



**REPUBLIC OF KENYA**

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

**CAUSE NO. 977 OF 2015**

**PETER MUTISYA MWOVE.....CLAIMANT**

**-VERSUS-**

**POLLMAN'S TOURS AND SAFARIS LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 08.06.2015 through Zed Achoki & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's summary dismissal was unlawful and unfair.
- b) Payment of the terminal dues including:
  - i. One month pay in lieu of notice Kshs. 29, 679.49.
  - ii. Annual leave for 2014 Kshs.51, 939.11.
  - iii. Gratuity at 15 days for each completed year of service Kshs. 816, 185.98.
  - iv. 12 months compensation for unfair termination Kshs. 356, 153.88.
  - v. Total claim Kshs. 1, 253, 958.46.
- c) Compensation for wrongful dismissal at 12 months' gross salary.
- d) Orders and directions as the Honourable Court deems fit to meet ends of justice.
- e) The respondent to pay costs of the claim.
- f) Interest at Court rates.
- g) Certificate of service per section 51 of the Employment Act, 2007.

The memorandum of response was filed on 17.02.2016 through the Federation of Kenya Employers. The respondent prayed for dismissal of the claimant's suit with costs and counterclaimed for Kshs.25, 000.00 being the towing charges the respondent paid to secure the release of its motor vehicle which had been impounded as a result of the claimant's traffic offence.

To answer the **1st issue** for determination the Court returns that there is no dispute that the parties were in a contract of service. The respondent employed the claimant by the letter dated 04.07.1994 as a Car Washer and later promoted him to the position of Driver Guide.

To answer the **2nd issue** for determination the Court returns that the claimant was summarily dismissed from employment by the letter dated 22.07.2014 on account of thus, **"On July 16, 2014 you were caught by Police driving the company vehicle while under influence of alcohol. This is contrary to the work ethics and is punishable by summary dismissal. Employment Act 2007 Section 44, Clause 30.2 of the Collective Bargaining Agreement (CBA) and the Driver Guide's SOP are very clear on this."** The letter stated that he'd be paid salary up to 22.07.2014; leave days 10.5; off days 15; and less any money owed to the respondent.

The **3rd issue** is whether the termination was unfair. The claimant testified that he admitted to driving while drunk and it was after official working hours. He confirmed that he did not know how the motor vehicle was removed from the scene. He confirmed that he left the motor vehicle with the ignition key and he did not know if the respondent incurred expenses to remove the motor vehicle from the scene. He confirmed that he was charged in Traffic Case No. 19248 of 2014 at Milimani Chief Magistrate's Court and he pleaded guilty and was convicted accordingly. The record of the proceedings in that case show that he was sentenced to a fine of Kshs.70, 000.00 in default 9 months jail and driving licence suspended for 1 year. That was on 17.07.2014. The claimant lamented that he was not given a show-cause notice and a disciplinary hearing per section 41 of the Employment Act, 2007.

The respondent's witness (RW) was Ronald Ngala, the Transport Manager. RW testified that after the conviction and sentence, a meeting was held between the claimant, the management and union representatives on 18.07.2014. It was decided that in view of the claimant's misconduct, he be assigned back to his previous designation as Car Washer. It was in view of the fact that his driving licence was suspended by the Court for a year. Further the respondent had considered the claimant's service of 22 years and desired to retain him. The claimant rejected the job as reassigned or redesignated and refused to apologise. The summary dismissal letter followed. He moved to file the present suit.

The Court has considered the evidence. The claimant admitted the gross misconduct at the hearing and when he took plea in the traffic case. There is no doubt that the claimant contributed to his summary dismissal 100%. Even if there was no show-cause notice and minutes of the disciplinary hearing after the conviction, the claimant fully contributed to his summary dismissal and he has not established a case for compensation under section 49 of the Act. In any event there is no reason to doubt the account by RW and looking at the case at the Traffic Court and the subsequent meeting between the parties in presence of the trade union representatives, the Court returns that the claimant was substantially accorded due process of notice and a hearing as per section 41 of the Act.

The **4th issue** for determination is whether the claimant is entitled to the other remedies as prayed for. He was a member of the NSSF and in view of section 35(5) of the Act he is not entitled to service pay as prayed for. The Court has found that the summary dismissal was justified and the claimant is not entitled to pay in lieu of the termination notice. The July 2014 payslip shows that the claimant was paid full salary for that month and he had 11.82 leave days. His last day at work had been 16.07.2014. In the circumstances the Court returns that the leave days were substantially set off in the July 2014 full pay. The claimant is entitled to a certificate of service as prayed for.

To answer the **5th issue** for determination the Court returns that the counterclaim will succeed as per the respondent's claim and evidence. The exhibited receipt shows that the respondent incurred Kshs.25, 000.00 for towing the motor vehicle KBL 977 Y Nissan from Kangundo Road to Traffic Headquarters. It is awarded accordingly being a loss to the respondent attributable to the claimant's misconduct.

The Court has considered the parties' margins of success and returns that each party will bear own costs of the proceedings.

In conclusion judgment is hereby entered for the parties for:

- a) The respondent to deliver to the claimant the certificate of service by 15.12.2019.
- b) The claimant to pay the respondent **Kshs.25, 000.00** by 15.12.2019.
- c) Each party to bear own costs of the proceedings.

**Signed, dated and delivered in court at Nairobi this Friday, 22nd November, 2019.**

**BYRAM ONGAYA**

**JUDGE**