



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

**CAUSE NO. 406 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPH OGWELLA AWUOR ..... CLAIMANT**

**-Versus-**

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

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

By his memorandum of Claim dated 19th November 2015 the Claimant alleges that he was unfairly dismissed by the Respondent and that during employment he was underpaid. He seeks the following remedies

- a) Damages for unfair termination.
- b) Severance pay.
- c) An order directing the claimant to pay the claimant for the untaken leave days for the entire period that he served the respondent.
- d) Costs of this suit.
- e) Interest on (a) and (c) above.

The Respondent filed a Reply/Defence to the Claim denying the averments thereto and putting the Claimant to strict proof.

The case was heard on 22nd November 2016. The Claimant testified on his behalf while the Respondent called ATIENO ALBERT AKECH who testified on its behalf. The parties thereafter filed written submissions.

**Claimant's Case**

The Claimant testified that he is a mechanic. That he was employed by the Respondent as a mechanic on 1st April 2011 and his employment terminated on 14th June 2014, without being subjected to a disciplinary hearing. He testified that on 14th June 2014 he reported to work as usual at 8 am and found a driver by the name John waiting for him to repair his vehicle registration No. KBD 474 W. The driver informed him that the brakes were faulty. The Claimant told the driver to remove the Jack so that he could diagnose the problem. After checking he found that the tyres were not aligned. He removed the brake lining and took to the store to get a new one for replacement. He did not find the store keeper and

waited at the store for about 15 minutes.

The Claimant testified that while waiting a director by the name Balraj came and started boxing him. Balraj pushed him and he fell, then pinned him on the ground with his foot. Balraj then told the claimant that he did not want to see him in his premises.

The Claimant left and reported the incident at Central Police Station. The police directed him to go to hospital and get treated then go back to the police station.

The Claimant testified that he was not issued with the letter of termination annexed to the bundle of documents of the Respondent or any other letter of termination. He testified that he was never given a hearing. The Claimant testified that his last salary was kshs. 14,000. Before then he was earning Kshs. 12,000. He was not housed or paid house allowance.

The Claimant prayed for judgment against the Respondent as prayed in the Memorandum of Claim. He stated that he had filed another suit against the Respondent in which he presented the P3 issued to him when he was beaten up by Balraj with as evidence.

Under cross examination the Claimant denied that he was not at work on 14th June 2014. He stated that he was dismissed after being beaten up. He stated that he was not allowed to take his tool box when leaving. He denied that he had refused to collect his terminal dues and stated he was not aware about the same.

In the written submissions filed on behalf of the Claimant it is argued that the Claimant was never given an opportunity to defend himself as provided in section 41 of Employment Act. The Claimant relied on the case of **Abraham Gumba v Kenya Medical Supplies Authority**. He further relied on the case of **Abisalom Ajusa Magomere v Kenya Nut Company Limited** in which the Court quoted with approval the case of **Shankar Saklani v DHL Forwarding (K) Limited** where the court held that even in the case of summary dismissal an employee is entitled to a hearing as envisaged under section 41 of the Employment Act.

### **Respondent's Case**

Mr. Akech for the Respondent testified that the Claimant's employment was terminated on 15th June 2014 after he failed to report on duty on 14th June 2014. His dues were calculated but he did not collect the same. He testified that the Claimant was earning Kshs. 14500 at the time of termination of his employment.

Under cross examination Mr. Akech stated that the Claimant was not issued with a letter of appointment. He admitted that the Claimant sued the Respondent in another case where he alleges that he was injured while dismantling a gear box. He stated that he prepared the Claimant's terminal dues but there is no indication that the Claimant was summoned to collect it.

Mr. Akech admitted that the letter of dismissal did not have the address of the Claimant and that there is no proof that the dismissal letter was served on the Claimant.

Mr. Akech stated that the Claimant's payslip does not show that his salary was consolidated. He stated that the Claimant was not paid house allowance. He stated the Claimant was not issued with a show cause letter or subjected to a disciplinary hearing. He stated that in his written witness statement filed in court he stated that the Claimant was verbally warned by Balraj but he was not present and did not witness the warning.

Mr. Akech stated that the Respondent has terms and conditions of employment which provides that absenteeism is absence from work without permission for 24 hours and that if the Claimant was present on 14th he should not have been dismissed on 16th June 2014.

In the written submissions filed on behalf of the Respondent it is submitted that the Claimant admitted in his testimony that he was at work in the morning hours of 14th June 2014 and left work on his own volition allegedly after being denied a tool box. It is submitted that the Claimant did not bring any of his co-workers to corroborate his evidence that he was beaten up and chased away by one, Balraj. The Respondent relied on the case of **Ann Njoroge v Tropez Petroleum Limited** in which the court stated that an employee who is proved to have absconded duty is guilty of gross misconduct and liable to the sanction of summary dismissal without notice. It was submitted that the summary dismissal of the Claimant was in line with the provisions of section 44(1), (3), and (4) of Employment Act.

## **Determination**

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

The procedure for unfair or unlawful termination as provided in the law is now well settled in the jurisprudence of this court. The cases relied upon by parties herein are all arising from claims of termination of employment.

Section 41 and 43 provide for the procedure and grounds for termination respectively as follows:

### **41. Notification and hearing before termination on grounds of misconduct**

*(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.*

### **43. Proof of reason for termination**

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

Section 45 provides prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination.

### **45. Unfair termination**

*(1) No employer shall terminate the employment of an employee unfairly.*

*(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.*

*(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

*(4) A termination of employment shall be unfair for the purposes of this Part where—*

*(a) the termination is for one of the reasons specified in section 46; or*

*(b) it is found out 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.*

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—*

*(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

*(b) the conduct and capability of the employee up to the date of termination;*

*(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

*(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

*(e) the existence of any previous warning letters issued to the employee.*

In the instant case the Respondent does not deny that there was no compliance with section 41 of the Act. What the Respondent argues is that the summary dismissal was in accordance with section 44(1), (3) and (4). Section 41(2) is explicit that "**...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...**".

Having failed to give the Claimant an opportunity to be heard, the summary dismissal of the Claimant was unfair under the provisions of section 45(2) of the Act. I therefore hold and declare the summary dismissal of the Claimant by the Respondent unfair.

## **Remedies**

Under section 49 of the Employment Act an employee who has been unfairly terminated is entitled to-

*(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;*

*(b) where dismissal terminates the contract before the completion of any service upon which the*

*employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or*

*(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*

The Claimant is thus entitled to one months' salary in lieu of notice, salary for days worked and not paid and compensation. The Respondent worked out the Claimant's terminal dues as follows:

• Leave allowance for 3 years worked	28,560.00
• Salary for days worked in the month of June 2014	6,346.70
Total	34,906.70

The Claimant however prayed for damages for unfair termination, severance pay and leave not taken. The Claimant further prayed for underpayments.

The Claimant's salary at the time of summary dismissal was Kshs. 14,500 according to payslips attached to the Respondent's memorandum of Reply. Both the Claimant and Mr. Akech testified that the Claimant was employed as a mechanic. In the written submissions of the Claimant it is stated that he should have been paid Kshs. 9450 in 2011 and 10,687.95 from 2012.

According to the Regulation of Wages (General) Order 2011 the minimum wage for an ungraded artisan which is the lowest artisan grade was Kshs. 10,239. In 2012 it was 11,580.30 and in 2013 it was Kshs. 13,201.55. The wages are exclusive of 15% house allowance. This means that the Claimant was entitled to consolidated wages as follows-

Consolidated Wage	Monthly Underpayments
From 1st May 2011 Kshs. 11774.85	
(less paid 8000)	Kshs. 3774.85
From 1st May 2012 Kshs. 13317.35	
(less paid 9266)	Kshs.4051.35
From 1st May 2013 Kshs. 15181.80	
(less paid 14000)	Kshs.1181.80
From 1st May 2014 Kshs.15181.80	
(less paid 14500)	Kshs. 681.80
Total Underpayments were therefore as follows	
From 1/5/2011 to 30th April 2012	Kshs.45298.20
From 1/5/2012 to 30th April 2013	Kshs.48616.20
From 1/5/2013 to 30th April 2014	Kshs.14181
From 1/5/2014 to 30th May 2014	Kshs. 681.80

**Total**

**Kshs. 108,777.20**

On damages for unfair termination the Claimant prayed for the maximum 12 months' salary as compensation. Taking into account his length of service and all relevant factors as provided in section 49(4) it is my opinion that 4 months' salary is reasonable compensation. I therefore award him (15181.80 x 4) Kshs. 60,727.20

**Conclusion**

I therefore award the Claimant the following:

1. 1 months' gross salary in lieu of notice Kshs. 15,181.80
2. Salary for 14 days worked in the month of June 2014 Kshs. 7,084.85
3. Pay in lieu of annual leave for 38 months worked Kshs. 33,653
4. Underpayments Kshs.108,777.20
5. Compensation for unfair dismissal Kshs. 60,727.20
- 6.The Respondent will pay Claimant's costs for this suit and the decretal sum shall attract interest at court rates.

**Dated and signed and delivered this 15th day of June, 2017**

**MAUREEN ONYANGO**

**JUDGE**