



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 626 OF 2016**

**PETER CHIRONDA BEGONJA.....CLAIMANT**

**VERSUS**

**WELD-CON LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Statement of Claim dated 23<sup>rd</sup> August 2016 and filed in court on 24<sup>th</sup> August 2016, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Response on 10<sup>th</sup> July 2017 to which the Claimant responded on 19<sup>th</sup> July 2017.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Charles Songoni. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a driver on a one year contract effective 27<sup>th</sup> May 2016. He worked six days per week and earned a daily rate of Kshs. 1,150. The Claimant avers that the Respondent terminated his employment on 7<sup>th</sup> May 2016.
4. The Claimant pleads that the termination of his employment was unlawful and unfair. He therefore claims the following:
  - a) Damages for unfair termination of employment.....Kshs. 331,200
  - b) Damages for breach of contract.....220,800
  - c) Costs plus interest

**The Respondent's Case**

5. In its Memorandum of Response dated 5<sup>th</sup> July 2017 and filed in court on 10<sup>th</sup> July 2017, the Respondent states that the Claimant worked five days a week. The Respondent adds that the Claimant's employment was terminated on grounds of careless and malicious damage to the Respondent's property.
6. The Respondent states that prior to termination, the Claimant had been warned on his performance but had shown no improvement.
7. The Respondent avers that under the contract of employment, the Claimant was to serve six months' probation. Further, at the time of termination, the Claimant was still on probation having completed only four months into the contract and as such, the Respondent was not required to give reasons for termination.

**Findings and Determination**

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

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

### **The Termination**

9. The Claimant states that his employment was terminated verbally. The Respondent however produced a letter dated 5<sup>th</sup> May 2016 addressed to the Claimant as follows:

*"Dear Peter,*

**REF: TERMINATION OF CONTRACT**

*This is to bring to your notice that your contract will be terminated on 7<sup>th</sup> May 2016. The management has decided to terminate your contract due to carelessness which has lead (sic) to Truck damage. You have been warned several times on the way you are handling Company Vehicle but there is no improvement. This is costing the company money in terms of repairs.*

*To avoid more expenses, the Management will release you on Saturday 07/05/2016. Please collect a clearance form from the HOD Miritini and clear with the relevant departments as required to facilitate your final payment.*

*You will be paid as follows:*

- 1. Days worked up to 7/05/2016.*
- 2. Any overtime due.*
- 3. Leave days due prorated at two days for each completed Month less days taken.*
- 4. 7 days salary in lieu of notice as provided for in the contract signed section 6 (sic).*

*Finally a certificate of service will be issued to you without prejudice as required.*

*Yours faithfully for and on behalf of:*

***Weld-Con Ltd.***

*(Signed)*

*Charles Songoni*

*Human Resource Manager."*

10. In its Memorandum of Response and final submissions, the Respondent states that at the time his employment was terminated, the Claimant was still on probation. The Respondent therefore submits that the Claimant is not entitled to the procedural fairness requirements of Section 41 of the Employment Act, 2007.

11. By definition, a probationary contract of employment must be in writing. The Claimant's contract makes no provision for probation and the submission that he was on probation at the time of termination is without basis. I will therefore inquire into the circumstances of termination on merit. From the termination letter produced by the Respondent, the Claimant's employment was terminated on account of carelessness in handling the Respondent's motor vehicles. This would fall within the realm of poor performance and misconduct.

12. The Respondent further produced a prior warning letter to the Claimant dated 22<sup>nd</sup> April 2016 raising similar issues as those cited in the termination letter. The Claimant however denied receiving the warning letter. Moreover, the Court was unable to reconcile the issues raised in both letters with the contents of a certificate of service dated 17<sup>th</sup> May 2016 issued to the Claimant by the Respondent in which the Claimant is described as honest and hardworking. What is more, the Respondent did not provide the Claimant with an opportunity to defend himself as required in law.

13. Overall, the Court finds and holds that the Respondent not only failed to establish a valid reason for termination of the Claimant's employment as required under Section 43 of the Employment Act but also failed the procedural fairness test set by Section 41 of the Act.

### **Remedies**

14. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's short period of service but also the Respondent's conduct in effecting the termination.

15. No basis was laid for the claim for damages for breach of contract which therefore fails and is dismissed.

16. Ultimately, I enter judgment in favour of the Claimant in the sum of Kshs. 82,800 being 3 months' salary in compensation for unfair termination of employment.

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

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

19. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Lewa for the Claimant

Miss Opolo for the Respondent