



**REPUBLIC OF KENYA**

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

**AT NYERI**

**CAUSE NO. 304 OF 2017**

**WILLIAM MAINA KARIUKI.....CLAIMANT**

**VERSUS**

**AEGIS CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent his erstwhile employer and in the suit asserts that his termination was illegal unfair and unlawful. He seeks payment of terminal dues. He averred that he was a driver for the Respondent working at the Mweiga-Brookside-Kimathi University Road works from 21<sup>st</sup> April 2015. He averred that on 16<sup>th</sup> June 2017 at around 9.00am he was driving lorry KAG 079G along the Mweiga-Chaka Road when the vehicle developed a mechanical problem. He informed the Respondent's mechanic, a Mr. Githinji, and he was waiting for him to arrive and attend to the vehicle on of the Respondent's directors by the name of Mr. Aftar happened to pass by and upon interrogating the Claimant alleged that the Claimant was siphoning diesel from the said lorry. He averred that shortly thereafter the Respondent's fuel attendant by the name of Mr. Warui arrived and upon conducting his tests confirmed that no fuel had been siphoned by the Claimant from the lorry KAG 079G. The Claimant was shocked and dismayed when he was summoned by the site agent/personnel Mr. Albert Kombo who issued the Claimant with a letter requiring him to attend to the Respondent's head office in Nairobi on 17<sup>th</sup> June 2017 on allegations that he had siphoned diesel from the vehicle. The Claimant averred that as instructed he presented himself at the head office where he met the Human Resource personnel by the name David who advised the Claimant that his services were terminated. The Claimant averred that he was never accorded a chance to defend himself against the allegations of siphoning fuel. He thus avers the dismissal was without any reason or lawful justification and the dismissal in total contempt of the Claimant's labour rights and the laws as obtaining in Kenya. The Claimant averred that the dismissal was in breach of Section 43(1) of the Employment Act which is couched in mandatory terms and the dismissal was thus unfair within the meaning of Section 45. He thus prayed for the payment of Kshs. 25,320/- being one month's salary in lieu of notice, unpaid salary for 17 days worked in June 2017 – Kshs. 14,348/-, twelve month's salary as damages for unfair termination – Kshs. 303,840/-, service pay @ 15 days for each completed year of service (Kshs. 25,320/-\*15/30\*2) – Kshs. 25,320/- as well as costs of the suit and interest thereon.

2. The Respondent filed a defence in which it denied all the averments by the Claimant save to admit the Claimant was issued with the letter of 17<sup>th</sup> June 2017 and the averment that there was no other suit between it and the Claimant. The jurisdiction of the court was admitted.

3. The Claimant testified but as the Respondent had not filed a witness statement the case for defence was closed without any evidence being adduced on behalf of the Respondent. The Claimant reiterated his dismissal was a surprise to him and that the Respondent falsely accused him of siphoning fuel. He was cross-examined by counsel for the Respondent and he testified that he had accepted the offer of employment though he did not have the letter before the court. He stated that he was at work when the lorry had a breakdown and he was found by the director while waiting for the mechanic to arrive and attend to the vehicle. He testified that there was someone who used to fuel the vehicles and on inspecting the lorry did not find any discrepancy. He stated he was issued a letter dated 16<sup>th</sup> June 2017 asking him to go to the head office and that he was notified at the head office of his dismissal. He stated that letter did not dismiss him. He stated that his pay was between Kshs. 23,000/- and 24,000/- and that though he did not have the payslip he had the P9 which was used for tax purposes. He confirmed that the P9 was not signed. He testified that he reported the dispute to the Ministry of Labour and attended the meeting on 18<sup>th</sup> July 2017 where 2 employees of the Respondent attended. In re-examination he stated that he was employed by the Respondent on 21<sup>st</sup> April 2015 per their letter. He stated that he had obtained the P9 form from the Respondent as evidenced by their stamp. He denied generating the form. He stated that per the P9 his pay was Kshs. 23,940/- and that his pay varied. He stated that he attended the meeting at the Labour Office where 2 employees of the Respondent appeared and the 2 representatives stated the Respondent would pay but they did not.

4. The Claimant filed submissions in which he argued that the validity of his dismissal was doubtful as the Respondent had failed to prove the reasons for the dismissal. He cited Section 43 and 45(1) of the Employment Act in support of his contention. He submitted that the procedure for dismissal was contrary to Section 41 of the Employment Act and placed reliance on the case of **Shadrack Mwaniki Ngaru v Aegis Construction Limited [2018] eKLR**. He urged the grant of his prayers per the claim before the court.

5. The Respondent in its submissions argued that the Claimant deserted employment as no one terminated his employment. The Respondent

submitted that the Claimant had not proved his case on a balance of probabilities. The Respondent submitted that if the court was however minded to find in the Claimant's favour then the Claimant was only entitled to one month's salary as there was proof by the Respondent that the Claimant was in violation of Section 44(a)-(e) of the Employment Act. the Respondent urged the court to take cognizance of the failure to observe the issues proved and urged an award of one month to be sufficient.

6. The Claimant was in the Court's view dismissed from his employment by the Respondent. Section 43 of the Employment Act provides that 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 Section provides further that 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. The Respondent seems to have had an issue with the Claimant but despite there being an issue as adverted to in the letter of 16<sup>th</sup> June 2017, the Respondent failed to prove the reasons for termination. The dismissal was therefore unfair within the meaning of Section 45 of the Employment Act.

7. The Claimant is therefore entitled to recover for the unfair dismissal. As keeper of employment records, the Respondent did not dislodge the claim that the Claimant earned Kshs. 25,320/- a month and as such he was entitled to receive the following:-

- a. One month's salary in lieu of notice – Kshs. 25,320/-
- b. 17 days pay for June 2017 – Kshs. 14,348/-
- c. 6 months' salary for the unfair dismissal – Kshs. 151,920/-
- d. Costs of the suit.
- e. Interest on the sums in a), b), c) and d) at court rates from date of the judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of September 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**