



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 895 OF 2016**  
**(Formerly Nairobi Industrial Court Cause No. 579 OF 2013)**

**BETWEEN**

**GERMAN WAWERU NJONJO .....CLAIMANT**

**VERSUS**

**CIVICON LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mwangi, Wahome & Company Advocates for the Claimant Munyao, Muthama & Kashindi, Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim at the Industrial Court in Nairobi, on 24<sup>th</sup> April 2013. The Respondent filed its Statement of Response on 30<sup>th</sup> August 2013. The matter was transferred to the Court in Mombasa, on 21<sup>st</sup> April 2016.

2. Parties agreed in Court on 31<sup>st</sup> October 2017 to have the matter considered and determined on the strength of their Pleadings, Documents, and Submissions. They confirmed filing of Submissions, on 12<sup>th</sup> February 2018.

**CLAIMANT’S CASE**

3. The Claimant states he was employed by the Respondent as a Driver, between 18<sup>th</sup> December 2010 and 30<sup>th</sup> October 2011. He states the Respondent terminated his contract on the latter date, without paying him terminal dues. He earned a monthly salary of Kshs. 18,975. He prays for Judgment against the Respondent in the following terms:-

- a. Severance pay, at 16 days’ salary for every complete year of service at Kshs. 20,240.
- b. Overtime, 2,696 hours at Kshs. 68.75 per hour – Kshs. 185,350.
- c. Unlawful deductions, on absenteeism at Kshs. Kshs. 15,750.
- d. 1 month salary in lieu of notice at Kshs. 18,975.

**Total..... Kshs. 240,315**

- e. Costs.
- f. Interest.

4. The Claimant adopts his Witness Statement filed on 30<sup>th</sup> April 2013. He relies on the Contract signed between the Parties on 5<sup>th</sup> January 2011; Pay Slip for October 2011; Certificate of Service; letter of Summary Dismissal dated 4<sup>th</sup> September 2011; and letter of Demand issued by his Advocates upon the Respondent before commencement of the Claim, dated 7<sup>th</sup> November 2011.

5. He submits that the Letter of Summary Dismissal indicates he was dismissed for theft. He was alleged to have stolen a fuel tank, and fuel. He was not provided with details of the alleged offence. The Claimant submits, citing various decisions of the Court, that he was entitled to fair procedure. He invokes also, his right to fair administrative action under Article 47 of the Constitution of Kenya, relying on the case of *Shankar Saklani v. DHL Global Forwarding (K) Ltd (2012) e-KLR*. He submits that termination went against Sections 41, 43 and 45 of the Employment Act 2007. His contract granted to him 16 days' pay, for every completed year of service. His pay slip shows illegal deductions were made on his salary. The Claimant urges the Court to allow his Claim.

#### **RESPONDENT'S CASE**

6. The Respondent concedes to have employed the Claimant as a Driver, as stated in the Claim. He was summarily dismissed, after he was involved in an act of gross misconduct. He directly or indirectly caused loss of fuel and fuel tank, the property of the Respondent. He fundamentally breached his contract of employment. He is not entitled to the Judgment sought.

7. The Respondent submits that the Claim is for a specific amount of Kshs.240,315. The Claimant goes off his course, by making Submissions on damages for unlawful termination. He has not in any event shown his contract was unfairly terminated, under Section 47(5) of the Employment Act 2007. Severance pay does not apply as termination was not based on redundancy under Section 40 of the Employment Act. Clause 4 of the contract did not allow for overtime. There are no details of excess hours allegedly worked. Salary deductions have not been clearly pleaded. The letter of termination contained a notice period of 1 month. The Respondent prays the Court to dismiss the Claim.

#### **The Court Finds:-**

8. The Claimant was employed by the Respondent Company as a Driver, on 18<sup>th</sup> December 2010. He was issued a written contract, which he signed on 5<sup>th</sup> January 2011. The contract was for 1 year, beginning 18<sup>th</sup> December 2010, lapsing 21<sup>st</sup> December 2011. His last salary was Kshs. 18,795 monthly.

9. His contract was terminated by the Respondent with effect from 4<sup>th</sup> October 2011. The Letter of Summary Dismissal is dated 4<sup>th</sup> September 2011, and gave notice period of 1 month. Termination became effective on 4<sup>th</sup> October 2011.

10. The Claimant was not summarily dismissed, although his Letter of Dismissal is titled 'Summary Dismissal.' Summary Dismissal is defined under Section 44(1) of the Employment Act 2007, to take place when an Employer terminates the employment of an Employee, without notice, or with less notice than that to which the Employee is entitled, by any statutory provision, or contractual term.

11. The Claimant has not shown that 1 month notice period given in the Letter of Summary Dismissal, was contrary to the notice period the Claimant was entitled to under statutory provision, or contractual term. He was not summarily dismissed.

12. He states at paragraph 5 of his Statement of Claim, that he is entitled to 3 months' salary in lieu of notice. In his prayers, he pursues 1 month salary in lieu of notice. The Court is convinced he does not merit notice pay for either period.

13. There is no prayer for compensation for unfair termination. The Claimant does not even pray for 'any other suitable relief the Court may deem fit to grant.' He makes Submissions on unfair termination, cites Judicial Authorities and provisions of the Law relating to unfair termination, but does not ask for the particular remedy of compensation. He attempts to introduce this prayer in his Submissions. The Court has stated in past decisions that closing Submissions are not intended to play the same role as Amendment of Pleadings.

14. At the time of termination, on 4<sup>th</sup> November 2011, Section 45(3) of the Employment Act had not been declared unconstitutional. This was at the time, still a good piece of legislation, not tainted by the Judgment of the High Court which adjudged Section 45(3) to be unconstitutional. The Claimant had not met the qualifying period under Section 45(3) of the Employment Act, to sustain a Claim for compensation for unfair termination. He was perhaps right, not to plead compensation for unfair termination, but wrong in submitting on unfair termination. The Court shall not deliberate on the reason, or reasons for termination, and on the procedure adopted by the Respondent in making the decision. It is not in the circumstances, necessary to do so.

15. The contract concluded by the Parties gave hours of work. Clause 4 expressly states: overtime - Not Applicable. The Claimant has not told the Court why he seeks overtime pay, while his contract states the item was inapplicable to the Parties. The Claimant in any case, did not give details of excess hours worked, and establish if this excess work was authorized and necessary.

16. Clause 7 of the contract offered the Claimant severance pay, upon successful completion of the contract period. It is correctly submitted by the Respondent that severance pay is made under section 40 of the Employment Act, on redundancy. Clause 7 suggests the Claimant would be entitled to gratuity upon the successful completion of the contract period. The clause does not give a mode of computing such gratuity. The Claimant did not successfully complete his contract period. He is not entitled to Claim any form of service pay under Clause 7 of the contract.

17. His pay slip for October 2011, which was his last month in employment, shows a deduction of Kshs. 15,750 from his salary. It is indicated this deduction, was intended to compensate the Employer, for some hours when the Claimant was absent from work. The Respondent has not shown justification for this deduction, under Section 19(1) of the Employment Act. There is no Attendance Register availed to the Court showing when the Claimant absented himself. No evidence of a clocking system, supporting the assertion that the

Claimant was absent for 189 hours, or any other number of hours, has been tendered before the Court. The mode of computation giving rise to the deducted sum, has not been made clear to the Court.

18. *The Respondent shall refund to the Claimant the sum of Kshs. 15,750, deducted from Claimant's salary.*

19. No order on the costs.

IN SUM, IT IS ORDERED:-

a. *The Respondent shall refund to the Claimant the sum of Kshs. 15,750, deducted from the Claimant's salary.*

b. *No order on the costs.*

**Dated and delivered at Mombasa this 20<sup>th</sup> day of March 2018.**

**James Rika**

**Judge**