Ali Omar v ECU Worldwide Limited [2018] eKLR* and *Ronald Nyambu Daudi v Tornado Carriers [2019] eKLR*).

15. This is borne out of the general tendency by employers to send their employees away without establishing a proper reason only to turn up in court with a myriad of reasons and tonnes of documentation as to why employment was terminated. If this Court were to accept this trend, it would be converting itself into a disciplinary committee thus usurping the employer's prerogative.

16. In the same way an employee is not at liberty to refuse to participate in an internal disciplinary process, an employer will not get away with a shoddy process. Both the employee and the employer must give their best at the shop floor because when they come to court, it is for review of the processes at that level. This is the essence of the procedural fairness requirements set out under Section 41 of the Employment Act.

17. That settled, in the case now before me, the Respondent made very serious allegations against the Claimant ranging from tampering with a motor vehicle tracking system to adulterating petroleum product under his care. However, the Court did not find any evidence that any of these charges were placed before the Claimant for his response.

18. The Respondent's Managing Director, Diba Boru told the Court that the Respondent conducted its own internal investigations and an incident report implicating the Claimant was filed. It would appear however that the Claimant was not involved in the said investigations and was thus denied an opportunity to be heard as dictated by Section 41 of the Employment Act as well as the Respondent's own Disciplinary Policy.

19. The Court therefore finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

20. In light of the foregoing findings I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's failure to accord him a fair hearing. I further award the Claimant one (1) month's salary in lieu of notice.

21. In opposing the Claimant's claim for leave pay, the Respondent produced a leave form with material alterations that were not explained. The Court was therefore unable to verify the authenticity of the said document and assigned nil probative value to it. The result is that the Claimant's claim that he never went on leave was unassailed and I therefore allow his claim for leave pay.

22. The Claimant also claims house allowance. Section 31 (1) and (2) of the Employment Act provides as follows:

***31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in Paragraph (a).***

23. According to an appointment letter dated 1<sup>st</sup> March 2010 which was produced by the Respondent, the Claimant earned a monthly basic salary of Kshs. 25,000 with no component for house allowance. I therefore allow the claim for house allowance at 15% of the basic salary and adopt the resultant figure of Kshs. 28,750 as the Claimant's monthly salary for purposes of this claim.

24. There was no evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF). The claim for service pay therefore succeeds and is allowed. The claim for 6 days in October 2015 is admitted and is payable.

25. The claim for overtime compensation was not proved and is dismissed. No basis was laid for the claims for punitive damages, NHIF and PAYE dues which therefore fail and are dismissed.

### **The Respondent's Counterclaim**

26. In its counterclaim the Respondents seeks the following from the Claimant:

- a) Kshs. 3,000,000 being cost of PMS;
- b) Kshs. 1,000,000 being penalty imposed by the customer;
- c) Cost of disposing of the contaminated product;
- d) Damages for loss of business due to suspension for 3 months;
- e) Injury to reputation.

27. In light of the finding that none of the allegations made against the Claimant were proved, the Respondent's counterclaim, which is premised on these allegations, has no leg to stand on and is rejected.

### **Final Orders**

28. In the end, I enter judgment in favour of the Claimant and against the Respondent as follows:

- a) 8 months' salary in compensation.....Kshs. 230,000
- b) 1 month's salary in lieu of notice.....28,750
- c) Leave pay for 5 years  $(28,750/30 \times 21 \times 5)$ .....100,625
- d) Prorata leave for 6 months  $(28,750/30 \times 1.75 \times 6)$ .....10,062
- e) House allowance for 66 months  $(3,750 \times 66)$ .....247,500
- f) Service pay for 5 years @ 15 days' pay per year.....71,875
- g) Salary for 6 days in October 2015.....5,750
- Total.....694,562**

29. This amount will attract interest at court rates from the date of judgment until payment in full.

30. The Claimant will have the costs of the case.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF APRIL 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Lutta for the Claimant

Mrs. Abdi for the Respondent