



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 751 OF 2012**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)

**JAMES MOKUA ONCHWATI.....CLAIMANT**

**-VERSUS-**

**RIFT VALLEY RAILWAYS (KENYA) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein James Mokuwa Onchwati filed his Memorandum of Claim on 4/5/2012 through the firm of Odhiambo & Odhiambo Advocates claiming that he was an employee of the Respondent and held the position of Locomotive Driver Grade 8 as per his appointment letter Appendix 1 dated 27<sup>th</sup> April 2011 confirming his appointment from 1.5.2011.
2. He avers that on 8/2/2012, he was summarily dismissed by the Respondent claiming that he had mismanaged Locomotive No. C3A LOCO 9314 on 24.5.2011 while on transit from Nairobi to Eldoret wherein he made a stop at unauthorised spot (Appendix 5).
3. Before the dismissal, the Claimant had been issued with a suspension letter in April 2012 and then a disciplinary letter for which he responded to.
4. The Claimant avers that his dismissal was unfair and unjustified as he was not accorded a hearing. He now seeks orders that a declaration be made that his dismissal amounted to an unfair dismissal and that he be paid 1 month salary in lieu of notice and compensation amounting to 12 months' salary for the unfair dismissal.
5. The Respondent's Counsel cross-examined the Claimant when he gave his oral evidence in Court and he stated that he was on a 3 year contract which was to expire on 6.7.2013. He states that he was suspended due to unauthorised handling of the train and excess consumption of fuel.
6. He avers that he explained himself that there was a wheel slip and that he stopped on the way without authorisation. He however told the Court that he did not need strict authorisation to stop and he could stop if there was a problem. He states that he stopped in Rongai Station in Nakuru.
7. He states that the Respondent did not consider his explanation as he was not given any opportunity to explain himself.
8. The Respondents filed their Defence in Court but never prosecuted their case on the day fixed for hearing. The Court thus ordered the Respondent's case closed and directed that parties file their submissions. The Claimant filed their submissions but Respondents never field theirs.
9. I have considered the evidence submitted by the Claimant. I note that the Claimant was actually suspended and asked to explain himself concerning the accusations made against him. He did respond in writing. He was thereafter dismissed without being taken through any disciplinary hearing.
10. Section 41 of Employment Act 2007 states as follows:-

**“(1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a**

shop floor union representative of his choice present during this explanation.

**(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.**

11. Indeed Section 41 (above) requires that an oral hearing be accorded to an employee whom the employer is considering to dismiss or terminate before the dismissal takes place. The Respondent failed to accord the Claimant this opportunity and therefore dismissed him unfairly.

12. Section 45(2) of Employment Act 2007 states as follows:-

**(2) “A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee’s conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure..”.**

13. In the circumstances, I find the dismissal of the Claimant unfair and unjustified. In terms of remedies I find for the Claimant and award him as follows:-

**1. 1 month salary in lieu of notice = 45,000/=.**

**2. 6 months salary as compensation for unlawful dismissal = 6 x 45,000 = 270,000/=**

**TOTAL= 315,000/=**

**3. The Respondent will also pay costs of this suit plus interest at Court rate with effect from the date of this judgement.**

**Dated and delivered in open Court this 20<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Parties