



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE. NO. 1826 OF 2014**

**ANTHONY KARIUKI MUNYI.....CLAIMANT**

**VERSUS**

**KENAFRIC INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1.This is a claim for terminal dues and compensation or unfair and unlawful termination of the claimant's contract of service by the respondent on 14.8.2014. It is the claimant's case that his dismissal was done contrary to section 41 and 45 of the Employment Act because it was done without explaining the reason for his termination and without giving him a chance to defend himself. The respondent has however denied the alleged unfair termination and the reliefs sought and averred that the claimant was dismissed for misconduct under section 44(4) (c) of the Act and after being accorded a chance to defend himself.

2. The suit was heard on 8.5.2018 when the claimant testified as Cw1 and the respondent called her HR officer M/s Miriam Nduta as Rw1. Thereafter both parties filed written submissions.

**Claimant's Case**

3. Cw1 testified that she was employed by the respondent on 5.6.2015 and Sales person and after serving probation, he was confirmed on 3.1.2014. He started working at the Coast region but in 2014, he was transferred to Nairobi as Eastern Region Area Manager due to his good performance. His gross pay was Kshs.75,000 per month.

4. On 14.8.2014, just one week after the transfer to Nairobi, he parked the Branded Sales vehicle at Shell petrol station along Thika Road because he could not drive it in to the city Centre without the required Branding License. He contended that he notified the National Sales Manager and the Regional sales Manager and he travelled with the Regional Sales Manager in his car. He was however shocked to be dismissed for parking the vehicle at the Petrol Station for 6 hours and secondly for causing an accident in Mombasa at night, passed the working hours. He admitted that the said accident occurred but explained that he was travelling from Ukunda for official duty and that it is why he arrived in Mombasa at 7 pm.

5. He contended that the dismissal was unfair because it was done verbally and without being accorded any prior hearing. He further contended that after the termination the National Sales manager told him that his terminal dues would not be paid until some customers paid for the outstanding supplies.

6. On cross examinations, Cw1 stated that he had no indiscipline record with the employer. He contended that on the date of the accident at Mombasa he had given his itinerary to his Regional Supervisors. He further contended that he reported the accident immediately to the Chief Security manager but he was not given Police Abstract until the following day. He however admitted that the Police Abstract blamed him for the accident. He further admitted that on 13th and 14th August 2014, he parked the Branded vehicle for 6 hours in petrol station but contended that he did so with the instructions from the Regional Manager Mr. Josphat Kilugha and the National Sales Manager. He further contended that he wrote email to them and they told him not to bring the branded vehicle to town centre until the branding issue was sorted out.

**Defence Case**

7. Rw1 confirmed that Cw1 was employed by the respondent as a Sales Representative. She testified that on 26.7.2014 the claimant caused

an accident while driving company vehicle and failed to report the accident to his immediate Supervisor for 2 days. She further contended that the company policy required him to report the accident to his immediate supervisor immediately but instead he reported to the security officer.

8. She further testified that on 13th and 14th August 2014, the claimant parked the company vehicle at a Petrol station for 6 hours without reporting to the supervisor until the petrol station reported the matter to the respondent. She contended that a Car Tracking Company called Retriever Limited was contacted and it confirmed that the vehicle had been parked at the petrol station for 6 hours.

9. Rw1 further testified that the respondent's HR manager summoned the claimant for a hearing but he declined and left after which he was dismissed. She contended that the respondent suffered loss in repairing the damaged vehicle and in engaging the car tracking company. She therefore prayed for the suit to be dismissed.

10. On cross examination Rw1 admitted that Mr. Joseph Kilugha and the claimant were working for the respondent as Regional Sales Managers. She maintained that the dismissal letter was issued to the claimant after walking away, refusing summon to attend disciplinary hearing but admitted that she did not know whether the dismissal letter was ever served on him.

### **Analysis and Determination**

11. There is no dispute that the claimant was employed by the respondent until 14.8.2014 when he was summarily dismissed from employment. The issues for determination are:

- (a) Whether the dismissal was unfair and unlawful;
- (b) Whether the claimant is entitled to the reliefs sought.

### **Unfair and unlawful dismissal**

12. Under section 45(2) of the Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that a fair procedure was followed before the termination. In this case, the reasons for the dismissal were causing accident on 26.7.2014 at Mombasa, and parking company vehicle at Shell Petrol Station Nairobi for 6 hours on 13th and 14th August 2014 without notice to his supervisor as required by the law.

### **Reasons for Dismissal**

13. The claimant admitted the accident on 26.7.2014 and parking the vehicle at the petrol station for 6 hours. He however contended that he did not violate any company policy in the two incidences. He maintained that he reported the accident immediately to his supervisor who had his itinerary for the material day. As regards parking the vehicle at the petrol station, he contended that he was instructed by the Regional Sales Supervisor and the National Sales manager not to bring the vehicle into the City centre until the issue of Branding License was sorted out. The said Managers were not called to give evidence herein and as such, I find that the evidence by the claimant has not been rebutted.

14. With due respect, much of what Rw1 stated was hearsay evidence because she cannot testify on behalf of the Regional Supervisor and the National Sales Manager. Save for the admission by the claimant that the Police Abstract indicated that he was to blame for the accident on 26.7.2014, and that he parked the vehicle for 6 hours at a petrol station, there is no evidence from the defence to prove on a balance of probability that he was the one to blame for causing and failed to report to his immediate supervisors the accident and that he breached the law and company policy by parking the vehicle at the petrol station for 6 hours.

15. In my view, an entry in a Police abstract cannot be treated as the conclusive finding of liability against a driver until the matter is heard and determined on merit by the court. In addition, the claimant's supervisor has not testified herein to deny that he was notified of the accident after 2 days. On the other, the law allegedly breached by parking the vehicle at the petrol station for lack of branding license has not been stated. Consequently, I held that the respondent has not justified the termination of the claimant contract of service by proving the reasons cited in the dismissal letter dated 14.8.2014.

### **Procedure followed**

16. The claimant testified that he was not accorded any hearing before the summary dismissal by the respondent. Rw1 contended that the claimant was summoned to a hearing by the HR Manager but he declined and left. The said HR Manager who dismissed the claimant has not given evidence herein to rebut the evidence by the claimant. Consequently I find that claimant was never accorded any hearing before the dismissal for the alleged misconduct as required by section 41 of the Act under the said provisions, before terminating the employee's contract of service, the employer is required to explain the reason for which termination is being considered and the explanation must be done in language of the employee's understanding and in the presence of another employee or shop floor representative of his choice. The employer is further required to hear and consider the representations by the employee and his chosen companion before the termination is decided. The employer having failed to prove a valid and fair reason for termination and that fair procedure was followed before summarily dismissing the claimant, I find and hold that the dismissal was unfair within the meaning of section 45 of the Act.

### **Reliefs**

17. Under section 49 of the Act, I award the claimant Kshs.75,000 being one month salary in lieu of notice plus Kshs.300,000 being salary for 4 months' salary compensation for the unfair and unlawful dismissal. In awarding the said compensation I have considered the fact that the claimant never contributed to the dismissal through misconduct. I have also considered the fact that he had served for a very short period

after appointment.

18. The claim for severance pay is dismissed because the termination was not through redundancy under section 40 of the Act. Likewise the claim for General and aggregated damages is dismissed for lack of particulars and legal basis. Finally, the claim for right outs and floats lacks particulars and evidence and it is also dismissed. However, the claim for 14 days leave is granted being 37,500 because it has not been disproved by leave records.

**Conclusion and Disposition**

19. For the reason the summary dismissal of the claimant was unfair and unlawful, I enter judgment for him in the sum of Kshs.412,500 plus costs and interest at court rates from the date hereof. The said award shall be subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**