



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

AT NYERI

CAUSE NO.56 OF 2015

HUSSEIN NDUBA WAKO.....CLAIMANT

VERSUS

**GULSAN INSAAT SANAYI TURIZM NAKLIYAT VE TICARET ANONIM
SIRKETI.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

JUDGMENT

The claimant filed the statement of claim on 09.04.2015 through Mokuia Obiria & Associates. The claimant prayed for judgment against the respondent for:

- a. A finding that the action of the respondent terminating the claimant's employment was unlawful and unprocedural.
- b. The respondent to be ordered to pay the claimant salary for 6 months, the remainder of the contract as damages for wrongful termination.
- c. The respondent be ordered to pay the claimant commensurate terminal dues in the form of leave allowances, gratuity, service pay, unpaid salary for May 2014, and any better relief the court may deem fit.
- d. The respondent be condemned to pay costs of the cause.

The respondent filed the memorandum of defence on 27.08.2015 through Lorraine Oyombe for the Federation of Kenya Employers. The respondent prayed that the court finds that the claimant's summary dismissal from employment was lawful and fair and upholds the decision and for the suit to be dismissed with costs awarded to the respondent.

The respondent employed the claimant as a plant operator on fixed term basis. The claimant was employed to operate an excavator in construction works. The claimant was initially employed by the respondent on 18.09.2009 and the fixed term contract lapsed on 17.12.2013. He was then reengaged on another fixed term contract to serve for one year effective 01.01.2014 to 31.12.2014.

On 24.05.2014 the claimant was working on Isiolo-Marsabit road when a co-worker one Mike came and told him to stop working because he had been dismissed and that he had been summoned to go to the office. The claimant telephoned his immediate supervisor one Sadat who advised him to continue working for the rest of that day. On 25.05.2014 he reported at the office and the said Mike informed the claimant that he had been fired because the fuel consumption by the machine he was assigned to operate was high. The claimant explained to Mike that fuel consumption was based upon the texture and hardness

of the ground the claimant had been assigned to work. Thereafter, Mike reported the claimant to the boss alleging that the claimant had threatened to beat Mike. The boss then beat the claimant in presence of two police officers. The boss was called Shamir. The claimant was then ordered to go to the accounts office for his final dues and Mike and one Mutuki paid the claimant Kshs. 37,671.00 and he was also given two warning letters he had never seen before. The letters were dated 22.05.2014 and 23.05.2014 respectively but which were not filed in court.

The claimant stated, and it was not denied for the respondent, that at no time was it alleged that he had stolen the fuel. His further evidence was that the job required high attention and he was never intoxicated of alcohol while on duty. Further, before the termination, there had been no allegations of drunkenness while on duty leveled against the claimant. The claimant denied invitation to attend and attendance at the meeting of 22.05.2014 so that he was not accorded a hearing before the termination. The claimant dropped the claim for annual leave.

The letter of summary dismissal dated 23.05.2014 and handed to the claimant on 24.05.2014 set out the ground for termination as follows, “ **The ground of your dismissal is gross misconduct , due to knowingly failing, or refusing, to obey a lawful and proper command which it was your duty to obey namely being intoxicated while on duty on several occasions rendering yourself incapable of performing your work carefully and properly, while on duty it has been discovered you used more diesel than it is required, an incidence that has occurred several times during your operation of which you have been warned but repeated the mistake therefore we consider it as serious breach of contract and hence summary dismissal.**”

The court has considered the evidence and the following findings are pertinent:

- a. As per RW1 the operator had nothing to do with the levels of fuel consumption because the machine by itself set the fuel consumption rates. The court finds that it was irrational for the respondent to fire the claimant on account of failure to explain the high consumption of the fuel especially after the mechanic had confirmed that the machine was fine.
- b. It was not established that the claimant was drunk of alcohol while he was on duty.
- c. It was not shown that the claimant had been given a notice prior to the termination.
- d. RW3 testified that he was entitled to hire and fire the claimant regularly or even arbitrarily.
- e. The claimant’s immediate supervisors, the foreman one Hussein Sahin and supervisor one Embra, reported no misconduct or poor performance against the claimant, they were not involved in the dismissal process and the court finds that the dismissal was unfounded as the reasons have not been established.
- f. The court finds that there is no reason to doubt the account by the claimant that he was beaten by the project manager.

The **1st issue** for determination is whether the claimant’s termination was unfair or unlawful. The court finds that the claimant was not accorded a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Further, the court finds that the reasons for the termination were not genuine as they were not valid and the termination was unfair under section 43 of the Employment Act, 2003. The court returns that the termination was unfair and unlawful.

The **2nd issue** is whether the claimant is entitled to the pay for the remainder of six months served. The court has considered that under section 49(1) (c) of the Act the claimant would be entitled to 12 months compensation for the unlawful and unfair termination. However, the claimant has opted to pray for the maximum pay of six months being the unexpired term of service. The court finds that the prayer is reasonable in the circumstances of the case taking into account the whimsical termination of the claimant’s employment by the respondent. The court awards the claimant **Kshs.172, 128.00** as submitted and prayed for.

In conclusion judgment is entered for the claimant against the respondent for:

1. The declaration that the summary dismissal was unfair and unlawful.

2. The respondent to pay the claimant **Kshs. 172, 128.00** by 1.05.2016 failing interest at court rates to be payable thereon from 1.01.2015 till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 24th March, 2016.**

BYRAM ONGAYA

JUDGE