



**REPUBLIC OF KENYA**

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

**CAUSE NO 1953 OF 2014**

**DAVID NJERU NYAGA.....CLAIMANT**

**VERSUS**

**KARSAN RAMJI & SONS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by Statement of Claim dated 3<sup>rd</sup> November 2014 and filed in Court on 5<sup>th</sup> November 2014 seeks relief for unlawful termination of employment. The Respondent filed a Memorandum of Response dated 16<sup>th</sup> March 2016.
2. When the parties appeared before me on 17<sup>th</sup> March 2016, they agreed to dispense with the case by way of written submissions.

**The Claimant’s Case**

3. The Claimant was employed by the Respondent as a driver at a monthly salary of Kshs. 14,300 effective 1<sup>st</sup> August 2012. He was not issued with a formal contract of employment nor an itemized pay slip.
4. On 10<sup>th</sup> March 2014, the Respondent’s dumper malfunctioned causing the Claimant serious injuries which forced him to stay away from work for three (3) days. Upon reporting for duty on 13<sup>th</sup> March 2014, he was notified by the Foreman that he was no longer under the Respondent’s employment. The Foreman issued the Claimant with a termination letter.
5. It is the Claimant’s case that he was not given an opportunity to be heard prior to the termination of his employment. He further states that he was not issued with a certificate of service.
6. The Claimant’s claim is as follows:

- a) A declaration that the termination of his employment was unlawful and unfair
- b) 12 months’ salary for unfair dismissal.....Kshs. 171,600
- c) House allowance..... 42,900

d) Certificate of service

e) Costs plus interest

### **The Respondent's Case**

7. In its Memorandum of Response dated 16<sup>th</sup> March 2016, the Respondent admits having employed the Claimant on 1<sup>st</sup> August 2012 in the position of dumper driver at a monthly salary of Kshs. 13,750.

8. On 15<sup>th</sup> August 2012, while still on probation, the Claimant recklessly operated the Respondent's dumper occasioning loss to the Respondent. After inquiry, he was served with a warning letter.

9. On 17<sup>th</sup> April 2013, the Claimant once again recklessly operated the dumper thus occasioning loss and expense to the Respondent. The Claimant suffered soft tissue injuries for which he was treated and a notification under the Work Injury Benefits Act, 2007 filed. The Claimant was served with another warning letter.

10. On 10<sup>th</sup> March 2014, the Claimant in the course of his duties, damaged the Respondent's dumper causing great cost and expense to the Respondent.

Having regard to past incidences of negligence and recklessness, the Respondent dismissed the Claimant and paid him all his terminal benefits.

### **Findings and Determination**

11. There are two issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

12. The termination letter issued to the Claimant states as follows:

*"Dear Njeru*

*Termination of your employment*

*On several occasions you have damaged Company equipment and property and have received warnings and advice on how to mitigate the problems. It was also indicated that your employment may be terminated if your performance/conduct did not improve.*

*We consider that your performance is still unsatisfactory and have decided to terminate your employment for the following reasons:*

*On 10<sup>th</sup> March, 2014 you caused a near fatal damage to one of our dumpers. This is a repeat incidence.*

*Your employment will end immediately. Based on your length of service, your notice period is one month. In lieu of receiving that notice, you will be paid the sum of Kshs. 14,300/=.*

*You will also be paid your accrued entitlements and outstanding*

*remuneration, up to and including your last day of employment as*

follows:

Salary for days worked-----	Ksh 5,500/=
Service pay for one year and seven months-----	Ksh 11,297/=
Leave accrued-----	Ksh 1,913/=
Notice pay-----	Ksh 14,300/=
Total Gross-----	Ksh 33,010/=
Less PAYE 4079.50, NSSF 200, NHIF 320-----	Ksh 4,599.50
Net pay-----	Ksh 28,411/=

Yours sincerely

SIGNED by Valji Rabadiya

Duly authorised for and on behalf of

Karsan Ramji & Sons Ltd”

13. Reading from this letter, the reason for the termination of the Claimant’s employment had to do with repeated accidents involving the Respondent’s dumper which was under the Claimant’s command.

14. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for the termination of the employment of an employee. As held in **British Leyland v Swift [1981] 1 IRLR 91**, the test on this account is whether the reason proffered by an employer is one which would move a reasonable employer to terminate employment.

15. The question then is whether in the circumstances of this case, the Respondent acted reasonably. The Claimant states that the accident of 10<sup>th</sup> March 2014 was caused by a malfunctioning of the Respondent’s dumper.

The Respondent on the other hand maintains that owing to his carelessness and recklessness, the Claimant had caused multiple accidents.

16. According to the pleadings and submissions filed by the Respondent, the dumper assigned to the Claimant had several mishaps. This led the Respondent to conclude that the Claimant was careless and reckless. There was however no evidence that the said dumper was subjected to any inspection in order to rule out mechanical fault.

17. It seems to me that in reaching the decision to take action against the Claimant, the Respondent failed to take reasonable steps to establish the actual cause of the multiple accidents involving the dumper. I therefore find that the Respondent failed to establish a valid reason for terminating the Claimant’s employment.

18. Additionally, the Respondent failed to afford the Claimant an opportunity to defend himself as required under Section 41 of the Employment Act. Consequently, the termination was procedurally unfair as well.

## Remedies

19. Having established that the termination of the Claimant’s employment was substantively and

procedurally unfair, I award him four (4) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

20. With regard to the claim for house allowance, the Respondent produced the Claimant's pay slip for the month of February 2014 reflecting a house allowance figure of Kshs. 1,865. The claim for house allowance is therefore without basis and is dismissed.

21. Ultimately I enter judgment in favour of the Claimant in the sum of Kshs. 57,200 being four months' salary in compensation for unfair termination of employment. The judgment amount will attract interest at court rates from the date of the judgment until payment in full.

22. I award the costs of this case to the Claimant.

23. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Gomba for the Claimant

Mr. Ouma for the Respondent