



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 329 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**BERNARD WAFULA SITOKAM.....CLAIMANT**

*VERSUS*

**JUBILEE RAFIKI HARDWARE LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant instituted this cause vide a statement of claim dated 26<sup>th</sup> November 2014 and filed in court on 1<sup>st</sup> December 2014.

In his statement of claim, the Claimant averred that he was employed by the Respondent on or about 1<sup>st</sup> February 2009 as a lorry driver and assigned to drive Motor Vehicle Registration No. KBL 315K, Mitsubishi HD Lorry which he drove until he was terminated on 7<sup>th</sup> October 2014.

He averred that for the 5 years he worked for the Respondent, he was grossly underpaid as he was paid below the recommended Government Minimum wage limits as envisaged in the relevant legal notices. He also worked overtime without pay. He serialized the history of the wages paid to him.

The Claimant further contended that he was unlawfully and unprocedurally terminated. He went ahead to enumerate the particulars of unlawful and unprocedural termination.

He prayed for a declaration that his services were unprocedurally, unlawfully and unfairly terminated and for a sum of Kshs.1,210,296/= spread in seven heads serialized at paragraph 5 of the statement of claim.

In its defence dated 20<sup>th</sup> February 2015 and filed in court on 23<sup>rd</sup> February 2015 the Respondent admitted that the claimant was its employee working as a driver but that he was driving a medium size vehicle. It denied having unlawfully and/or unprocedurally terminated the Claimant. It averred that the Claimant is not entitled to compensation for wrongful termination and/or any benefits.

At the hearing the claimant testified on his behalf while the respondent called LAMECK ODOYO NYAMBALA, the respondent's accountant. The parties thereafter filed and exchanged written submissions.

The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the remedies sought.

The claimant testified that he was not given a hearing. He was not given a show cause letter or an opportunity to explain what happened.

The claimant further testified that prior to the summary dismissal, he was accused of stealing one roll of kukunet, which he had allegedly been given by a customer to deliver to the respondent's hardware on 6<sup>th</sup> October 2014. The letter of dismissal is reproduced below –

*“7<sup>th</sup> October 2014*

*To: Contrary to Company Policy*

*Benard Wafula Sitokani*

**RE: SUMMARY DISMISSAL**

*This is to inform you that due to the incident whereby I established that while on transit from Baraton on 06.10.14 you were given by the customer to return one roll of Kuku-net back to Store/Shop but you never did. When you were asked to explain the whereabouts of the Kuku-net, you alleged that you return it to the Store which was confirmed you never did.*

*Being the driver and staff trusted with the Company's goods under your custody and instead of making sure that the goods were delivered back, you decided to steal the goods which contravene the Company's Policy.*

*In the view of the above, therefore the Management has decided to Summary dismiss you from Employment with effect of 7<sup>th</sup> October 2014.*

*As you have already collected your September 2014 salary. The salary for the 6 days worked in October 2014 will be forfeited and will be recovered to pay part of the cost of the stolen roll of Kuku-net.*

*I wish all the best for your future endeavour.*

*Yours faithfully,*

SIGNED

*cc District Labour Officer*

*P. O Box 110*

*ELDORET"*

RW1 alleged that the claimant was asked where the Kukunet was and replied that he had returned it but could not explain whom he gave it to.

RW1 further testified that the claimant was given a notice to show cause in his presence. It would not be practical however for a person to commit an offence on 6<sup>th</sup> October 2014, be given a show cause letter on 7<sup>th</sup>, heard on the same 7<sup>th</sup> and dismissed the same day. The letter of dismissal does not refer to any hearing or notice to show cause.

I find that the claimant's dismissal was unfair for want of both valid reason and procedural fairness as the respondent did not prove the reason for dismissal as provided in Section 43 or give the claimant a hearing as provided in Section 41 of the Employment Act.

The claimant prayed for underpayments, overtime, notice, salary for days worked, accrued leave, service gratuity and compensation.

The claimant is entitled to one month's salary in lieu of notice. He is further entitled to salary for 7 days worked which was withheld by the respondent. His last salary was Kshs.16,100.

The claimant prays for underpayments. He testified that he was driving a 7 tonne Mitsubishi lorry Registration Number KBL 315K, which is a heavy commercial vehicle as defined under the Regulation of Wages (General) Order. RW1 however testified that the claimant was driving motor vehicle registration No. KBL 416K which is a 4 tonne vehicle and falls within a medium sized vehicle range. He denied that the respondent owns a vehicle registration No. KBL 315K lorry. There was however no evidence produced by the respondent to prove that it does not own motor vehicle registration no. KBL 315 lorry or that motor vehicle KBL 416 which it is alleged the claimant drove is a 4 tonne medium sized vehicle. It would have been easy to prove this by producing delivery notes, which always indicate the registration no. of delivery vehicles. The respondent could also have produced their records of the motor vehicles owned or registration certificates which are in the respondent's possession. Under Section 10(6) as read with Section 10(7) of the Employment Act, it was the duty of the respondent to discharge the burden of proving the size of motor vehicle the claimant drove as this should have been specified in his letter of appointment.

I find that the respondent has not discharged the burden of proof that the vehicle that the claimant drove was not a heavy commercial vehicle of 7 tonnes. I will therefore find in favour of the claimant and use the rate of heavy commercial vehicle to determine the claimant's prayer for underpayments.

Based on the foregoing I find that the claimant was underpaid as claimed and award him the same in the sum of Kshs.347,094.75.

I do not find any proof of overtime as the claimant did not submit any evidence of the same and it is not conceivable that he worked similar hours overtime every day for the entire period he was in the employment of the respondent.

**Annual Leave**

The claimant prayed for annual leave from 2010 to 2013. RW1 testified that the claimant was paid for 2010, 2011, 2012 and 2013 leave and that he did not complete the year 2014 and was therefore not entitled to leave. No leave records were produced as required by the Employment Act 2011, which at Sections 10(3) and 74 provide as follows –

Section 10(3)(a)(i)

**10(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—**

**(a) any terms and conditions relating to any of the following—**

**(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);**

**(ii) ...**

Section 74(1)(f)

**(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—**

**(a)...**

**(b)...**

**(c)...**

**(d)...**

**(e)...**

**(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;**

Section 10(6) as read with 10(7) of the Employment Act provides that, where the employer fails to produce records it is required to keep under the Act, the burden of proving or disproving the alleged term of employment shifts to the respondent. I find that the respondent has not discharged its burden of proving that the claimant went on leave. I award him the leave at Kshs.96,460.70 based on basic salary of Heavy Commercial Driver at Kshs.20,770 per month.

The prayer for service gratuity is not payable as the claimant was a member of NSSF and his letter of appointment did not provide for service gratuity.

The claimant is entitled to compensation for unfair dismissal which I award him at 7 months' gross salary taking into account the length of service, the manner in which his employment was terminated and all the circumstances of his case.

In the final analysis judgment is enter for the claimant against the respondent as follows –

(a) one month's salary in lieu of notice based on minimum wage of Driver, Heavy Commercial Vehicle inclusive of 15% house

allowance as at October 2014-----Kshs.23,885.50

(b) withheld salary for 7 days worked in October 2014-----Kshs.6,430.70

(c) Annual leave not taken-----Kshs.96,460.70

(d) Underpayments-----Kshs.347,094.75

(e) Compensation-----Kshs.167,198.50

**Total      Kshs.641,070.15**

(f) The respondent shall pay claimant's costs of the suit.

(g) Interest shall accrue on decretal sum from date of judgment.

It is so ordered.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**