



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 266 OF 2016**

**MOSES NYAGA NKABU.....CLAIMANT**

**VERSUS**

**GULSAN INSAAT SANAYI TURIZM NAKLIYAT**

**VE TICARET ANONIM SIRKETI CO. LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant's suit against the Respondent is for an issue he framed as the unlawful and wrongful dismissal of the Claimant from employment and failure of the Respondent to pay terminal dues or reinstate him to employment. The Claimant averred that at all material times to the suit he was an employee of the Respondent as a driver. He averred that he was accused of stealing fuel and he denied stealing any fuel. He was dismissed on 15<sup>th</sup> May 2015 without pay. He thus sought an order declaring the termination as wrongful, an order for payment of damages for wrongful dismissal and terminal benefits as well as costs of the suit.

2. The Respondent asserts that the Claimant had been assigned a tipper number DT 31 and that the truck was fuelled with 216 litres to make it full tank as it had 134 litres. The Respondent states that the truck made 5 trips of 12 kilometres each and that for this the consumption was 36 litres for the 60km travelled. The Respondent asserts that five 20 litre jerrycans with 100 litres of fuel were found hidden in the culvert where the Claimant was working. The Respondent avers that the fuel clerk was called to check the fuel in the tipper and he found that the truck had 210 litres meaning that for the journeys made the Claimant had used 140 litres instead of 36 litres. The Respondent asserts that the Claimant was asked to explain how the truck had consumed so much fuel and he could not and he was also asked to explain how the 100 litres equivalent to the diesel missing from his truck found its way in the culvert. He could not explain the discrepancy he was dismissed and was to collect his dues. The Respondent asserts the dismissal was substantively and procedurally fair and that the Claimant was not entitled to any relief as the claim was an abuse of the court process.

3. The Claimant testified that he was a lorry driver from Tharaka Nithi. He stated that he had worked for the Respondent for 15 months before his summary dismissal on 14<sup>th</sup> May 2015 on allegations that he had hidden fuel in the culvert. He stated that he denied having taken the fuel and despite the Respondent calling the Administration Police (AP) to investigate no charges were preferred. He thus sought the award of his claim. The Respondent did not attend the hearing despite invitation to do so.

4. The Claimant submitted that he was unfairly dismissed and that despite filing an elaborate defence the Respondent had failed to lead evidence leaving his testimony uncontroverted. He thus sought the grant of relief as per his claim being the compensation and the terminal dues plus costs of the suit plus interest.

5. The Claimant was dismissed for allegedly siphoning fuel. This is conduct that would entitle an employer to dismiss an employee summarily. Prior to dismissal however, an employer has to give an employee the safeguards of Section 41 of the Employment Act. Section 41 in the pertinent parts provides as follows:-

*41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

Section 41 of the Employment Act provides for fair procedure while Section 43 provides for proof of reason for termination. Section 43 provides as follows:-

43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

6. It is not in doubt that an employer has the statutory right to dismiss an employee by summary action under the provisions of section 44 of the Employment Act as was done in this case. Such summary action must of necessity follow a fundamental breach of the contract of employment or involving gross misconduct. The employer is however required to abide by the procedural requirements of the law set out under section 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to a hearing as held in the case of **Titus Musau Ndivau & Another v Waridi Limited [2012] eKLR**, where Ongaya J. held that upon misconduct being reported the employer must make an enquiry into the matter and allow the employee to show cause why employment should not be terminated and ensure the employee is given a hearing under the provisions of section 41 of the Act. In the instant case the Claimant was neither issued with a notice to show cause nor accorded a hearing before termination. It is also clear from the evidence adduced in court that the Respondent failed to provide justification for the dismissal in terms of Section 43 of the Act. In my view, whereas there may have been grounds for dismissal the dismissal was effected contrary to the law. The Claimant is entitled to recover as follows:-

- i. One month's salary in lieu of notice – Kshs. 22,425/-
- ii. 6 months salary as compensation – Kshs. 134,550/-
- iii. Costs of the suit
- iv. Interest on i) and ii) above at court rates from date of judgment till payment in full.
- v. Sums i) and ii) subject to statutory deduction per Section 49 of the Act.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**