



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 267 OF 2016

DICKSON MATHEKA MUSYOKI.....CLAIMANT

VERSUS

VOLCAN HOLDINGS LTD .....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 11/3/2016. The respondent has denied the alleged unfair termination and averred that the termination on account of the claimants misconduct and after following a fair procedure. The issues for determination herein are:

- (a) Whether the termination was substantively and procedurally fair.
- (b) Whether the reliefs sought should be granted.

2. The parties dispensed with the hearing and opted to dispose of the suit by written submissions on the basis of their respective pleadings, witness statements and documentary evidence filed.

CLAIMANT'S CASE

3. The claimant stated that he was employed by the respondents on 1/8/2009 as a Turnboy earning a consolidated monthly salary of ksh.8000. By letter dated 27/6/2012, he was promoted to a Truck driver with effect from 1/5/2012. His salary was increased to ksh.17974 effective from the same date. In his new position he was operating 24 hours whenever he left Mombasa to other parts of the country and as such he was working for more than the 45 hours per week stipulated in his contract of employment. He was also not given any rest day as he was working both Sundays and public holidays. His salary was unlawfully deducted by the respondent towards fuel. He produced payslips for 2012 to 2016 showing total deductions of ksh.49638. He further stated that his salary was underpaid with respect to wage guideline for 2012 and 2015.

4. On 3/1/2016, he was involved in a road traffic accident at Salama area of Makueni County along Nairobi-Mombasa road. According to him the accident was caused by mechanical defects on the truck namely tyre burst. He denied causing the accident by his negligence and averred that the cause was beyond his control. He was however charged in court for causing the accident and the case is still pending trial.

5. On 11/3/2016, he was surprised to receive a summary dismissal letter from the respondent without being accorded any hearing. He therefore contended that the dismissal was unfair and prayed for compensation by 12 months gross salary, one month salary in lieu of notice, gratuity, overtime, public holidays, rest days, house allowance and underpayment.

### DEFENCE CASE

6. The respondents HR and Administration Officer Mr. clement Ndunga filed a written statement confirming that the claimant was employed by the respondent on 1/8/2009 as a Turnboy earning a consolidated salary of ksh.8000 until 2012 when he was promoted to be a Truck driver. In his new capacity, he signed the Respondent's driver's policy which bound him to comply with the traffic law and be liable for penalties which will accrue from any traffic offences he may commit.

7. On 3/1/2016, claimant crashed the respondent's truck registration number KBK 137V/ZD into a police canter Reg.No. GKB 408D at Salama along Nairobi-Mombasa toad. As a result of the said accident, the cargo and the truck were damaged and the claimant was charged with the offence of careless driving. The claimant also reported the accident to the respondent and explained that when he reached a sharp bend, smoke started coming from the trailer, followed by different tyres including the front left tyre which busted and the truck lost control and brakes failed. As he tried to control the truck, the container toppled and hit the police canter.

8. The respondent found the claimant's explanation unsatisfactory in the face of the police report which blamed the claimant for overspeeding. The claimant was therefore summarily dismissed by letter dated 11/3/2016 for negligent performance of duty pursuant to Section 44(4) (c) of the Employment Act. According to Mr. Ndunga, the termination was fair and justified because the claimant was given an opportunity to be heard on the incidence and he was paid his terminal dues and issued with certificate of service. He produced a bundle of documents including discharge voucher and certificate of service to support his case.

### ANALYSIS AND DETERMINATION

9. There is no dispute that the claimant was employed by the respondent and that he was summarily dismissed on 11/3/2016. The issue for determination have already been outlined herein above.

#### **Substantive fairness**

10. The claimant was dismissed for negligent performance of duty which allegedly caused the accident on 11/3/2016 as a result of which both the cargo and the truck were damaged. The basis of the said conclusion was the investigations done by the police which led them to conclude that the claimant was overspeeding and charged him with the traffic offence of careless driving. The claimant has however denied the alleged offence of negligent performance of his duty and contended that the accident was caused by mechanic defect on the truck he was driving. He has further contended that alleged negligence is the subject matter of the traffic case which is still pending trial.

11. After careful consideration of the evidence and submissions presented to the court, I find on a balance of probability that the respondent has proved on a balance of probability that there existed a valid and fair reason for dismissing the claimant as she did. Section 43(2) of the Employment Act provides that:

***“the reason or reasons for termination of the contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

12. In this case, the respondent was presented with information from the police investigator which had found the claimant guilty of culpable negligence and charged him with careless driving. Supplied with such information by the police investigator plus a motor vehicle inspection report confirming that the truck had no pre-accident defect, a reasonable employer would have a basis to initiate disciplinary action

against his employee for negligence. Consequently, I find and hold that the employer herein has discharged his burden of proving and justifying the reason for dismissing the claimant.

### **Procedural fairness**

13. The claimant contended that the termination came as a shock because he had no prior notice and he was not accorded a chance to defend himself before the termination. The respondent has contended that she accorded the claimant a hearing before the dismissal but his explanation was unsatisfactory.

14. After careful consideration of the evidence, I find that the respondent has not produced any proceedings of the alleged hearing or called witnesses who participated in the same. She has also not stated the date when it was held and whether the hearing met the threshold of a fair hearing as provided for by Section 41 of the Act. The said provision requires in mandatory terms that before an employer terminates the contract of service of his employee, on ground of misconduct, poor performance or physical capacity, he shall first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative, and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided. Consequently, I find and hold that the respondent has not proved on a balance of probability that she followed a fair procedure before summarily dismissing the claimant from employment.

15. Under Section 45(2) of the Act, termination of employment is unfair unless the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Although there was a valid and fair reason to dismiss the claimant, the employer never followed a fair procedure as provided in mandatory terms under Section 41 of the Act. It matters not how glaring and justifiable the reason for dismissing the employee is, fair procedure must be followed. The employer has no discretion whether or not to comply with Section 41 of the Act. Failure to comply, as in this case renders the termination of the contract unfair within the meaning of Section 45 of the Act.

### **Reliefs**

16. Under Section 49 of the Act I award the claimant ksh.26750 being one month salary in lieu of notice plus ksh.267,500 being 10 month salary as compensation for unfair termination of his contract of service. In awarding the said compensation, I have considered the fact that the claimant served the respondent for a fairly long period without any misconduct.

17. The claim for service gratuity is however dismissed for lack of any evidence. The claimant has not shown any legal or contractual basis for claiming gratuity.

18. The claim for overtime, public holidays and rest days is too generalized and exaggerated. It does not exclude the Sundays and public holidays which fell within the periods when the claimant was on leave. I therefore dismiss it for want of material particulars and evidence. I will not shift the burden of disproving the said generalized allegations of overtime, public holidays and Sundays worked to the respondent under Section 10 of the Act because the claim coated with dishonesty on the part of the claimant.

19. The claim for house allowance is also dismissed because the contract of employment provided that the salary was a consolidated pay. Likewise after the promotion, only the salary changed but all other terms of the initial contract remained the same.

20. Finally the claim for underpayment is dismissed for lack of merits. The promotion from Turnboy to Truck driver took effect from 1/5/2012 and not January 2012 as alleged by the claimant. All what the promotion letter dated 27/6/2012 stated is that the claimant was tested on the truck for 6 months before he was found to be fit to drive the same. It therefore did not entitle the claimant to backdated pay beyond 1/5/2012 when he was promoted.

21. The respondent has contended that the claimant was paid all his lawful dues and he signed a discharge voucher undertaking not to raise any further claim against the respondent. According to the defence, the

claimant is estopped from claiming the dues sought by this suit. With due respect however, I find that a settlement agreement between employer and employee after termination of their contract remains subject to challenge by court proceedings just like the termination itself. The employee has very little options when confronted by his employer with a settlement agreement after the termination of their contract of employment regardless of whether the parting was peaceful or acrimonious. However in deciding whether or not to interfere with a settlement agreement the court must always consider whether the employer is using the agreement to evade legal obligation to pay his employee his lawful benefits.

22. In this case, it is my considered opinion that the discharge voucher was designed by the employer to shield herself from future lawful claims by the claimant. I will therefore not aid her to stay behind that shield and shout 'estoppel' against the claimant's right to compensation for the unfair summary dismissal metted against him by the respondent. The settlement agreement is therefore interfered with because Section 49(1) of the Employment Act entitles the claimant to salary in lieu of notice and compensation if the court finds as I have done here that he had been unfairly terminated.

#### DISPOSITION

23. For the reason that the claimant's contract of service was unfairly terminated, I enter judgment for him in the sum of ksh.294,250 plus costs and interest.

Dated, signed and delivered this 28<sup>th</sup> July 2017

O.N. Makau

Judge