



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 232 OF 2013**

**RAJAB WAKOLI.....CLAIMANT**

**VERSUS**

**ABSON MOTORS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed this suit on 20<sup>th</sup> February 2013. In the claim, the Claimant sought to have the issue of his unlawful termination, refusal to issue a certificate of service and refusal to pay workman compensation benefits determined. The Claimant averred that he was hired as an employee of the Respondent on 1<sup>st</sup> August 2008 as a vehicle mechanic and was earning Kshs. 15,000/-. He averred that he was dismissed on 20<sup>th</sup> January 2010 unlawfully without ever going on leave. He stated that on 15<sup>th</sup> January 2010 while in the course of his ordinary duties with the Respondent, he was involved in a road accident along Mombasa Road near City Cabanas while on a road test for m/v KAZ 007M a Foton Canter belonging to the Respondent's client. The Claimant averred that he was treated and discharged and in February 2010 reported back to work seeking more time off as he had not fully recovered only to be handed a summary dismissal letter dated 20<sup>th</sup> January 2010. He averred that the purported termination was unlawful as the reasons given are not genuine and because he was not given an opportunity to defend himself. The Claimant averred that the injuries were assessed by the Director of Occupational Safety & Health and in spite of the assessment has not received the sums due. The Claimant sought a declaration that the termination and refusal to pay work injury compensation unlawful; an order that the Respondent issues the Claimant with a certificate of service forthwith, pay the Claimant one month salary in lieu of notice – Kshs. 15,000/-, salary in lieu of leave for 1½ years – Kshs. 22,500/-, compensation for unlawful dismissal – Kshs. 180,000/-, service pay for 1½ years – Kshs. 11,250/-, workman compensation benefits assessed at Kshs. 306,461.50; costs of the suit, interest on above sums until payment in full, and any other relief as this honourable court may deem just and fit to grant. The Claimant changed advocates and filed an amended statement of claim on 30<sup>th</sup> April 2013. The Claimant added the fourth issue for determination being refusal to pay terminal dues. The Claimant added a claim for house allowance being Kshs. 40,500/- at the rate of 15% of his basic pay for the 18 months of service.

2. The Respondent filed its defence on 22<sup>nd</sup> April 2013. In the defence, the admitted that the Claimant was its employee from 1<sup>st</sup> August 2008 but denied that the Claimant was unlawfully dismissed. The Respondent averred that the Claimant was summarily dismissed on 20<sup>th</sup> January 2010 for being in serious breach of his obligations which actions put the Respondent into disrepute. The Respondent averred that the Claimant was entitled to 24 days annually of paid leave which the Claimant always took and that it was not true that the Claimant never went on leave. The Respondent denied that the Claimant was on duty attending to m/v KAZ 007M as the Claimant had not been assigned any repair duties on the said vehicle

and neither was the vehicle on the roster of vehicles to be repaired on 15<sup>th</sup> January 2010. The Respondent averred in the alternative that if the Claimant was involved in an accident on 15<sup>th</sup> January 2010 as alleged, then it was not within the scope of his employment and he was not in the course of his duties and that the Claimant was stealing his employers time and was performing private duties for the Respondent's client which is against the rules and regulations of the Respondent. The Respondent denied that the Claimant went on sick leave on the dates alleged as the Claimant was on duty as per the master roll of the Respondent. The Respondent avers that the issue of workman compensation does not arise as the Claimant was not injured within the scope of his duties or while performing his lawful duties or obligations as an employee of the Respondent.

3. The Claimant testified on 16<sup>th</sup> October 2014 and stated that he was employed in 2008 as a mechanic and dutifully served the Respondent as such until his dismissal in 2010. He testified that on the material day he was working on a vehicle KBC 429C a Foton Canter and that after obtaining authority left with the customer. He stated that a vehicle made a u turn and caused an accident. He testified that he had been given permit to exit and gave the permit at the gate. He stated that he was taken from the accident scene by the workshop manager and taken to hospital and was given sick off for one month from 19<sup>th</sup> January 2010 till 19<sup>th</sup> February 2010 and that on returning to work was given a summary dismissal letter. He stated that he was not given an opportunity to defend himself. He testified that he sought the help of the labour office and the Respondent did not respond. He stated that he had not healed fully and had never been issued with a warning letter and that if he had left without permission the Respondent would not have been involved after the accident.

4. He was cross examined by Mr. Ngalwa for the Respondent and testified that he was undertaking normal service of KBC 429C and the wheel cap was missing and they were to purchase it at Tusky's and the spares were to be taken from showroom and his boss told him to go with the customer and take the wheel cap and fix it. He stated that if he was doing something illegal there was no way the workshop would take him from the accident scene and pay his hospital fee. He stated he was treated as an outpatient on daily basis and that the company took him there daily. He denied ever receiving the warning letters. He stated that he never went on leave.

5. In re-examination by Mrs. Bukachi he testified that the showroom belonged to the Respondent and that was where spares were collected from. He stated that he left the gate pass at the gate. He stated that Mr. Singh directed him to go with the client and that it was routine that after service the car was to be taken on road test. He testified that the Respondent paid for the medical and that he received the dismissal letter on 20<sup>th</sup> January 2010. He stated that he never went on leave. The Court set judgment for 9<sup>th</sup> December 2015 as the Respondent had failed to attend the hearing on the occasions the matter was set for hearing of the defence case in 2015.

6. The Respondent applied to arrest the judgment and succeeded in having a shot at having a defence hearing. The defence case was on 11<sup>th</sup> July 2016 after the setting aside on 18<sup>th</sup> January 2016. The defence called Ali Mbwana Shakue who testified that he was the foreman who worked with his at the workshop as a mechanic. He recalled the 15<sup>th</sup> day of January 2010 and stated that the Claimant was at work and that the Claimant left in a customer's vehicle and had an accident along Mombasa Road. He testified that he did not send the Claimant to collect spares and that he just heard that the Claimant had left in customer's vehicle to collect a spare. He stated that the rule was that there was someone to collect spares and it was not the mechanic who was to fetch spares. He stated that the Claimant left with a customer to collect spares and that was not allowed. He testified that he saw the Claimant come back and state that there was an accident involving a customer's vehicle and the Claimant was told to go to hospital. He stated that the Claimant did not have any injury or harm and the Claimant went to hospital and came back. He stated that the Claimant was not given sick off after work. He denied that the Claimant was a good mechanic and that there were many times he found fault with the Claimant's work and he would remedy the ones he could but some required involving management. He stated that he was aware of two warnings the Claimant was given for filling too much oil in the engine and another for not properly repairing a vehicle. He stated that the Claimant was not dismissed without reason. He testified the accident could not attributed to the Respondent.

7. He was cross-examined by Mr. Shijenje for the Claimant and stated that he had not produced any document to show he was an employee of the Respondent. He stated that there was someone assigned the duty to collect spares and it was not the Claimant. He stated that he had not given the name of the person. He testified that he is a mechanic and is not a doctor and had not examined the Claimant. He maintained that the Claimant was not a good mechanic. He stated that the Claimant went on leave though he admitted that he had not shown documents to show that the Claimant went on leave. He testified that the Claimant was possibly at work on the day he went to the hospital. He stated that the master roll was on a computer and the computer was stolen and that is why he had not produced it. He stated that he had not signed the job card produced. He stated that he had not shown that the Respondent took the steps required before termination. He testified that the Claimant had no right to sue the Respondent for the injury but had every right to sue the insured. He confirmed that the warning letters were not delivered to the Claimant by email and instead were sent to the HR and he had no proof that the Claimant received them.

8. He was re-examined by the Respondent's counsel Mr. Ngarua and stated that he had not seen the job card for 19<sup>th</sup> January 2010 and was not sure why it was not before the Court. He testified that he did not know who filed the Directorate of Occupational Safety & Health form and that the Claimant was not at work for the Respondent when the accident occurred.

9. The parties filed submissions and the Claimant's set was filed on 18<sup>th</sup> July 2016 while the Respondent's was filed on 25<sup>th</sup> July 2016. The Claimant submitted that the issues to determine were

- i. Was the Claimant injured in the course of his employment?
- ii. Was the Claimant unlawfully terminated?
- iii. Is the Claimant's claim meritorious in terms of remedies sought?

The Claimant submitted that the accident occurred when the Claimant was on duty and in particular on a road test for a client. The Claimant submitted that he was not lawfully terminated by the Respondent and did not follow the procedures laid down in Section 41 and 45 of the Employment Act. The Claimant stated that no certificate of service was issued contrary to Section 51 of the Employment Act which was in mandatory terms. The Claimant submitted that he was entitled to service pay as well as the sums sought in the claim. He relied on the case of **Ayanna Yonemura v Liwa Kenya Trust [2014] eKLR** where a finding was made by Nduma J. that if it was the intention of the employer to provide for housing it would expressly provide for the same in a contract of employment.

10. The Respondent submitted that its insurer had declined to pay the workman injury benefit claim as the Claimant was injured outside the scope of his employment. The Respondent submitted that the Claimant should have pursued a claim against the insurance of the of the said vehicle. The Respondent stated that the Claimant was an incompetent mechanic with a history of shoddy jobs and that after the Claimant did an incompetent and careless job the Claimant was called for a meeting on 19<sup>th</sup> January 2010 to defend himself and was then summarily dismissed. The Respondent submitted that the dismissal was within the provisions of Section 44(4)(c) of the Employment Act and the provisions of clause 11(b) of the Claimant's employment contract. The Respondent submitted that the dismissal was fair and therefore the Claimant was not entitled to the notice pay sought or service. The Respondent stated that the Claimant had not requested for nor gone to collect the certificate of service as the Respondent could not go looking for the Claimant to give him the certificate of service. The Respondent asserted that the Claimant had not proved his case while the Respondent had been able to explain the reason for dismissing the Claimant's claim. The Respondent thus sought the dismissal of the claim with costs.

11. The claim is in respect of termination and refusal to pay terminal dues. The Claimant crystallized the issues to be resolved as follows:-

- i. Was the Claimant injured in the course of his employment?
- ii. Was the Claimant unlawfully terminated?
- iii. Is the Claimant's claim meritorious in terms of remedies sought?

12. In regard to the first issue, the Claimant testified on the material day, he was working on a vehicle KBC 429C a Foton Canter and that after obtaining authority from the supervisor left with the customer. He said that a vehicle made a U turn and caused an accident and in cross-examination he stated that the wheel cap of the vehicle was missing and they were to purchase it at Tusky's. He said that his boss had told him to go with the customer and take the wheel cap and fix it. The Respondent's witness who was the Claimant's supervisor at the material time stated that he did not send the Claimant to collect spares and that he just heard that the Claimant had left in a customer's vehicle to collect a spare. He said that the rule was that there was someone assigned the responsibility of collecting spares and it was not the mechanic who was required to fetch spares. Evaluating the evidence, it is clear that the Claimant was on a frolic of his own when the accident occurred. He had no business going to Tusky's supermarket to buy or collect a wheel cap for the client. If indeed it was a road test, why was there no indication of the job that was undertaken by the Respondent? I would hold that the Claimant has not proved that he was on duty at the time the accident took place. On the second issue, the Claimant asserts he was summarily dismissed though he had been given sick off. The Respondent asserts that the Claimant had been performing poorly and was dismissed summarily for good cause. The Claimant was by all accounts not heard as the letter of summary dismissal is even different from the reasons advanced by the Respondent in its testimony. Under Section 41 of the Employment Act, the employer has a burden to engage the employee in a discussion in the event the Respondent was minded to terminate the Claimant's services on account of misconduct or incompetence. In the case of **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** Radido J. stated thus:-

*Section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representations which the employee may make before taking the decision to terminate an employee.*

*During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative.*

*The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.*

And later in the judgment:-

*Compliance with the procedural fairness outlined in section 41 of the Employment Act is not a mechanical rote process where an employer is expected to keep a check list. The essentials are to notify an employee of the charges or reasons being contemplated to terminate his services in a language the employee understands, giving him an opportunity to prepare and respond to the charges either in person or colleague/ union representative or considering his representations.*

13. The judge held that the employer must give an employee a hearing before dismissal. In this case, the Respondent asserts a modicum of a disciplinary meeting was held and that the Claimant was dismissed after being given an opportunity to be heard. There is nothing to show that there was any such process on 19<sup>th</sup> January 2010. The Claimant was given the dismissal letter of 20<sup>th</sup> January 2010 and he was in his words, 'surprised' to receive it. The Respondent did not undertake a hearing as stipulated under Section 41 and the dismissal was thus unfair. The Claimant should have been dismissed with notice. The warning letters purportedly issued were never addressed to the Claimant and it is interesting that he was stated to have been warned yet the letters were addressed to management staff and not the Claimant.

14. The Claimant has sought various relief's including house allowance. Under Section 31 of the Employment Act there is provision as follows:-

*31.(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee,*

*as will enable the employee to obtain reasonable accommodation.*

*(2) This section shall not apply to an employee whose contract of service—*

*(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or*

*(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).*

15. The law stated that this Section does not apply where the employee has a contract that specifies that the salary is consolidated. The Claimant's contract is silent on the issue of consolidation of salary and therefore the Claimant is entitled to recover house allowance for the 18 months at the rate of 15% of basic pay. The Claimant went on leave and only had a balance of 6 days and therefore the claim on leave fails save for payment for the 6 days not taken. The Claimant is also by law entitled to a certificate of service and non-issuance of the certificate is one of the factors to consider under Section 49 of the Employment Act. It is my view that it is the business of an employer to ensure the certificate is issued even if it means posting it by registered mail as the law frowns on non-compliance with Section 51 of the Employment Act. It is indeed in the interests of the employer to issue the certificate of service in strict compliance with Section 51.

16. In the final analysis, I find that the dismissal was unfair and unlawful within the meaning of Section 45 of the Employment Act and the Claimant is entitled to receive compensation for the unlawful dismissal. I enter judgment for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice Kshs. 17,250/-
- b. Kshs. 3,450/- for leave days not taken
- c. Unpaid house allowance for 18 months Kshs. 40,500/-
- d. 6 months' salary compensation for unlawful and unfair dismissal Kshs. 103,500
- e. The sums in a), b), c) and d) above to be subject to statutory deductions as per Section 49 of the Employment Act
- f. Certificate of service
- g. Costs of the suit
- h. Interest on sums in a), b), c) and d) above at Court rates from date of judgment until payment in full

Orders accordingly.

**Dated at Nairobi this 11<sup>th</sup> day of August 2016**

**Nzioki wa Makau**

**JUDGE**

**Delivered at Nairobi this 24<sup>th</sup> day of August 2016**

**Hellen Wasilwa**

**JUDGE**