



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 325 OF 2014

**KENYA PLANTATION & AGRICULTURAL WORKERS
UNION.....CLAIMANT**

v

DEL MONTE KENYA LTDRESPONDENT

JUDGMENT

1. John Ogito Ogoti (Grievant) was dismissed by Del Monte Kenya Ltd (Respondent) on 23 September 2011, and the reason given was reckless driving/gross negligence in that he rammed into *equipment 221* causing it extensive damage.
2. The Grievant complained to his union, the Kenya Plantation & Agricultural Workers Union (Union) which in turn reported a trade dispute to the Cabinet Secretary for Labour. A Conciliator was appointed but on 5 February 2014, she returned a verdict of unresolved dispute.
3. Consequently, the Union moved to Court on 24 July 2014, alleging *unlawful, unfair and/or illegal dismissal* of the Grievant. The Respondent filed a Response on 17 October 2014 and the Cause was heard on 9 November 2015.
4. The Claimant filed written submissions on 2 December 2015 while the Respondent's submissions were filed on 11 January 2016 (both were filed outside agreed timelines).
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Grievant was unfair and appropriate remedies.*

Whether the dismissal was unfair

Procedural fairness

6. Section 41 of the Employment Act, 2007 provides for the basic right to a hearing before termination of employment on the grounds of *misconduct, poor performance or physical incapacity*. The Grievant herein was dismissed because of reckless driving/gross negligence, a misconduct.
7. The essentials of the process contemplated by section 41 of the Employment Act, 2007 are that the employee is informed of the allegations to confront and that he is afforded an opportunity to make representations. The employee has a right to be accompanied by a fellow employee or union representative.
8. The Grievant was issued with a show cause/suspension letter dated 14 September 2011. The letter outlined the allegations.
9. The show cause letter requested the Grievant to make written representations within 24 hours, and he did tender written explanations on 17 September 2011.

10. A face to face hearing was held on 22 September 2011.
11. The Grievant was informed of the charges to confront and he was requested to make written explanations, which he did. Thereafter, he was invited to attend a face to face hearing which he attended.
12. The Court is satisfied that the Respondent complied with the statutory requirements of procedural fairness.

Substantive fairness

13. Pursuant to sections 43 and 45 of the Employment Act, 2007, an employer is under a duty to prove the reasons for dismissing an employee, and that the reasons are valid and fair.
14. The Grievant was dismissed on allegations of reckless driving/gross negligence. It is not disputed that damage was caused to another vehicle.
15. The Grievant contended that the accident was due to the failure of the brakes of the lorry he was driving, and therefore the accident was not due to negligence. The lorry in question was not the one he ordinarily used.
16. The Respondent's witness produced a report by its Safety/Workshop Manager. The report indicates that *the right hand side front wheel had brake fluid leaking from the bleeding nipple. The vehicle started very well, but could not build brake pressure... brakes could not hold.*
17. The report was produced by the Respondent's Industrial Relations Officer and not the technical person who inspected the vehicle.
18. In my view, the report suggests a possibility that the brakes of the lorry failed as contended by the Grievant, and therefore the reason advanced by the Respondent to dismiss him was not valid. It was equally not fair.
19. The Court has also noted the recommendations by the Conciliator that the dismissal of the Grievant should have been converted into normal termination.

Appropriate remedies/Orders

20. The Grievant pleaded several heads of relief. The Court will briefly examine them as some are contractual/ statutory entitlements not dependent on manner of separation.

Reinstatement

21. This was the main relief sought by the Grievant. It is not an appropriate remedy in the circumstances of this case.

Gratuity/House allowance/Leave/Leave travelling allowance

22. There was no attempt to quantify these heads of relief.
23. The Court declines to make any award under these heads.

Salary in lieu of notice

24. With the conclusion reached on the fairness of the dismissal, and pursuant to clause (11)(iii) of the collective bargaining agreement, the Grievant would be entitled to 80 days pay in lieu of notice, unfortunately he did not compute the same and the award is declined.

Compensation

25. Compensation is discretionary. The Grievant served the Respondent for nearly 13 years with a clean record.
26. Considering the length of service and clean record, the Court is of the view that maximum compensation equivalent to 12 months gross wages is merited (Grievant's gross wage in July 2011 was Kshs 27,315/-).

Conclusion and Orders

27. The upshot of the foregoing is that the Court finds and holds that the dismissal of the Grievant was substantively unfair and the Court awards him and orders the Respondent to pay him

a. 12 months wages compensation Kshs 327,780/-

28. Because of ongoing relationship/social partnership between the Union and Respondent, each party to bear its own costs.

Delivered, dated and signed in Nakuru on this 26th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muli, Legal Officer, Kenya Plantation & Agricultural Workers Union

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon