



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1629 OF 2015**

**FREDRICK JUMA OLOO.....CLAIMANT**

**- VERSUS -**

**CHANDARIA INDUSTRIES LTD..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 31<sup>st</sup> July, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 18.09.2015 through Namada & Company Advocates. The claimant prays for judgment against the respondent for:

- a) A declaration that the respondent's actions amounted to unlawful summary dismissal from employment.
- b) The declaration the claimant is entitled to payment of his terminal dues and compensatory damages totalling to Kshs.333, 000.00 being:
  - i. One month pay in lieu of notice Kshs.16, 800.00.
  - ii. 2 weeks' pay for days worked in February 2015 Kshs.8, 400.00.
  - iii. Pay in lieu of untaken leave from 2008 – 2015 Kshs.16, 200.00 x 7 making Kshs.113, 400.00.
  - iv. 12 months' pay in compensation for unfair termination Kshs.194, 400.00.
- c) Interest on (b) from the date of filing the suit till full payment.
- d) Costs of the suit plus interest thereon.

The claimant's case is that on 12.02.2015 his supervisor asked him to write an explanation about the events of the evening of 10.02.2015. The claimant's case is that he complied and the written explanation was retained by the respondent. He says he was sent away and told to await a decision. He was never recalled and on 26.02.2015 he received the letter dated 26.02.2015 alleging he had deserted duty leading to the dismissal. The claimant's case was that he had done nothing wrong; dismissal was discriminatory because the driver was not implicated; he was not given a warning or notice prior to the termination; and no hearing took place prior to the termination. It was urged that the aggravating factor was that the respondent failed to pay the terminal dues.

The respondent filed the statement of response on 23.11.2015 through Anne Babu & Company Advocates. The respondent prayed that the claimant's suit is dismissed with costs.

It is not in dispute that the respondent employed the claimant as a turn-boy. On 10.02.2015 the claimant accompanied a driver to make deliveries of goods to a customer located at Valley Arcade Shopping Centre in Lavington, Nairobi. It is the respondent's case that the claimant offloaded the goods leaving some in the lorry. It was at about 5.00pm. The respondent's case was that it was the intention of the claimant to convert the remaining goods for his own use and purpose. The respondent's case is that the claimant refused to offload the remaining goods and when the person receiving the goods questioned the claimant, the claimant had no option but to offload the remaining goods.

The respondent's case is that the respondent served the claimant a show-cause notice on 14.02.2015 and requiring a reply by 17.02.2015. Further respondent's case is that from 15.02.2015 to 26.02.2015 the claimant was absent from duty without leave or other lawful cause.

Having failed to show cause, the claimant was summarily dismissed by the letter dated 26.02.2015.

By consent of the parties it was ordered that the suit be determined on the basis of the pleadings and documents filed for the parties. The submissions were filed for the parties.

The Court has considered the material on record and submissions filed for the parties. The Court makes findings as follows:

- 1) There is no dispute that the parties were in a contract of service.
- 2) There is no dispute that the claimant's employment was terminated by the letter dated 26.02.2015. The further undisputed evidence is that on 12.02.2015 the respondent required the claimant to explain the events of the evening of 10.12.2015. The unclear issue is whether the claimant was given the letter dated 12.02.2015 requiring him to reply in writing. The reason for dismissal was that he failed to submit his written submission as required in the letter dated 12.02.2015 and by 17.02.2015. The Court finds that the claimant cannot be believed when he urges that he wrote the letter explaining the events because he never served a notice to produce the alleged letter which he says he wrote to explain the events as required by his supervisor. Further, the Court finds that in his pleadings he carefully fails to confront the reason stated in the letter of summary dismissal and instead paints the case that he was dismissed on account of the events of 10.02.2015 – but the stated reason being that he failed to reply the letter requiring him to explain the events of 10.02.2015. Thus the Court returns that the respondent's account was coherent. The claimant failed to make the written explanation by 17.02.2015 and instead disappeared from work and when he resurfaced, he met the letter of summary dismissal. Taking the circumstances as can be deciphered from pleadings and documents on record, there was due process, the claimant knew he was required to explain the events of 10.02.2017 and when he failed to do so he was dismissed – and the Court considers he was therefore culpable as was alleged, his failure to make a written explanation having entitled the respondent to deem him culpable. Section 45 of the Employment Act, 2007 appears to the Court to have been complied with and the termination was not unfair in substance and procedure.
- 3) The termination having not been unfair, the Court returns that the prayers for notice pay and compensation will collapse.
- 4) The claimant is entitled to 2 weeks earnings for days worked in February 2015 making **Kshs.8, 400.00** as prayed for.
- 5) The respondent provided no records maintained under section 74 of the Employment Act, 2007 to show that the claimant had taken leave during the period of employment. On a balance of probabilities the Court finds that in absence of any material and submissions by the respondent on the issue, the claimant was entitled to annual leave as per section 28 of the Act and he is awarded **Kshs.113, 400.00** as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant a sum of **Kshs.121, 800.00** by 15.09.2019 failing interest to be payable thereon from the date of filing the suit till payment in full.
- b) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Wednesday 31<sup>st</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**