



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 216 OF 2016**

**EMMANUEL MAITHA DAVID.....CLAIMANT**

**VS**

**ANGLICAN DEVELOPMENT SERVICES.....1<sup>ST</sup> RESPONDENT**

**ACK ST. LUKES MISSION HOSPITAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant’s claim brought by a Memorandum of Claim dated 21<sup>st</sup> March 2016 and filed in court on 22<sup>nd</sup> March 2016 is for unlawful termination of employment. The Respondents filed a joint Reply on 5<sup>th</sup> March 2016.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called its former Human Resources Officer, Hesbon Mae. Both parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the 1<sup>st</sup> Respondent as a driver on 1<sup>st</sup> April 2014. He was deployed to work at the 2<sup>nd</sup> Respondent. He worked as such until 17<sup>th</sup> November 2015 when he was dismissed.

4. The Claimant pleads that his dismissal was unlawful and unfair. He therefore claims the following:

- a) Unpaid salary for July, August & October 2015.....Kshs. 90,080
- b) Three months’ salary in lieu of notice.....67,560
- c) 16 days @ double pay.....31,010
- d) Shares and security deductions.....24,000
- e) Compensation for unlawful termination.....270,120
- f) Unpaid overtime

**The Respondents’ Case**

5. In their Reply dated 27<sup>th</sup> April 2016 and filed in court on 5<sup>th</sup> May 2016, the Respondents admit having employed the Claimant as a driver on a 36 months’ contract running from 1<sup>st</sup> April 2014 until 30<sup>th</sup> March 2017.

6. The Respondents state that the Claimant was a problematic employee prone to insubordination and disrespect to his superiors, lacked commitment and neglected and/or refused to adhere to the terms of his employment and the Respondents’ code of conduct.

7. The Respondents plead that the Claimant was lawfully dismissed under the provisions of Section 44 (4)(c) and (e) of the Employment Act, 2007. They add that the Claimant had caused disruption at his work place by organizing a political meeting and mobilizing other staff members to attend the political meeting during normal working hours.

8. The Respondents further state that the Claimant was aware of the charges against him and that he was given an opportunity to defend himself before the decision to dismiss him was made. The Respondents deny owing the Claimant any money in terminal dues.

### **Findings and Determination**

9. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

10. The Claimant was dismissed by letter dated 17<sup>th</sup> November 2015, stating the following:

**“RE: TERMINATION OF SERVICE**

*You are accountable to disrespect observed by you (sic) when you successfully mobilized staff to a political meeting in the institution and within the normal working hours forgetting you are working in an essential service.*

*Your presentations have been accorded every consideration of humanly possible (sic) but your above actions remain conclusive to afore said doubts; a possibility that a fundamental breach of your obligations has been constituted (sic).*

*We regret to inform you that your service with us has been terminated with effect from 17<sup>th</sup> November 2015.*

*Please arrange to return every hospital property that may be in your possession vide a discharge form obtained from Human Resources department and collect your terminal dues from the pay office.*

*Yours faithful,(sic)*

***For: ST LUKES MISSION HOSPITAL***

*(Signed)*

*HESBON S MAE*

***Human Resources Officer”***

11. This letter accuses the Claimant of organizing a political meeting at his work place without authority from his superiors. The Claimant denies organizing the political meeting but agrees having attended it, upon the invitation of his colleague, Charo Kitsao.

12. Section 43 of the Employment Act, 2007 places a burden on the employer to demonstrate a valid reason for terminating the employment of an employee. In inquiring whether an employer has discharged this burden, the Court does not seek to supplant the employer's decision with its own. All the Court asks is whether in the circumstances of the case, the employer acted lawfully and reasonably.

13. In ***Paul Waigiri Muriuki vs Nairobi Water and Sewerage Company Ltd [2015] eKLR*** this Court pronounced itself as follows:

***“When the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer acted lawfully and in a reasonable manner.”***

14. In the instant case, it is not in dispute that the Claimant attended a political meeting at his place of work. It is also undisputed that the said meeting had not been sanctioned by the Respondents' management. Even assuming that the Claimant was not the mastermind of the meeting, I think he breached the terms of his employment, by attending a political meeting at his place of work, without the concurrence of his employer. For this reason, the Court finds that the Respondents had a valid reason for terminating the Claimant's employment.

15. The next question is whether in effecting the termination, the Respondents observed due procedure. From the evidence on record, the Respondents convened some meetings to discuss the issue of the political meeting. There was however no evidence of the Claimant being specifically invited to respond to any specific charges regarding his role in the political meeting. In light of this, the Court finds that the Respondent failed to comply with the procedural fairness requirements of Section 41 of the Employment Act, thus rendering the Claimant's dismissal procedurally unfair.

### **Remedies**

16. Pursuant to the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service, his employment record and the conduct of the parties.

17. From the evidence on record, the Claimant was paid three (3) months' salary in lieu of notice. The claim thereon is therefore without basis and is dismissed. The claims for unpaid salary, 16 days @ double pay, shares and security deductions and unpaid overtime were not proved and are therefore also dismissed.

18. In the end, I enter judgment in favour of the Claimant and against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the sum of Kshs. 67,560 being three (3) months' salary in compensation for unfair dismissal.

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant will have the costs of the case.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF MAY 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ambwere for the Claimant

Mr. Masila for the Respondent