



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 163 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**DAVID AGUKO ONGARO.....CLAIMANT**

**-Versus-**

**NDUGU TRANSPORTERS LIMITED.....RESPONDENT**

**J U D G E M E N T**

By his Memorandum of Claim dated 23rd May, 2015 the Claimant avers that he was unfairly terminated by the Respondent. He further states that during his employment commencing 2nd January, 2008 to date of verbal termination on 17th January 2014, he was never granted any annual leave and was underpaid. He prays for payment of terminal dues, costs and interest.

The Respondent filed a defence in which it denies the allegations in the Memorandum of Claim and avers that the Claimant was summarily dismissed from service for absconding duty on 17th January, 2014. The Respondent admits owing the Claimant pay in lieu of leave and underpayments but based on salary of general labourer and not turn boy as alleged by the Claimant.

At the hearing the Claimant testified on his behalf. The Respondent called one witness ATIENO ALBERT AKECH, its transport Manager (RW1) who testified on its behalf. The parties thereafter filed and exchanged written submissions.

The Claimant testified that he was employed by the Respondent on 2nd January, 2008 as a helper on a building site for 2 years. In 2010 he was employed as a turn boy. He did not have any disciplinary issues.

He testified that on 17th January, 2014 he reported to work as usual at 7am. At 11.30 am he was called by his supervisor by the name Daniel, who told him that 'Ndugu', the owner of the Respondent Company wished to meet all employees. When he arrived at the venue for the meeting he was asked by a Mr. Baraj, a grandson of 'Ndugu', where he was working. He responded that he was burning rubbish. Baraj then told him to go home. The Claimant testified that he waited until after Baraj had asked everyone where they worked then he went to Baraj and asked him what he had done to warrant the termination but Baraj told him to go away. The Claimant asked for his terminal benefits and Baraj told him there was none.

The Claimant testified that his last salary was Shs.9,350/-. In 2013 his salary was Shs.8,000, in 2012 his salary was 7,586, in 2011 he earned Shs.6045 and in 2010 he earned Shs.5,688. He stated that he was not paid house allowance.

He denied receiving any warnings as alleged in the defence and disowned the signatures in the two warning letters appended to the Defence. He further denied ever working in any quarry as alleged in one of the warning letters and stated that in September 2013 when the warning letter alleging he was absent from the quarry was written he was working as a night guard.

The Claimant further denied that he was away on 9th January, 2014. He denied going on leave on 9th January, 2014 as alleged by the Respondent.

He testified that he was never informed about tabulation of his leave pay by the Respondent's accountant as alleged by the Respondent and stated that the Respondent did not respond to his demand letter sent through his advocates.

In cross examination the Claimant stated that he was a turn boy in Motor Vehicle KAW 397 B, a trailer driven by a Mr. Okeyo and later by Mr. Kituyi. He stated that at the time he left service he was not a turn boy.

In the written submissions filed on behalf of the Claimant he submits that he was dismissed verbally without following the laid down procedure, that he was not given a hearing or given an explanation of the reasons for dismissal. It was submitted that the dismissal was unlawful and unfair.

### **Respondent's Case**

RW1 testified that the Claimant was an employee of the Respondent between 2010 and 2014 as a general labourer. He testified that the claimant had disciplinary issues. On 2nd September, 2013 he disappeared from his work station at 10.30 am and reappeared at 4.30 pm and was issued with a warning letter. The Claimant was again issued with a warning letter on 16th December, 2013 for idling and sleeping during working hours. On 9th January 2014 the Claimant was sent on a week's leave and failed to return following which he was dismissed.

RW1 testified that the Respondent prepared the Claimant's terminal dues but he has never collected it. He conceded that there were underpayments which the Respondent was willing to pay.

The Respondent denied that the termination of the claimant's employment was unlawful or unfair.

### **Determination**

I have considered the pleadings, evidence adduced and written submissions. The issues for determination are whether the summary dismissal of the Claimant was fair and if he is entitled to remedies sought.

### **Unfair Dismissal**

Section 45(2) of the Employment Act provides that termination of employment by an employer is unfair if the employer fails to prove valid reason and fair procedure.

In the present case the Respondent alleges that the employee was sent on leave for 7 days due to major reorganisation. The Respondent did not state what kind of reorganisation or submit any evidence to prove that there was any reorganisation at all. On the very day that the alleged leave of 7 days lapsed a letter of summary dismissal was written to the Claimant.

The Claimant himself has denied having been sent on leave and states he was at work on 17th January, 2014 when he was called and verbally dismissed by Mr. Baraj, a grandson to the Managing Director Mr. Ndugu.

The letter of dismissal was never received by the Claimant as evidenced by the fact that he did not sign it. It has neither been pleaded in the defence or stated in the testimony of RW1 that any attempt was made to deliver the letter to the Claimant.

Assuming that the Respondent's version of the circumstances leading to the summary dismissal of the Claimant is the correct version, the Respondent must still justify the reason for summary dismissal.

The Respondent states that it relied on section 44(4)(a) which states that it is a lawful or justifiable ground for dismissal if -

*"without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work."*

The section only makes absence a ground of dismissal if it is "**without leave or other lawful cause.**" The Respondent has not demonstrated that it investigated the reason for the Claimant's absence and found it to have been "without other lawful cause."

Having failed to establish that the Claimant's absence, if factual, was without lawful cause, the summary dismissal is without valid reason.

Section 45(4) (b) further states that termination of employment would be unfair if -

*"It is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee."*

The circumstances under which the Claimant was summarily dismissed cannot pass the test of justice and equity. First, it is questionable why the Claimant had to be sent on 7 days leave "due to major reorganisation" which has not been specified. Secondly it is not just and equitable to summarily dismiss an employee on the date he is supposed to report back to work after what would qualify to be termed *compulsory leave* without asking the employee to explain why he has not reported back.

The foregoing notwithstanding section 41 of the Employment Act requires an employer to explain to an employee, in a language he understands, and in the presence of either a union shop floor representative or a fellow employee of his choice, the reasons for which termination is contemplated, on the grounds of misconduct/poor performance or physical incapacity.

The Respondent did not do this. It did not wait for the Claimant to report back so that he could be given an opportunity to defend himself against the reasons for which the Respondent intended to summarily dismiss him.

Whether considered according to the Claimant's or the Respondent's version of the facts, the summary dismissal of the Claimant is unfair and unjust for want of both validity of reason and want of fair procedure. I therefore declare the summary dismissal unfair.

## **Remedies**

The Claimant prays for damages for wrongful dismissal, under payments, pay in lieu of leave, termination notice and certificate of service.

Taking into account the circumstances under which the Claimant was summarily dismissed and all the factors set out in section 49(4) of the Employment Act, I award the Claimant 6 months' salary as compensation for unfair termination. I also award him one month's salary in lieu of notice and pay in lieu of leave.

I must however determine whether the Claimant was a general labourer as alleged by the Respondent, or a turn boy as pleaded by the Claimant.

RW1 stated under cross-examination that the Respondent does not issue employment contracts to its employees. As correctly submitted for the Claimant, section 10 of the Employment Act requires employers to issue contracts of service and to keep records which should contain the employment

particulars. The section provides as follows -

**10. Employment particulars**

*(2) A written contract of service shall state—*

*(a) the name, age, permanent address and sex of the employee;*

*(b) the name of the employer;*

*(c) the job description of the employment;*

*(d) the date of commencement of the employment;*

*(e) the form and duration of the contract;*

*(f) the place of work;*

*(g) the hours of work;*

*(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*

*(i) the intervals at which remuneration is paid; and*

*(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and*

*(k) any other prescribed matter.*

Where such records are not produced in proceedings between the parties it is the burden of the employer to disprove any alleged term of employment required to be stipulated in the contract. In this case the Claimant has given particulars of the vehicle in which he was a turn boy as KAW 397 B, a trailer, driven first by Mr. Okeyo, and later by Mr. Kituyi. These facts were not contested by the Respondent. No other proof was produced by the respondent to contradict or controvert the claimant's evidence that he was a turn boy. For the foregoing reasons, I find that the claimant was a turn boy.

Although the Claimant admitted that at the time of dismissal he was not a turn boy, he was entitled to the salary of a turn boy as there was no evidences of his demotion from turn boy to general worker.

On the issue whether or not the Claimant was housed by the Respondent the Claimant did not controvert the Respondents averments in the Defence or the evidence of RW1 that he was provided with housing. I therefore find that the claimant is not entitled to house allowance.

The Claimant is therefore entitled to compensation based on gross salary of Shs.10,563.60.

RW1 admitted that the claimant was underpaid. The underpayments are as follows -

<b>2010</b>	<b>Statutory</b>	<b>Paid</b>	<b>Underpayments</b>
January	5,658		
February	6,130		
March	6,130		

April	6,130		
May	7,283	5,186	2,097
June	7,283	5,835	1,448
July	7,283	6,743	540
August	7,283	6,743	540
September	7,283	6,743	540
October	7,283	6,743	540
November	7,283	6,743	540
December	7,283	6,743	540

**2011**

January	7,283	6,743	540
February	7,283	6,743	540
March	7,283	6,743	540
April	7,283	6,743	<u>540</u>

**Total Underpayments**

**Shs.8,945**

**2011**

May	8,193	6,743	1,450
June	8,193	7,586	607
July	8,193	7,586	607
August	8,193	7,586	607
September	8,193	7,586	607
October	8,193	7,586	607
November	8,193	7,586	607
December	8,193	7,586	607

**2012**

January	8,193	7,586	607
February	8,193	7,586	607
March	8,193	7,586	607

April	8,193	7,586	607
May	9,266.30	7,586	1,680.30
June	9,266.30	7,586	1,680.30
July	9,266.30	8,579	687.30
August	9,266.30	8,579	687.30
September	9,266.30	8,579	687.30
October	9,266.30	8,579	687.30
November	9,266.30	8,579	687.30
December	9,266.30	8,579	687.30

**2013**

January	9,266.30	8,579	687.30
February	9,266.30	5,279	3,987.30
March	9,266.30	8,579	687.30
April	9,266.30	8,579	687.30
May	10,563.60	8,579	1,984.60
June	10,563.60	8,579	1,984.60
July	10,563.60	8,579	1,984.60
August	10,563.60	9,781	782.60
September	10,563.60	9,781	782.60
October	10,563.60	9,781	782.60
November	10,563.60	9,781	782.60
December	10,563.60	9,405	<u>1,158.60</u>

**Total**                      **23,776.40**

2014

January                      10,563.60                      5,986.00

17 days

Total underpayments based on statutory minimum rates of pay for turn boy is Shs.32,721.40.

The Claimant is also entitled to salary up to 17 th of January, 2014 being the date of dismissal at Kshs.5,986.

## **Conclusion**

In summary, I declare that the summary dismissal of the Claimant was unfair both substantively and procedurally and award him the following:-

- (i) One months salary in lieu of notice Shs.10,563.60
- (ii) Underpayments Shs.32,721.40
- (iii) Salary for 17 days of January Shs. 5,986.00
- (iv) Pay in lieu of Leave (2010-2013) as Shs.31,721.40

calculated by Respondent

- (v) Damages for wrongful dismissal  
(6 Months Salary) Shs.63,381.60

**Total Shs.144,252.60**

- (vi) Certificate of Service

The Respondent shall also pay Claimant's costs for this suit. Decretal sum shall attract interest at court rates unless payment is made within 30 days.

**DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**