



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 422 OF 2013

REUBEN MAHINDI MULAMA

CLAIMANT

v

MENENGAI OIL REFINERIES LTD

RESPONDENT

JUDGMENT

1. Reuben Mahindi Mulama (Claimant) was employed as a driver by Menengai Oil Refineries Ltd (Respondent) and served as such until he was summarily dismissed through a letter dated 25 May 2013.
2. The reasons given for the dismissal were that the Claimant had siphoned about 35 litres of diesel from a vehicle KBT 255D on 20 May 2013, and a further 25 litres on 23 May 2013.
3. The legal foundation for the dismissal was stated to be section 44(3) & (4)(g) of the Employment Act.
4. The Claimant was aggrieved and he reported a dispute to the Labour office, but no resolution was reached culminating in the present proceedings which were commenced on 3 December 2013.
5. The Respondent filed its Memorandum of Defence on 20 February 2014 and the Defence included submissions.
6. On 16 February 2016, the Claimant's counsel on record informed the Court that he wished to proceed in terms of rule 21 of the Industrial Court (Procedure) Rules, 2010 because the Claimant was based in South Sudan and could not travel to testify.
7. The Respondent however indicated that it would call 1 witness and also that it would also file documents.
8. The Court fixed the Cause for hearing on 26 April 2016 and directed the Respondent to file its documents before 23 February 2016.
9. The Respondent did not file the documents.
10. When the Cause was called out for hearing on 26 April 2016, the Respondent was not represented and the Court directed that its case be deemed closed and gave directions as to the filing of further submissions.
11. The Claimant filed his submissions on 9 May 2016 while the Respondent did not file any further submissions.

12. The Court has considered the pleadings, documents on file and submissions and determines the Cause on the basis of the record.

13. Section 47(5) of the Employment Act, 2007 has placed a low threshold burden upon a Claimant in a dispute concerning unfair termination of employment to prove that an unfair termination of employment occurred.

14. It is only after a Claimant has discharged the burden that the employer would be called upon to justify the termination of employment (section 47(5) of the Employment Act, 2007), prove the reasons for the termination of employment (section 43 of the Act) and prove the reasons as valid and fair (section 45 of the Act).

15. Discharging the burden placed upon Claimant's by section 47(5) of the Act, generally require some form of evidence. The evidence can be in the form of documents or should be plain enough from the pleadings (such as failure to conduct the hearing envisaged by section 41 of the Act or give written notice in terms of section 35(1) of the Act).

16. In this respect, parties should not invoke rule 21 of the Industrial Court (Procedure) Rules, 2010 except in the clearest of cases and where the facts are not disputed.

17. In the instant case, there is nothing before Court to remotely suggest that there was an unfair termination of employment either in terms of documents filed or pleadings.

18. The Court in the event reaches the conclusion that the Claimant has failed to discharge the burden placed upon him by section 47(5) of the Employment Act, 2007, and therefore there is no need to call upon the Respondent to discharge the burden placed on it as an employer by sections 43 and 45 of the Employment Act, 2007.

19. The Court will next examine the remedies sought by the Claimant as some of them do not depend on the fairness of separation.

Appropriate remedies

Salary in lieu of notice

20. In terms of the conclusion on fairness of termination of employment, this head of claim does not lie.

Gratuity

21. No contractual, statutory or evidential basis for this relief was disclosed.

Pro rata leave

22. The Claimant sought Kshs 13,279/50 on account of *pro rata* leave.

23. The summary dismissal letter appeared to suggest that the Claimant may have had un-utilised leave and the Memorandum of Defence calculated the same as Kshs 8,556/- (7 days).

24. The Claimant is entitled to the same.

Damages for wrongful dismissal

25. With the conclusion on fairness of dismissal, this relief is not available.

Wages for May 2013

26. The Respondent computed the Claimant's net wages for May 2013 as Kshs 20,061/- and the Court would find he is entitled to the same.

Certificate of Service

27. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 7 days.

Conclusion and Orders

28. The Court finds and holds that the Claimant has failed to prove that there was unfair termination of employment and that element of the cause of action is dismissed.

29. The Court further finds that the Claimant is entitled to and the Court orders the Respondent to pay him

a. <i>Pro rata</i> leave	Kshs 8,556/-
b. May 2013 wages	Kshs 20,061/-
TOTAL	Kshs 28,617/-

30. The Respondent to issue a certificate of service within 7 days.

31. No order as to costs.

Delivered, dated and signed in Nakuru on this 9th day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Olonyi instructed by Olonyi & Co. Advocates

For Respondent Federation of Kenya Employers

Court Assistant Mwangi