



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 104 OF 2011**

**SHEM OCHIENG OMOLLO.....CLAIMANT**

**VERSUS**

**SIMBA COLT MOTORS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was commenced by the Claimant on 31<sup>st</sup> January 2011. He averred that he was employed by the Respondent as a driver on or about 1<sup>st</sup> of April 1998. He averred that he performed his duties efficiently, competently and diligently in terms of the contract of employment and the law. It was averred that he was a unionisable employee and was thus governed by the Collective Bargaining Agreement signed between the Claimant and the Amalgamated Union of Kenya Metal Workers and the employer's association the Motor and Allied Industries Employers Association. He averred that the Respondent summarily dismissed him from employment with effect from 10<sup>th</sup> June 2010 purporting that the Claimant had been guilty of misconduct thus liable for dismissal summarily without any benefits. He averred that he did not commit any misconduct rendering him to be summarily dismissed and that he was discriminated against. He averred that the dismissal was unfair and unlawful and thus he was entitled to his terminal benefits. He averred that on 3<sup>rd</sup> June 2010 he visited the Respondent's Mombasa Branch in the company of the Respondent's field service manager Yakooob Awan and that the latter poked his eyes and stepped on his toes while pushing him from the Claimant's premises prompting him to react in self defence from the manager's assault, battery and misconduct. He averred that in the course of trying to defend himself, the manager caused him serious bodily harm causing him to seek treatment and report to the police. He averred that he obtained a P3 dated 4<sup>th</sup> June 2010 after reporting the incident at Makupa Police Station, Mombasa under Occurrence Book No. 18/4/6/2010. He averred that despite this evidence and the Claimant's testimony the Respondent, on or about the 7<sup>th</sup> June 2010, purported to hold disciplinary proceedings which ignored the evidence that the Claimant had presented or the Claimant's testimony and failed to give the Claimant sufficient opportunity of calling witnesses in his favour. He averred that the evidence he had was disregarded by the arbitrator and that led to an erroneous finding in law and fact. It was averred that the Claimant was informed by the Respondent to sign an agreement ceding any further claim for *inter alia* terminal dues from the Respondent if he was to be granted *ex gratia* payment. He averred that he was compelled by financial, physical, psychological, actual and implied duress to sign the agreement and receive a paltry sum of Kshs. 107,306/-. He averred that the money granted enabled him relocate to Nairobi where he is currently based and that at the time of dismissal he earned a basic salary of Kshs. 24,084/-. He averred that he had a further 19 years of service at the time of dismissal and that the allegations by the Respondent do not constitute the offence of gross misconduct as

defined by Section 44 of the Employment Act. He also averred that the Respondent failed to prove the reason for terminating the Claimant and thus contravened Section 43(1) of the Employment Act. The Claimant averred that the termination was unfair and that the Respondent violated Sections 45(1), 2(a), (b)(i), (ii) and 45(4)(b) of the Employment Act and dismissed him at the behest of the manager who had assaulted him. He sought a declaration that the dismissal was unfair, unlawful and wrongful, two months' pay in lieu of notice Kshs. 48,168/-, 12 months' salary as compensation Kshs. 298,008/-, damages equivalent to remainder of the contract Kshs. 5,491,152/-, severance pay at the rate of 20 days for each completed year of service Kshs. 192,672/-, costs and interest on the suit. To his claim he attached the letter of appointment dated 31<sup>st</sup> March 1998, CBA between Motor Trade and Allied Industries Employers Association and the Amalgamated Union of Kenya Metal Workers for the period 1<sup>st</sup> July 2010 to 30<sup>th</sup> June 2012, summary dismissal letter of 10<sup>th</sup> June 2010, medical report from Sparki Health Services, P3 dated 4<sup>th</sup> June 2010, minutes of the joint shopstewards and management meeting of 7<sup>th</sup> June 2010, the termination agreement dated 23<sup>rd</sup> June 2010, cheque for 107, 306/- dated 24<sup>th</sup> June 2010 from Respondent in favour of Claimant, payslip for June 2010, copy of national identity card, demand letter dated 25<sup>th</sup> November 2010 from Odawa Ombwayo & Ochich Advocates to the Respondent, and finally a letter of reply from the Respondent to the Claimant's lawyers.

2. The Respondent filed its defence on 14<sup>th</sup> February 2011. In it, the Respondent averred that the Claimant's claim was an abuse of the Court process on account of the fact that the Claimant had signed a termination agreement and letter of discharge wherein the Claimant not only voluntarily agreed to accept payment of such terminal benefits as indicated therein in full and final settlement of any terminal dues payable under the terminated contract of service but also waived his right to further action. Without prejudice to the foregoing averment, the Respondent denied the averments in the claim and demanded strict proof. The Respondent averred that the Claimant was in fact habitually neglectful in performing his duties and that he failed to perform the duties with due care and attention. The Respondent particularised 6 instances where the Claimant was issued with warning letters. The Respondent averred that the operating Collective Bargaining Agreement was the one dated 1<sup>st</sup> July 2008 to 30<sup>th</sup> June 2010. The Respondent averred that it was permitted under Section 44 of the Employment Act to dismiss the Claimant summarily on grounds of gross misconduct. The Respondent averred that on 3<sup>rd</sup> June 2010 the Claimant visited the Respondent's Mombasa Branch and without cause and/or provocation physically assaulted Mr. Yakooob Awan the field services manager. The Respondent averred that disciplinary proceedings were convened and hearings conducted on 7<sup>th</sup> and 10<sup>th</sup> June 2010 and that the Claimant made submissions in presence of his peers from the union. The Respondent averred that the Claimant was given a fair hearing and that he in fact presented evidence in his defence which was taken into consideration by the disciplinary committee. The Respondent averred that it considered all the evidence adduced at the disciplinary proceedings and found the Claimant guilty of gross misconduct and summarily dismissed him from employment with attendant loss of all terminal benefits. The Respondent averred that upon plea by the Union, it agreed to pay to the Claimant his terminal dues despite not being obliged to do so under the law and consequently the Claimant signed a termination agreement and letter of discharge wherein he not only accepted payment of the terminal benefits indicated therein as full and final settlement but also expressly waived his right to further action. The Respondent averred that the agreement was signed by both parties on their own volition devoid of any duress, coercion or undue pressure. The Respondent averred that moreover, the Claimant admitted assaulting Mr. Yakooob Awan as evidenced by his letters of apology addressed to the Respondent's CEO. The Respondent averred that the Claimant had on more than one occasion fundamentally breached his obligations despite repeated warning and there were adequate grounds for summary dismissal as provided for under clause 2.7(a) of the contract of service and Section 44 of the Employment Act. The Respondent averred that the decision to dismiss the Claimant was justified and due process was followed in arriving at this decision. It was averred that the claim was irredeemably defective on account of the termination agreement and the letter of discharge signed by the Claimant. To the response to claim, the Respondent attached copies of the warning letters issued to the Claimant, apology from the Claimant, memo dated 19<sup>th</sup> April 2010 on fuel siphoning, the CBA between Motor Trade and Allied Industries Employers Association and the Amalgamated Union of Kenya Metal Workers for the period 1<sup>st</sup> July 2008 to 30<sup>th</sup> June 2010, statement by Gabriel Masai dated 8<sup>th</sup> June 2010, report on incident involving Yakooob and Shem on 3<sup>rd</sup> June 2010 at

Simba Colt Motors Mombasa, statement by Mr. Tony D'Silva dated 4<sup>th</sup> June 2010, the minutes of the joint shopstewards/management meeting of 7<sup>th</sup> June 2010, statement of James Wafula dated 8<sup>th</sup> June 2010, summary dismissal letter dated 10<sup>th</sup> June 2010, apology dated 19<sup>th</sup> June 2010 from Claimant, cheque dated 24<sup>th</sup> June 2010, cheque payment voucher in support of the cheque for Kshs. 107,306/- and finally the letter of discharge.

3. The Claimant testified on 17<sup>th</sup> March 2015 and just before he commenced testifying, his counsel Mr. Ombwayo sought to amend the date of dismissal to read 10<sup>th</sup> June 2010 instead of 10<sup>th</sup> July 2010. The oral application to amend was not objected to by Mr. Anyona, counsel for the Respondent and it was allowed by the Court. The Claimant was called and testified that he resided in Komorock estate and was engaged in business at present. He stated that he had sued the Respondent who was his employer from April 1998 when he was employed as a driver. He testified that he was dismissed on 10<sup>th</sup> June 2010 and that on the material day he was called by the regional manager in Mombasa Mr. Tony D'Silva and that there was also a manager from Nairobi Mr. Yakoob Awan and that Yakoob did not want to speak to him and poked his eyes and stepped on his ties. He stated that he had to defend himself and was suspended and called for a disciplinary meeting on 7<sup>th</sup> June 2010 in Nairobi. He testified that he was unlawfully dismissed as he was assaulted and that he had evidence that he was the one who was assaulted. He stated that the evidence was not looked into and even after showing the evidence of assault he was dismissed and given Kshs. 107,000/- as his final dues. He stated that he felt that he had no option but to take the money as his family was in Nairobi, he was working in Mombasa and that he had to relocate immediately. He testified that if he had not signed he would not have had money to allow him to return to his family. He stated that according to the CBA for the period 1<sup>st</sup> July 2008 to 30<sup>th</sup> June 2010, he was entitled to payment of all monies, allowances and benefits due to an employee. He testified that on retirement those with 10 and above years were entitled to 21 day basic pay for each completed year of service and that on that very day after the assault he was taken to Spaki Health Services Hospital where he was treated and urged to report matter to police. He stated that he was treated on 3<sup>rd</sup> June 2010 and had evidence of treatment and that after he had reported matter to Makupa Police Station under OB 18/4/6/2010 he was given a P3 form and it was filled at Coast General Hospital. He testified that he presented this evidence but it was disregarded and that it was not used at the disciplinary meeting. He stated that he was provoked and acted in self defence. He was referred to the dismissal letter is dated 10<sup>th</sup> June 2010 and confirmed he was summarily dismissed and that there was allegation he assaulted Yakoob Awan. He stated that no evidence of assault has been availed.

4. In cross-examination by Mr. Anyona for the Respondent, he testified that the CBA Clause 14 had warning procedure. He confirmed that he received warning letters such as the one for lateness to work. He admitted that he was late for work but stated that there were some warning letters he did not receive. He was referred to a letter he had written and stated that it was an apology. He testified that he was called to Nairobi after the incident in Mombasa and that at the meeting, that happened in the Boardroom was one way. He stated that when he pleaded with them they ignored him. He was on suspension but was called for the meeting and confirmed that he was a union member and that there were members of the union present at the meeting. He testified that Mr. Yakoob Awan did not attend the disciplinary meeting but that he attended and his union representatives attended. He stated that the evidence he gave them was not considered and that what he presented was ignored. He testified that when he asked for the meeting to call Mr. Awan they refused. He stated that the union members are employees so they feared for their job. He testified that he was forced to apologise so that he could get money. He stated that he had not called any witness to prove that because some of them had left the Respondent. He confirmed that he signed the termination agreement and that the Union also signed and did not agree this was a fair termination. He testified that he read the agreement and was forced to sign it by management. He denied that he was in breach of the agreement. He confirmed that he received Kshs. 107,306/= as terminal benefits. He maintained that he signed under duress due to circumstances in Mombasa and because his family was in Nairobi he was forced to sign in order to get money and that he was forced by the Respondent and also by circumstances. In his understanding, due process was not followed. He felt this was unfair and stated that a warning letter that has expired cannot be used and that the warning is rendered invalid once it expires. He testified that he did not even get the 3<sup>rd</sup> warning as per the regulations of the CBA and that there must

be 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> warning. He stated that the final warning makes one liable for any other offence committed later.

5. In re-examination, he testified that validity period of a warning letter is one year and that his summary dismissal did not refer to any previous warning. He stated that the dismissal was due to what was claimed as assault to Yakooob Awan. He testified that the letter of apology is dated 19<sup>th</sup> June 2010, the disciplinary meeting was on 7<sup>th</sup> June 2010 and the letter of discharge is dated 25<sup>th</sup> June 2010 while the agreement is dated 23<sup>rd</sup> June 2010. He stated that the letter of apology was done much later after meeting had been held and he had been told that if he did not write apology letter he would not get anything. He stated that the union is the same union that signed the CBA and that the CBA provided for payment of dues and terminal benefits even if there was a summary dismissal. He testified that the union members are part of employees and they were scared and took the side of management. He stated that the witnesses who had recorded statements were not at disciplinary meeting. He stated that the statement of Gabriel Masai was signed 8<sup>th</sup> June 2010 a day after the disciplinary meeting on 7<sup>th</sup> June 2010.

6. The Respondent called Mr. John Ikinya who was the HR Manager and that he had been working for the Respondent since February 2008. He stated that he was the custodian of employees files and had knowledge of times the Claimant had misconducted himself and was given warning letters. He testified that he also had personal interactions and sometimes minor incidences where he counselled the Claimant and in some cases it was serious enough to warrant a warning. He referred to the warning letters that the Claimant had been issued and stated some were for fuel siphoning, absenteeism, lateness and assault. He testified that on 3<sup>rd</sup> June 2010 he received a call from the branch manager Mombasa who informed him that the Claimant had visited the Mombasa Branch from AVA and found the branch manager and another manager entering their vehicle to go for lunch and upon the Claimant approaching them, the Claimant sought audience with the technical manager who offered to meet the Claimant after lunch but the Claimant assaulted the manager. He stated that he asked the branch manager to record statements of people who had witnessed the incident and this was done and the statements forwarded. Upon receiving the statements the following day on 4<sup>th</sup> he stated that he informed the branch manager to do a letter to the Claimant to show cause and invite the Claimant for disciplinary hearing on 7<sup>th</sup> June. He stated that on 3<sup>rd</sup> June the Claimant personally called and informed him of what had transpired. He testified that the Claimant confirmed receipt of the letter inviting him for a disciplinary meeting. He stated that they had a disciplinary hearing on 7<sup>th</sup> June 2010 but the Claimant requested for more time to seek witness and statements. He stated that present at the meeting were the chief shop steward Thomas Kili accompanied by Elam Kasoni and Charles Kasyoka who were the unionisable workers representatives in the disciplinary proceedings. He stated that the Claimant had a right to choose the person to call and that during the meeting of 7<sup>th</sup> June 2010 the Claimant sought time to call witness and that the request was considered and allowed and another meeting scheduled for 10<sup>th</sup> June 2010. He testified that the Claimant travelled to Mombasa and on 10<sup>th</sup> June brought in a witness statement of one Mr. Wafula and that this formed part of the Claimant's defence and evidence on the matter. He testified that after the disciplinary hearing the company made a decision to summarily dismiss the Claimant effective 10<sup>th</sup> June and a letter issued together with a copy of certificate of service. He stated that the letter was copied to the Secretary General of the union and copied to shopstewards in terms of the CBA. He testified that after the issuance of summary dismissal, the shopstewards approached the management appealing to management to consider making some *ex gratia* payment considering the length the Claimant had served the company. The Claimant also wrote to CEO and apologized for the incident and requested to be paid for the years served. He stated that the letter was dated 19<sup>th</sup> June 2010. He testified that the management considered the plea and the apology and looking at length of service management on purely humanitarian ground accepted to pay the Claimant some *ex gratia* equivalent to service pay the Claimant could have earned for the 12 years of service at the Respondent. He testified that after considering the plea, on 23<sup>rd</sup> June 2010 the Claimant and the Respondent entered into an agreement to that effect and that the agreement was signed by the Claimant, chief steward and the company representative. He testified that the Claimant signed a letter of discharge acknowledging the payment and discharged the Respondent. He stated that the Ksh. 107,306/- is net of taxes and that the amount payable was Ksh. 129,409/- and after tax it was 107,306/-. He testified that the dismissal was lawful as the Claimant's conduct was of gross nature and

therefore liable to summary dismissal. He stated that notice pay is normally paid where the employee is terminated not summarily dismissed and that this was not a normal termination but a summary dismissal for gross misconduct. He testified that the pay the Claimant had sought was misplaced as dismissal was for misconduct and that it was an own action of misconduct that limited the Claimant's service. He stated that severance pay is payable on redundancy and a summary dismissal would not attract severance pay. He testified that the allegation of coercion is completely out of order and a misrepresentation of facts as the Respondent made a decision to summarily dismiss the Claimant and of own free will the Claimant wrote a letter requesting consideration. He testified that he was in Mombasa on 8<sup>th</sup> June and had a personal interaction with people who witnessed the assault, the branch manager Tony D'Silva, the driver Ali Gadi, the security officer Masai and the person who was assaulted Yakoob. He testified that he was gathering information to help in ascertaining the occurrence.

7. He was cross-examined and admitted that there was no reference to his visit on 8<sup>th</sup> June in the minutes of the disciplinary meeting. He stated that the Claimant was allowed to call witnesses on the meeting of 10<sup>th</sup> June. He testified that there are no minutes but that there was a meeting on 10<sup>th</sup> June 2010 and that the proof of that was in the dismissal there is reference to that. He testified that the dismissal letter referred to meeting of 7<sup>th</sup> and 10<sup>th</sup> June and indicated that there was a meeting on that day and the issue that was deliberated is captured. His testimony was that the Claimant was not coerced and that it was not true the Respondent required the Claimant to apologise. He stated that the Claimant was paid out of the kindness of the company and that the discharge was signed by the Claimant freely. He testified that no witnesses were called at the disciplinary hearing but the panel had witness statements from all the witnesses but for a statement from Yakoob Awan. He stated that there was no cross-examination session but the Claimant was given the statements and the meeting was adjourned for the Claimant to bring witnesses. He testified that the Claimant brought the statement from Wafula as a defence on 10<sup>th</sup> July and that the statement from the witness states the Claimant reacted in self defence and that the statement was considered. He referred to the tripartite agreement and that the payment made was purely *ex gratia* following the Claimant's plea and apology. He testified that the cheque for 107,306 is for *ex gratia* and does not include salary for June and leave earned and that the salary for June and leave dues was paid separately. He admitted that there was no final warning and that the conduct of the Claimant warranted summary dismissal and did not require to prior warning.

8. In re-examination he testified that the Respondent normally pays salaries at end of month and referred to an appendix attaching the Claimant's payslip for June 2010 and stated that basic pay paid was 6,347/-, leave pay was 15,887/- and housing allowance of 1,653/- and commuting allowance. He testified that this was a separate payment from *ex gratia*. He stated that the Claimant sought to bring a witness and was allowed but chose to bring a statement.

9. The Respondent then called Tony D'Silva who testified that he was the regional manager Coast area and that on the material day he was going out for lunch at around 1.00 p.m. with Yakoob. He stated that the Claimant was waiting for them and sought to speak to Yakoob and that he asked the Claimant to wait. He testified that the Claimant claimed that Yakoob had ruined his life and punched Yakoob right across the jaw. He stated that there was no chance to fight back and the Claimant was pulled Shem back as another blow was aimed but instead missed. He testified that the altercation was started by the Claimant. He stated that present were the gate *askari*, the workshop driver Ali and cleaner Matayo. He testified that Yakoob had a swollen jaw and was in pain. He stated that he did not take action against the Claimant and as things had calmed down, he prepared a report and sought held of workshop manager and the shopsteward. He sent the report to Nairobi for HR to take over and the nature of incident led to summary dismissal. He stated that the case was taken to Nairobi office to handle but from Mombasa the Claimant was summarily dismissed.

10. In cross-examination he testified that he did not have the OB or medical report and P3 in respect of the injuries to Awan. He stated that he took Yakoob to Pandya Hospital but that he did not have documents in Court. He testified that he witnessed the altercation on 3<sup>rd</sup> June 2010.

11. The claim relates to an allegation of unfair dismissal. It is not disputed that the Claimant was an

employee of the Respondent and that he was summarily dismissed. In the pleadings, the Respondent particularised 6 instances where the Claimant was issued with a warning letter and of the 6 incidents, one related to assault and the other involved a brawl with a fellow employee. The main incident involving the alleged assault of Mr. Yakoob Awan is the one that led to dismissal of the Claimant. In the course of hearing, it became apparent that the Claimant signed a termination agreement. The Claimant asserts it was on account of coercion and thus was not an agreement he willingly entered into. He however did not avail of any evidence of this. The Claimant was justifiably dismissed for gross misconduct. Whereas the Respondent needs to fine tune the disciplinary process at the company, the fact that the Claimant was taken through a process to ascertain whether grounds existed for his dismissal is commendable. In cases where Section 44 of the Employment Act comes into play and results in summary dismissal, one need not have received prior warnings at all. The conduct may be so grave that there is no way the employment relationship can subsist. In the premises, the suit falls for dismissal. The Claimant filed the suit fully aware that he had signed a disclaimer and waived his rights to further action. He asserts that he was coerced. He did not sign the agreement with qualification such as without prejudice or mark it in any way to show disagreement. This was improper. In the premises, the suit is dismissed with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of July 2016**

**Nzioki wa Makau**

**JUDGE**