



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 676 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 28<sup>th</sup> May, 2019)

**LUKE MUTHENGI KASONI.....CLAIMANT**

**VERSUS**

**ADIX PLASTICS LIMITED .....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 23<sup>rd</sup> April, 2015 seeking damages for unfair termination and payment of terminal dues.
2. He avers that he was employed by the Respondent on 1<sup>st</sup> January, 2014 as a Driver where he worked continuously with due diligence and to the satisfaction of the Respondent until 23<sup>rd</sup> March, 2015, when he reported for duty as usual and was about to log in for work but was not allowed to. That later on he was instructed by the Director one Mr. Hardick to sign a 24 hour notice of termination which he refused to do as in his view the termination was unwarranted. He was immediately thereafter ordered to leave the Respondent's premises.
3. That the decision to terminate the Claimant was unfair and unlawful as due process was not adhered to and he was neither given sufficient notice of dismissal. He prays for the Claim to be allowed.
4. The Respondent filed a Response to the Memorandum of Claim wherein they admit the employment relationship and state that during the course of the Claimant's employment, he failed to conduct himself within the precincts of his contract and the dictates of statute. That the Claimant's employment was characterised by insubordination and a gross and reckless disregard of his duties.
5. The Respondent aver that the Claimant absconded from duty without just cause thus violating the express terms of his contract of employment and the Employment Act in particular Section 44 thereof. That in the circumstances the Claimant was never dismissed/terminated within the meaning of section 35 of the Act or at all.
6. They further aver that the Claimant was required by way of a Notice to Show Cause to appear and confirm why he had absconded duty and had failed to carry out his duties which the Claimant failed to honour. The Respondent aver that all sums due to the Claimant including his monthly wage and any outstanding leave days have been settled in full. That the Claim for service pay has no statutory underpinning as the Claimant was a member of a registered pension or provident fund scheme at the time of his employment. The Respondent urge the Court to dismiss the claim with costs.

**Evidence**

7. In evidence he stated that he was employed by the Respondent in January 2014 as a truck driver at a salary of Kshs. 6625/= . He stated that on 19<sup>th</sup> March, 2015, he left to go to the field in Kisii, Homabay and Migori to deliver plastic goods. That he stayed there for 3 days and returned on Saturday at 4.30pm when he returned the vehicle to the Company and then proceeded to go home.
8. That when he reported to work on Monday, 23<sup>rd</sup> March, 2015, he tried to clock in but he was informed by the guard not to do so and wait for the boss. He waited for 20 minutes when he was called by the branch manager who gave him a letter written "24 hours' notice" which he refused to sign. The said letter gave him 24 hours' notice of termination on grounds that his vehicle was consuming a lot of fuel than others. Another reason contained in the termination letter was that he threatened a receptionist and stayed in Mai Mahiu for 45 minutes. He was then terminated and paid Kshs. 12,000 on his phone. He denied absconding duty and urged the Court to allow the Claim.
9. In cross-examination, he denied receiving any warning letter and being issued with a show cause letter. That he was terminated and he did

not abscond duty. He however admitted being a member of NSSF.

10. The Respondent put up one witness one Anna Maragia who stated that the Claimant's conduct was not good because he kept asking for more fuel all the time and was at logger heads with other staff. That the Claimant was issued with a show cause letter dated 16<sup>th</sup> March, 2015.

11. That the Claimant was sent to Bungoma to deliver goods and was expected back on 18<sup>th</sup> March, 2015 but he arrived on 19<sup>th</sup> March, 2015. That he was in Mai Mahiu on 18<sup>th</sup> March where he decided to sleep over and he was given a show cause letter on the issue dated 21<sup>st</sup> March, 2015 which he was expected to respond to within 2 days.

12. That the Claimant refused to acknowledge receipt of the notice which led the Respondent to send the letter through registered post. That from that time he never returned to the Respondent's premises. They paid him his March 2015 salary and all his dues.

13. In cross-examination, RW1 admitted that the Claimant was never given any warning letter over the reason of always asking for more fuel. RW1 also stated that they never issued the Claimant with any termination letter.

### **Submissions**

14. It is submitted on behalf of the Claimant that he was unfairly terminated as the Notice to Show Cause dated 21<sup>st</sup> March, 2015, was not a termination notice as envisaged under the Employment Act. That the said document only lay allegations levelled against the Claimant and demanding that he replies within 2 days. That no disciplinary hearing was set for the Claimant to defend himself.

15. That the importance of giving a notice was underscored in the case of **Alex Muriuki Bundi vs Kakuzi Limited (2012)eKLR** where Odunga J cited a publication of the ILO during its 82<sup>nd</sup> session of 1995, titled "protection against unjustified dismissal" where the committee of experts in their report at paragraph 247 page 92 stated as follows:-

***"The purpose of the period of notice is to mitigate the consequences of termination of employment, and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice; the worker must therefore be entitled to compensation in lieu of notice. Such compensation should correspond to the remuneration the worker would have received during the period of notice if it had been observed."***

16. That Section 41 of the Employment Act is couched in mandatory terms and they aver that the Notice to Show Cause dated 21.3.2015 was done by the Respondent to satisfy a requirement of notification but in actual sense it did not meet the test and thus no termination notice exists in the instant case.

17. That the mandatory procedure set out under Section 45(1) was not followed and thus the termination of the Claimant was unlawful and unfair and the Court should so order. In consequence of the unlawful termination, the Claimant urges the Court to allow the compensation and terminal dues prayed for in the Memorandum of Claim.

### **Respondent's submissions**

18. It is submitted that the Claimant was given a chance to be heard under section 41(2) of the Employment Act but he chose not to take it up. Further that the statutory burden to prove unfair termination from employment is on the Claimant as set out in Section 47(5) of the Employment Act while the burden of justifying the grounds of wrongful dismissal rests on the employer. That the Claimant has not discharged the burden of proving unfair termination and therefore the Claim should be dismissed with costs.

19. The Claimant submits that it is now settled law that absence from work for ten days without permission entitles an employer to summarily dismiss an employee from work as provided under section 44(4) of the Employment Act. That the Claimant acknowledged in evidence that he received the Notice to Show Cause dated 21.3.2015 and that he did not respond to the same.

20. That the Claimant refused to present himself to the procedures available to him and thus the Claim should be dismissed. Further that the Claimant did not resign and thus constructive dismissal does not apply in the circumstances.

21. On remedies sought it is submitted that the Claimant received the salary for 2015 which fact is demonstrated in the Respondent's list of documents and thus this prayer should fail.

22. That the Claimant was not terminated from employment and therefore payment in lieu of notice does not apply.

23. On service pay, it is submitted that the Claimant admitted being a member of NSSF and his dues were remitted by the respondent and as such the claim should fail.

24. That the Claimant voluntarily absconded from duty and did not present himself to renew the contract upon expiry. In lieu of this, the claim for damages for unfair dismissal/termination should fail.

25. I have considered all the evidence and submissions of both parties. The issues for determination by Court are as follows:-

#### ***1. Whether the Claimant was dismissed or he absconded duty.***

**2. If the Claimant was dismissed before the dismissal and if the Claimant had valid reasons for the same.**

**3. Whether the Claimant is entitled to the remedies sought.**

26. On the 1<sup>st</sup> issue, the Respondent aver that the Claimant absconded duty. The Claimant's position is that he was ordered to leave the Respondent's premises.

27. The Respondent aver that after the Claimant absconded duty, they served him with a show cause letter to explain why he should not be dismissed for absconding duty and he failed to honour the summons.

28. The Claimant has denied ever receiving any show cause letter but avers that he was given a termination letter dated 23.3.2015 and denies ever receiving any letter dated 21.3.2015.

29. The Respondent despite alleging that they served the Claimant with a show cause letter dated 21/3/2015, there is no evidence of service. It is not indicated at which address this letter was sent and neither is there any certificate of posting to show service.

30. There is therefore no evidence that the Claimant absconded duty and was asked to defend himself on this allegation. This Court therefore finds that the Claimant never absconded duty as alleged.

31. That Claimant has told Court that he was ordered to leave the Respondent's premises. No reasons was advanced to him for this.

32. The Claimant was also not served with any termination letter, which indicate the reason for the termination. There is also no indication that he was subjected to any disciplinary hearing before the termination.

33. In the circumstances, I find the termination of the Claimant unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 which states as follows:-

**(2) A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure".**

34. In the case of the Claimant, there is no evidence that she committed the offence complained of and neither was he accorded an opportunity to be heard. In the circumstances, I find the termination of the Claimant unfair and I declare that so.

35. In terms of remedies, I find for the claimant and award him as follows:-

**1. 1 Month salary as notice = 16,625/=**

**2. Salary for March 2015 =  $23/20 \times 16625 = 12,746/=$**

**3. Leave for 1 year = 16,625/=**

**4. 9 months' salary as compensation for the unlawful termination =  $9 \times 16,625 = 149, 625/=$**

**Total = 185,621/= less statutory deductions**

**5. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 28<sup>th</sup> day of May, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Kwamboka for Respondent – Present

Kuria holding brief Amtalla for Claimant