



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 357 OF 2013**

**PAUL KYUMWA MWANIKI.....CLAIMANT**

**VERSUS**

**LOAD RUNNERS LIMITED .....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment contract by the respondent on 3.9.2010. The respondent has however denied the alleged unfair termination and averred that it is the claimant who deserted work after it was discovered that he had stolen hydraulic oil from the lorry he was assigned as a Turn boy and further attempted to steal 8 bags of fertilizer when exiting the respondent's yard.
2. The suit was heard on 1.3.2018 when the claimant testified as Cw1 but the respondent never attended the hearing. After the hearing the hearing, the claimant filed written submissions which I have carefully considered herein.

**Claimant's Case**

3. Cw testified that he was employed by the respondent as a Turn boy in January, 2016. He was assigned to work in motor vehicle registration number KAS 806H lorry. His salary was Kshs.7,049.50 per month as per the payslip for May 2019 produced as exhibit C.1. He worked diligently until July 2016 when he was dismissed from employment on allegation that he had syphoned fuel from the said lorry and offered terminal dues totaling to Kshs.13,822 which he took.
4. Cw1 further testified that the said dismissal was unfair because the alleged offence was not true, and that he was not accorded any hearing before the dismissal. He therefore prayed for compensation plus terminal dues amounting to Kshs.208,385 as per the calculations by the Labour officer and the trade union produced as Exhibits C. 3a, b, and c.

**Analysis and Determination**

5. After careful consideration of the pleadings, evidence, and submissions presented to the Court, the following issues arose for determination.
  - a. Whether the claimant deserted employment or he was unfairly dismissed.
  - b. Whether the reliefs sought ought to issue.

**Desertion or Unfair Dismissal**

6. The burden of proving that the claimant deserted employment lies with the respondent while the burden of proving dismissal lies with the claimant. In this case, the respondent has not given any evidence to prove the alleged desertion by the claimant. Consequently, the alleged desertion has not been proved on a balance of probability.
7. On the other hand, the claimant's evidence that he was dismissed by the respondent on 3.9.2010 has not been contested by evidence.

The claimant's evidence is fortified by the findings by the conciliator in his report dated 7.11.2011 produced as exhibit C.3'b', that the

management that dismissed the claimant verbally. It was further finding by the conciliator that the termination was without reason and done without following due process.

8. Under section 45(2) of the Employment Act, termination of employment contract is unfair if the employer fails to prove that it was grounded on valid and fair reason and that a fair procedure was followed. A valid and fair reason must related to the employee's conduct, capacity and compatibility or operational requirements of the employer. On the other hand, fair procedure is described by section 41 of the Act to involves, explaining to the employee the reason or the contemplated termination in a language he understands and in the presence of another employee or shop floor union representative, and thereafter according the employee and his chosen companion a chance to air their defence for consideration before the termination is decided.

9. As already observed herein above, the respondent never attended the hearing and as such she did not even attempt to discharge her burden of proving the procedural and substantive fairness in the claimant's dismissal. Consequently, I find and hold that the dismissal of the claimant from employment by the respondent on 3.9.2010 was unfair within the meaning of section 45 of the Act.

#### **Reliefs**

10. The parties herein voluntarily subjected themselves to conciliation under section 49 of the Act and after considering the evidence by both the claimant and the employer, the conciliator recommended that the claimant be paid his terminal dues plus compensation for wrongful termination of 8 months' salary. No good reason has been shown why I should review that award. That award is reasonable considering that the claimant had served the respondent for over 4 years without any warning and that he never contributed to the dismissal through misconduct. Consequently, under section 49 of the Act, I award the Claimant Kshs.8,200 as one month salary in lieu of notice, plus Kshs.65,600 being 8 months' salary as compensation for unfair termination. The said award is based on the salary of Kshs.8,200 admitted by the respondent during the conciliation proceedings.

11. In addition, the claim for leave for 3 years is awarded at the rate of 21 leave days per year for 3 years which works to Ksh.19,869.25. The claims for leave travelling allowance, public holidays, Sundays worked and legal costs are however dismissed for lack of particulars and evidence to substantiate. The claim for certificate of service is however granted as prayed because it is a right under section 51 of the Act.

#### **Disposition**

12. For the reason that the dismissal of the claim was unfair, I enter judgment for him in the sum of Kshs.93,669.25 plus costs and interest from the date hereof. He will also have certificate of service. The award granted above will be paid less the applicable statutory dues.

**Dated, Signed and Delivered in Open Court at Nairobi this 19th day of June, 2018**

**ONESMUS N. MAKAU**

**JUDGE**