



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

**AT MOMBASA**

**CAUSE NO. 290 OF 2015**

**KENGA CHARO KAMBI.....CLAIMANT**

**VERSUS**

**BLUE JAY INVESTMENT LTD.....RESPONDENT**

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

**INTRODUCTION**

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment contract by the respondent on 21/10/2014. The respondent has denied the alleged unfair termination and avers that she fairly dismissed the claimant for gross misconduct within the provisions of the Employment Act. It is further defence case that after the dismissal, she offered to pay the claimant his terminal dues but he refused to collect the same and brought this suit.

2. The suit came for hearing on 14/11/2016 but the parties agreed to dispense with oral testimonies and instead adopted their respective records and filed written submissions.

**CLAIMANT'S CASE**

3. The claimant stated in his written statements that he was employed by the respondent in June 2013 as a lorry driver at a monthly salary of ksh.25000. In July 2014, he parked lorry registration KBY 495G/ZB3158 at Malaba border under the care of the assigned Turnboy Mr. Kashmir Kuru Wachira, and went to sleep. When he returned in the morning he found the computer PLD (a device in the lorry) missing. It was worth ksh.175000 and he reported to the respondent immediately and the Turnboy was dismissed vide the letter dated 11/7/2014.

4. In October, the claimant was allocated another lorry registration number KBN 606P but it developed fuel leakage from its tank. When he informed the respondent, he was instructed to get a mechanic to fix it which he did and brought the receipts for repair costs plus other receipts for extra fuel.

5. To his shock, however, the claimant was served with the dismissal letter dated 21/10/2014 which indicated that his salary was to be paid less ksh.36000 loan which had not been advanced to him. That upon further inquiry he was told that the said deduction was for the loss of the computer PLD which was stolen from lorry registration number KBY 493G at Malaba while under the care of the Turnboy. He declined the said deductions and brought this suit claiming terminal dues plus compensation as prayed in the suit.

## DEFENCE CASE

6. Mr. Said Lugo Mwachiti, the respondent's Claims Officer stated in his written statement that the claimant was employed by the respondent on 14/6/2013 as a lorry driver. In July 2014, the claimant was assigned to drive a lorry registration number KBY 493G but on reaching Malaba border, he left the lorry at the parking zone and went to attend to his private issues and when he returned, he found the lorry's computer device PLD, worth ksh.175000 missing. As a result, the claimant was served with a warning letter and he accepted liability by signing on the letter.

7. Mr. Mwachiti further stated that despite the said warning, the claimant continued with his negligent performance of duty and frequently requested for extra fuel while on transit unlike the other drivers in the fleet of similar lorries who were allocated the same amount of fuel. As a result of the said gross misconduct, the claimant was summarily dismissed by the letter dated 21/10/2014 but has since declined to collect his terminal dues.

## ANALYSIS AND DETERMINATION

8. There is no dispute that the claimant was employed by the respondent as a driver from 14/6/2013 until 21/10/2014 when he was summarily dismissed. The issues for determination are:

- a. Whether the summary dismissal was unfair.
- b. Whether the reliefs sought should be granted.

### **Unfair dismissal**

9. Under Section 45(2) of the Employment Act, termination of the employment contract by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason(s), and that it was done after following a fair procedure. A reason for termination is valid and fair if it is true and if it relates to the employee's misconduct, compatibility, poor performance, physical incapacity, and/or if it relates to the employer's operational requirements.

### **Reasons for the dismissal**

10. In this case, the reason for the termination was gross misconduct namely, negligence that led to the loss of computer PLD and the unjustifiable demand for extra fuel unlike the other comparable drivers in the same fleet of lorries. The claimant has denied liability and blamed his Turnboy who was guarding the lorry for the loss of the computer PLD. As regards the extra fuel, the claimant blamed it on the leaking fuel tank, which he reported to the respondent and was authorized to repair. He produced receipts to prove the said repairs on the fuel tank.

11. After careful consideration of the evidence and the submissions before me, I find on a balance of probability that the extra fuel demanded by the claimant while on transit was occasioned by the leaking fuel tank. The respondent has not rebutted that allegation by the claimant and more so the receipt for ksh2500 dated 7/10/2014 which was issued for welding of fuel tank on KBN 606P. The respondent has also not produced any expert opinion to prove that all the respondent's lorries, the age notwithstanding, were supposed to consume the same amount of fuel in covering the same distance while carrying the same weight.

12. In addition, I find that the respondent has not proved that the claimant acted negligently by going to sleep while leaving the lorry KBY 493G under the care of the Turnboy at Malaba border parking zone. Specifically the defence witness has not demonstrated that the claimant was not supposed to leave the lorry with the Turnboy at any time to go and sleep. My reading of the letter dated 11/7/2014 by which the respondent dismissed the Turnboy, it is clear that all the blame for neglecting to guard the lorry at Malaba border was heaped on the Turnboy as he was dismissed and surcharged for the whole ksh.175000 while the claimant was served with a warning letter on 31/7/2014. Had the claimant been negligent like the

Turnboy, he would have been dismissed.

13. For the reason that the respondent has failed to prove negligence on the part of the claimant, and further having failed to rebut the claimant's evidence that the demand for extra fuel was due to a leaking tank, I find that she has not proved and justified the reason for summarily dismissing the claimant. Under Section 43 of the Act, if the employer fails to prove the reason for terminating the services of his employee, the termination is deemed to be unfair within the meaning of Section 45 of the Act.

### **Procedure followed**

14. In this case the claimant contended that fair procedure was not followed before his dismissal. According to him, he arrived at Mombasa on 21/10/2014 and upon presentation of the receipts for fixing the leaking fuel tank and extra diesel, he was served with a termination letter which also surcharged him ksh36000 allegedly for the stolen computer PLD for KBY 493G. The respondent has not rebutted the foregoing evidence by the claimant but only contends that the claimant was summarily dismissed for gross misconduct.

15. Under Section 41, before the employer terminates the services of his employee on account of misconduct, poor performance and physical incapacity, he shall first explain to the employee in the presence of a fellow employee or shop floor union representative of his choice and in a language they understand, the reason for which she intends to terminate the services of the employee and thereafter invite the employee and his chosen companion, a chance to air their defence for consideration before the termination is decided. There is no doubt that the procedure laid down by Section 41 of the Act was not followed before the summary dismissal of the claimant. Consequently, I find that the respondent has not proved that she followed a fair procedure before dismissing the claimant from employment on 21/10/2014.

16. Having found herein above that the respondent has failed to prove and justify the reason for dismissing the claimant, and that she has failed to prove that she followed a fair procedure before the dismissal, it is my holding that the summary dismissal of the claimant was unfair within the meaning of Section 45 of the Employment Act.

### **RELIEFS**

17. Under Section 49(1) of the Act, I award the claimant ksh.25500 being one month salary in lieu of notice plus ksh.76500 being three months salary as compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the claimant has served the respondent for a fairly short period.

18. The claimant is also awarded salary for the 21 days worked in October 2014 being  $21/26 \times 25500 = 20596.16$ . He worked from June 2013 to October 2014 which totals to 16 months X 1.75 leave days per month equaling to 28 days earned. The claimant utilized 6 leave days, according to the leave record produced by the defence. He will therefore get  $22/26 \times 25500 = 21576.95$ .

19. The claim for gratuity is dismissed for lack of particulars and evidence. No evidence was adduced by the claimant to prove that he was entitled to gratuity under the contract of employment at a specified rate per year. Likewise the claim for unremitted NSSF and NHIF deductions is dismissed because after considering the statement from NSSF and NHIF, produced by the defence, all the contributions for the claimant had been updated. Finally the claim for overtime worked is dismissed also for lack of particulars and evidence. The amount sought and the formula used have not been pleaded.

### **DISPOSITION**

20. For the reason that the summary dismissal of the claimant was unfair, I enter judgment for him in the sum of ksh 144,173.10 plus costs and interest. The said sum will be subjected to statutory deductions. The claimant will also be issued with certificate of service as per Section 51 of the Employment Act.

Dated, signed and delivered this 16<sup>th</sup> June 2017

**O. N. Makau**

**Judge**