



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 374 OF 2014**

**JOHN NYOTA NDUNGU**

**CLAIMANT**

**v**

**PETWA CONSTRUCTION COMPANY LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent in February 2012 as a Roller Operator. The relationship hit turbulence on 17 July 2013 when the Respondent dismissed the Claimant.
2. As a result, the Claimant commenced legal proceedings against the Respondent on 15 August 2014, alleging unfair termination of employment.
3. A Response was filed on 19 February 2015 and the Cause was heard on 24 February 2015 and 29 October 2015. The Respondent filed its submissions on 14 January 2016 while the Claimant's submissions were filed on 19 February 2016.
4. The Court has considered the pleadings, evidence and submissions, and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies.*

**Whether dismissal was unfair**

5. The Claimant in testimony stated that he was arrested by the Police on 16 July 2013 and he was released the next day. When he reported to the work site he was given a dismissal letter by one Gabriel Kibicho and the reason for the dismissal was siphoning of fuel.
6. The Claimant stated that he was not given notice of termination, nor afforded an opportunity to be heard.
7. The Respondent's witness on his part stated that he caught the Claimant with stolen fuel on 16 July 2013 along Gilgil/Nyahururu road. The Claimant had 2 jerry cans and a pipe and he caused the Claimant to be arrested.
8. The next day, the Claimant was released and he was afforded an opportunity to offer explanations in the presence of Paul Mwangi (supervisor), Paul Kingori and a Diana, but his explanations were found inadequate and he was dismissed.
9. The Court is satisfied that the Claimant was granted an opportunity to make representations before his dismissal, and therefore the Respondent met the statutory requirements of section 41 of the Employment Act, 2007.
10. The Court is also satisfied that the Claimant was caught red handed and therefore the Respondent had valid and fair reasons to dismiss him and that the same have been proved.

**Appropriate remedies**

***Wages for July 2013***

11.The Claimant is entitled to the earned wages which he quantified as Kshs. 13,038/-.

***1 month pay in lieu of notice***

12.Because of the conclusion reached on the fairness of the dismissal, notice pay becomes legally untenable.

***Annual leave***

13.The Claimant sought Kshs 30,667/- on account of leave. His testimony that he had 40 days accrued leave was not challenged. He is entitled to cash in lieu of the leave days.

***Compensation***

14.Compensation is a primary and discretionary remedy where the Court makes a finding of unfair termination of employment. The Court has found the dismissal was for valid and fair reasons and compensation is not available.

***Certificate of Service***

15.This is a statutory right and the Respondent should issue one to the Claimant within 7 days.

**Conclusion and Orders**

16.The Court finds and holds that the summary dismissal of the Claimant was fair.

17.The Court awards and orders the Respondent

a. July Wages	Kshs 13,038/-
b. Accrued leave	Kshs 30,667/-
<b>TOTAL</b>	<b>Kshs. 43,705/-</b>

18.Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 26<sup>th</sup> day of February 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant      Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent    Mr. Biko instructed by Muchemi & Co. Advocates

Court Assistant    Nixon/Kosgei