



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 572 OF 2015**  
**DAVID ODHIAMBO AYANY.....CLAIMANT**  
**VERSUS**  
**SANDY CARRIERS LIMITED.....RESPONDENT**  
**JUDGMENT**

**Introduction**

1) The Claimant brought this Claim on 1.8. 2016 seeking terminal dues plus compensation for unfair and unlawful termination of his contract of service by the respondent on 2.9.2013. The respondent denies the alleged unfair termination and averred that she fairly terminated the claimant's services on account of redundancy and poor performance and paid him all his dues. The issues for determination herein relate to unfair termination and the reliefs sought. The suit was heard on 26.4.2017 when the claimant testified as cw1 and thereafter the parties to dispense with the oral testimony of the defence witness Mr. Clement Okun and instead adopted his written statement and documents filed as exhibits.

**Claimant's Case**

2) Cw1 testified that he was employed by the respondent as a mechanic for a gross monthly salary of Kshs. 20000. He worked well until 28.2.2013 when he suffered injuries while in the cause of duty. Thereafter he continued with his normal duties until 2.9.2013 when the HR Manager Mr. Edward Mbuthia told him verbally that his job was over. Upon enquiry on the reason for the termination, the HR Manager referred him to the Director who was then away. He came to see the Director the following day but again he was absent. Thereafter he went twice to the Director's offices but he could not see him and gave up and reported the matter to the Labour Officer through a trade union. When he got no solution, he instructed his lawyer who served demand letter and filed this suit.

3) After service of summons, the respondent responded to the demand letter alleging that the reason for terminating the Claimant's services was gross misconduct. However, on 7.10.2016 she filed defence and a witness statement stating that the reason for terminating the claimant's services was redundancy and his poor performance. Cw1 denied ever being served with the termination letter dated 31.8.2013 which cited restructuring and his performance as the reason for his termination.

4) Cw1 contended that his termination was unfair because no reason was given to him and no prior hearing was given to him. He contended that he was never served with any warning letter for the alleged misconduct or poor performance. He denied ever being paid terminal dues and maintained what all that was paid was his salary arrears for August 2013 less statutory deductions. He therefore prayed for salary

in lieu of notice, compensation for unfair termination and service pay. He clarified that Mr. Clement Okun evidence witness herein joined the respondent after he had left the company.

### **Defence Case**

5) Mr. Clement Okun, respondent's HR Manager confirmed in his written testimony that cw1 was employed by the respondent as a mechanic from 1.9.2012 and worked until 31.8.2013 when he was terminated on account of redundancy following a restructuring of the workshop. He concluded by contending that the terminal dues were paid to the claimant and produced a letter from Equity Bank confirming that money had been paid through his account.

### **Analysis and Determination**

6) There is no dispute that the Claimant was employed by the respondent as a mechanic from 1.3.2011 for Kshs. 20,000 gross salary. There is also no dispute that his contract of service was terminated by the respondent on 2.9.2013 or thereabout. The issues for determination are:-

*a) Whether the termination was unfair.*

*b) Whether he is entitled to the reliefs sought.*

### **Unfair Termination**

7) Under section 45(2) of the Employment Act, termination of an employee's employment by employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the claimant testified that he was dismissed verbally by the HR Manager then Mr. Edward Muthia and upon enquiry as to the reason for the termination, he was referred to the Director who was not present. That after a few days of visiting the office to see the Director without success, he gave up and reported the matter to the Labour Officer and thereafter brought this Suit. That, it is only after service of summons herein did the respondent disclose the reason for terminating the claimant as gross misconduct. However the respondent pleaded in her defence, redundancy and poor performance by the claimant as the reason for terminating his contract of service. The same reasons were echoed by Mr. Clement Okun in his witness statement. Under section 43 and 47(5) of the Act, the burden of proving and justifying the reason of termination of employees' contract of service in legal proceedings like this one lies with the employer. After careful consideration of the evidence and submissions, I find that the respondent has failed to prove and justify the reason for termination on a balance of probability. She has not stated what gross misconduct the claimant committed. She has also not proved that the claimant was a poor performer through performance appraisal done based on some agreed targets. Finally he has not proved the alleged redundancy or restructuring in any manner.

8) In addition to the foregoing default, I find that the respondent has failed to prove that the termination of the claimant's services was done fairly under section 40 of the Act, under the said section, employer is barred from terminating the services of his employee on account of redundancy before serving him (or his trade union) and the Labour Officer with at least one month notice in writing; followed by fair selection process to identify the staff for the layoff; then paying the selected employees at least one month salary in lieu of notice, accrued dues plus severance pay.

9) On the other hand section 41 of the Act requires that before terminating employees' contract of service on ground of misconduct, prior performance and physical incapacity, the employer must first explain to the employee, in a language he understands and in the presence of a fellow employee or shop floor union representative, the reason for which termination is contemplated and thereafter accord the employee and his chosen companion a chance to air their defence for consideration before the termination is decided. In this case, mandatory procedure prescribed by section 40 and 41 of the Act were not complied with before the claimant was discharged by the respondent. Consequently, I hold that the termination of the claimant's contract of service by the respondent was unfair within the meaning of section 45 of the Act.

### **Reliefs**

10) Under section 49 and 50 of the Act, I award the claimant Kshs. 20,000 being salary in lieu of notice plus Kshs. 200,000 being ten months' salary compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant did not contribute to his termination through misconduct nor was he served with any warning letters for poor performance or misconduct.

### **Disposition**

11) For the reason that the claimant's contract of service was unfairly terminated, I enter judgment for him in the sum of Kshs. 220,000 plus costs and interest.

**Signed, Dated and Delivered at Mombasa this 24<sup>th</sup> day of November 2017.**

**ONESMUS MAKAU**

**JUDGE**