



**REPUBLIC OF KENYA**

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

**KENYA AT NAIROBI**

**CAUSE NO 1348 OF 2014**

**OKWARO J. L. LOROI.....CLAIMANT**

**VERSUS**

**DICKSON MUZUNGU.....1<sup>ST</sup> RESPONDENT**

**DHL EXCEL SUPPLY CHAIN (K) LTD.....2<sup>ND</sup> RESPONDENT**

**EDWARD SIMBAUNI.....3<sup>RD</sup> RESPONDENT**

**ELKANA MONG'ARE.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. By a memorandum of claim filed on 13<sup>th</sup> August, 2014 the claimant averred that he was employed by the 1<sup>st</sup> respondent as a lorry driver at a salary of Kshs 15,000/= per month. The 2<sup>nd</sup> respondent was sub contracted by SDV-Transami to provide trucks for transporting products from East African Breweries and the 1<sup>st</sup> respondent's truck was one of trucks sub-contracted. The 3<sup>rd</sup> respondent was the 2<sup>nd</sup> respondent's supervisor whereas the 4<sup>th</sup> was working for SABL as head of security.

2. The claimant further pleaded that the 1<sup>st</sup> respondent's lorry had been assigned for delivery of EABL products to Bomet County and he was the designated driver to make deliveries either during the day or at night. On 10<sup>th</sup> June, 2013 the claimant averred that the 3<sup>rd</sup> and 4<sup>th</sup> respondents made false and malicious allegations to the police against him upon which the claimant was arrested and taken to Kasarani Police Station. According to the claimant, the 1<sup>st</sup> respondent recklessly and without verifying the false and malicious allegations verbally terminated the claimant's employment and without notice. The claimant further averred that upon termination the 1<sup>st</sup> respondent never paid him his terminal dues and for the period he worked.

3. The 1<sup>st</sup> respondent on its part pleaded that on 10<sup>th</sup> June, 2014 the claimant was arrested and taken to Kasarani Police Station on allegation of theft from EABL premises in Ruaraka following complaint by EABL Staff. When the claimant was arrested, the 1<sup>st</sup> respondent's lorry was also impounded and detained at Kasarani Police Station. The 1<sup>st</sup> respondent further averred that it was never involved in the arrest of the claimant, neither was the claimant acting on 1<sup>st</sup> respondent's instructions when he was alleged to have stolen some products from EABL.

4. The 1<sup>st</sup> respondent further averred that as a result of the incident his contract with EABL was suspended during the period of investigations occasioning him substantial loss. The 1<sup>st</sup> respondent also pleaded that when the claimant was released from custody, he pleaded with the 1<sup>st</sup> respondent to give him some money as he was in financial difficulty and the respondent gave him Kshs 15,000/= which was the agreed commission though the delivery was not done. According to the 1<sup>st</sup> respondent the claimant thereafter went away and never returned to work. After a few number of days, the 1<sup>st</sup> respondent presumed the claimant had deserted his work and took another driver.

5. The court will not consider the defenses as put forward by the 2<sup>nd</sup> and 4<sup>th</sup> respondents since there was no employer –employee relationship between them and the claimant. They were wrongly joined in the suit and are hereby removed forthwith.

6. In his oral evidence in court the claimant further stated that he worked for the respondent from October, 2012 to June 2013 and that in June he returned empty bottles to EABL and went to surrender the receipts but when he returned he found the 3<sup>rd</sup> and 4<sup>th</sup> respondent had put some products in his vehicle. He denied knowledge of how they got there. He was later accused of stealing and taken to Kasarani Police Station. He was later on released on a Kshs 10,000/= cash bail.

7. It was his evidence that he never went to work thereafter. According to him, he was refused entry to the EABL premises thereafter. According to him, he was refused entry to the EABL premises thereafter. He called the 1<sup>st</sup> respondent as his employer and he told him he could not go back to work.

8. In cross-examination he stated that his employment contract was drawn by the 1<sup>st</sup> respondent and that his salary was paid through Mpesa by the 1<sup>st</sup> respondent. It was further his evidence that the respondent had paid him for the period he last worked. In cross-examination he stated that when he returned from surrendering the receipts he found his truck already loaded.

9. The 1<sup>st</sup> respondent on his part stated that the claimant was working for him as a driver and that he used to pay him Kshs 500/= per day and that payment was after each trip. The payment was done through a senior driver. It was his evidence that he received a call from the senior driver over the theft incident and that he did not go to the scene because DHL and EABL said they were handling it. According to him, he never received any call from the claimant over the incident. In cross-examination he stated that the claimant used to drive the truck under supervision of the senior driver.

10. It was common ground that the claimant used to work for the 1<sup>st</sup> respondent as a truck driver and was to earn Kshs 15,000/= per month. It was also not in dispute that some incident of attempted theft occurred at the EABL premises in which the claimant was implicated since the goods attempted to be stolen were found in the truck the claimant was driving. The claimant was consequently attested and the truck impounded pending investigations.

11. The claimant was subsequently released with no charges but when he attempted to resume work he was not allowed access to the EABL premises where the truck he used to drive was. He called the 1<sup>st</sup> respondent who told him he could no longer go back to work. The 1<sup>st</sup> respondent however on his part stated that the claimant saw him after release from custody and sought financial assistance to solve some personal issues and the respondent gave him Kshs 15,000. The claimant admitted this fact. The respondent however stated that the claimant never went back to him and after a number of days he engaged another driver as he assumed the claimant had absconded work.

12. On an allegation of desertion from duties, the burden is cast upon an employer to show what efforts it made to contact the employer to call on such employee to resume duty at the paid of a dismissal. The respondent never produced any such evidence making the claimant's claim that he was refused entry to EABL premises to resume work more plausible. Under section 43(1) of the Employment Act if an employer fails to prove reason or reasons for termination of an employee's service, the termination shall be deemed to have been unfair.

13. The claimant was employed in October, 2012 and worked until June, 2013 (approximately 9 months). It cannot therefore be denied that he had not worked for the respondent for long. The court having found that the 1<sup>st</sup> respondent neither proved the reason for ending the claimant's contract nor followed the required procedure in ending the same will award the claimant as follows:

a. One months pay in lieu of notice	15,000
b. Three months salary as compensation for unfair termination of service	<u>45,000</u>
	<b><u>60,000</u></b>
c. Costs	

14. The other heads of compensation pleaded will be disallowed because although pleaded no evidence was laid or produced in their support.

15. Items (a) and (b) shall be subject to applicable taxes.

16. It is so ordered.

Dated at Nairobi this 30<sup>th</sup> day of November, 2018

**Abuodha Jorum Nelson**

**Judge**

Delivered this 30<sup>th</sup> day of November 2018

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.