

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 199 OF 2016

KENYA PLANTATION & AGRICULTURAL WORKERS UNION....CLAIMANT

VERSUS

DEL MONTE (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sought to recover on behalf of the Grievant one Abdi Ndege who was an employee of the Respondent. It was stated that the Grievant was employed by the Respondent as a driver at its Thika farm and at the time of dismissal was earning Kshs. 21,338.48 per month. It was averred that on 2nd March 2015 the Grievant was assigned tractor no. 778 to transport irrigation pipes from Gatuanya yard to field No. 50 which is between Thika/Garissa highway. His shift begun at 9.00pm and was to end at 5.00am the next day. It was averred that about 4.30am towards the end of the Grievant's shift, the Grievant was about to turn when a motor vehicle No. KAX 684T headed his way and which was speeding indicated a right turn and instead took the same turn the Grievant was making thus hitting the tractor's front wheel. The Grievant reported the accident to his supervisor Mr. Karumba and was taken to the nearest dispensary for check-up. He was issued with a show cause letter on 26th March 2015 requiring him to show cause within 24 hours why disciplinary action should not be taken against him for failing to diligently perform his duties. The Grievant replied to the show cause letter on 26th March 2015 and stated that it was the fault of the saloon car driver who was under the influence of alcohol who was responsible for the accident. The Grievant wrote a resignation letter on 17th April 2015 and on 21st April 2015 the Respondent wrote to the Grievant inviting him for a disciplinary hearing on the same day at 2.30pm. The Claimant averred that on 30th April 2015 the Respondent summarily dismissed the Grievant on account of gross negligence and failure to follow safety measures and instructions. The Grievant wrote a letter on 3rd July 2015 appealing against his unfair dismissal from service and the Respondent replied on 10th August 2015 explaining that the decision taken earlier to dismiss him from service was based on sufficient grounds to justify the dismissal. The Claimant reported the dispute to the Minister for Labour and a conciliator was appointed and the parties were unable to agree prompting the issuance of a certificate of disagreement. The Conciliator recommended that the summary dismissal of the Grievant be reduced to termination but the Respondent declined to accept the recommendation. The Claimant averred that the Grievant worked for the Respondent for 34 years and his record was without blemish. The Claimant averred that the Grievant's dismissal was malicious, uncalled for and unfair in the circumstances. The Claimant thus sought the unconditional reinstatement of the Grievant to the Respondent's service, payment for the entire period the Grievant was dismissed, leave days due, leave travelling allowance. In the alternative to these prayers, the Claimant sought that the Grievant be paid gratuity for the period of service, salary for 12 months, payment in lieu of leave, leave travelling allowance, 2 month's salary in lieu of notice, damages for unlawful and unfair dismissal, costs of the cause and interest on the sums claimed.

2. The Respondent filed a reply to the claim and therein averred that the Grievant was assigned the equipment no. 778 to transport the pipes as indicated and that the accident occurred between the vehicle the Grievant drove and the third party motor vehicle on 2nd March 2015 for which the Respondent blamed and still blames the Grievant. The Respondent averred that he failed to give way to the oncoming vehicle and underestimating the speed of the oncoming vehicle. The Respondent averred that the Grievant was driving on the right side of the road and failing to keep left and failing to abide by Traffic Rules and the Highway Code Regulations. The Respondent averred that it would rely on the doctrine of *res ipsa loquitor*. The Respondent in answer to the averments on the dismissal averred that the Grievant was lawfully dismissed from employment and that the Respondent followed due process including the process after the referral to the conciliator. The Respondent averred that the Grievant having failed to defend himself against the allegations he faced and in compliance with Section 44(4)(c) of the Employment Act read together with clause 11(c)(iii) of the parties Collective Bargain Agreement. The Respondent averred that the Grievant was not entitled to any of the prayers in the claim. The Respondent thus urged the dismissal of the suit.

3. The Claimant testified on 10th April 2018 and stated that he was driving back on the highway when the saloon car hit him. He testified that the saloon car driver indicated a left turn on a 4 way junction and turned opposite to the side indicated for the turn. He stated that he was dismissed after 3 weeks and that he wrote and gave his explanation when he was asked but the Respondent nevertheless dismissed him. He was called for the disciplinary hearing and received the summary dismissal letter thereafter.

4. In cross examination he testified that he had worked for the Respondent for 34 years and that the driver indicated he would turn one way and turned the opposite side. He insisted he did not commit any mistake. He stated that he replied to the show cause letter, there was a disciplinary hearing and that there was a union representative who was the shop steward present. He stated that he was given an explanation why the Respondent was dismissing him but he was not satisfied with that. He testified that he resigned after the accident and that it was not after he was aware of termination.

5. In re-examination the Claimant testified the turn he made was on his lane and that the vehicle was to turn in the opposite direction but changed course and turned towards his tractor. He stated that he had written the resignation letter as he did not want to have a bad relationship with his employer. He testified that he went to the disciplinary hearing with union representatives. That marked the end of oral testimony as the Respondent did not call any witness. The Respondent's case was closed by counsel and the parties offered to file written submissions.

6. The Claimant filed submissions on 3rd May 2018 and the Respondent filed its submissions on 14th May 2018. The Claimant submitted that the issues for determination were 2:- whether the dismissal of the Grievant was fair and lawful and whether the Grievant is entitled to the reliefs sought. The Claimant submitted that Section 43(1) of the Employment Act makes provision on reasons for termination and that Section 45(1) and (2) make provision on the bar to unfair termination. The Claimant averred that the Grievant was assigned the tractor 778 to transport pipes and that he performed his tasks as directed and on his way back the saloon car headed toward him indicated a turn opposite to the side he was turning and instead hit him as he turned to the left. It was submitted that the Grievant did not cause the accident and that his termination was unfair and without valid reasons. The Claimant relied on the case of **Kenya Plantation & Agricultural Workers Union v Del Monte Kenya Limited [2016] eKLR** where Radido J. held that the decision to terminate the employee in that case was not valid and equally was not fair. The Claimant also relied on the case of **Zephania Nyambane v Nakuru Water & Sanitation Services Company Limited [2013] eKLR** and submitted that the Grievant was entitled to the prayers sought. The Claimant prayed that the case having been proved to the required standard the claim should be allowed.

7. The Respondent submitted that the issues for determination were 3:- whether the Claimant was an employee of the Respondent, whether the Claimant was unfairly and unlawfully dismissed from employment, whether the Claimant is entitled to compensation as prayed for in the memorandum of claim. The Respondent admitted that the Grievant was its employee up till the time of dismissal. The Respondent submitted that the Grievant was blamed for the negligence and recklessness in causing the accident. The Respondent submitted that the Grievant failed to properly explain how the accident occurred and that the Grievant should have exercised better traffic judgment and either gave way or slow down. The Respondent submitted that the Grievant was given reasons for the dismissal and he was properly terminated and in arriving at the decision to terminate the Respondent went through the various steps that are required in law. The Respondent relied on the case of **John Rioba Maugo v Riley Falcon Security Services Ltd [2016] eKLR** which cited the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR** on procedural and substantive fairness procedures which were followed. The Respondent thus urged the dismissal of the claim.

8. The Grievant was dismissed for alleged gross misconduct. It was the Respondent's position that the Grievant was careless and negligent in causing the accident. The Grievant asserts that he made a proper turn and the carelessness of the driver of the saloon car was the cause of the accident. The Claimant argued that the Grievant was not careless and that despite the process the Respondent undertook after the accident it was not fair to dismiss the Grievant. The Grievant resigned sometime after the accident. The Respondent instead of accepting the resignation decided to undertake a disciplinary process in short shrift. The result was the dismissal of the Grievant.

9. In my considered view, the summary dismissal was not called for. The Grievant was not charged for the offence of careless driving, the Respondent did not indicate any damage to its equipment no. 778, a tractor. The dismissal it seems was geared to deny the Grievant his dues after 34 years of service without blemish. The Respondent's reasons for dismissal were not fair and therefore the dismissal was unlawful in terms of Section 43 and 45 of the Employment Act. The Respondent's dismissal of the Grievant is reduced to normal termination with notice. The Respondent is to pay the Grievant his terminal dues as it would have after a normal termination of employment without loss of benefits. The Grievant will also have the costs of the suit. His claim for leave will be computed by the Respondent based on leave days not taken as well as the allowances due. The Claimant did not prove that the Grievant was entitled to salaries for the period he was not employed. This would be unusual as he did not render service and cannot have a salary paid for the time since his dismissal. The Claimant will also have costs.

It is so ordered.

Dated and delivered at Nyeri this 9th day of July 2018

Nzioki wa Makau

JUDGE