



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.229 OF 2015**

**EDWARD MWATELA MWALEKWA.....CLAIMANT**

**-VERSUS-**

**KASSAM HAULIERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 17.4.2015 claiming terminal dues plus compensation for unfair termination of his employment by the respondent on 30.8.2014. The respondent admits that she terminated the claimant's services on 30.8.2014 but avers that the termination was fair procedurally and substantively. She therefore denies liability to pay the damages sought by the claimant.

2. On 18.6.2015, this suit was consolidated with ELRCC 230 of 2015 but when the suit came up for hearing on 9.6.2016, the parties agreed to disperse with the hearing and instead adopt the witness statements and documentary evidence as their evidence and file written submissions. After considering the pleadings, evidence and the submissions filed, I formed the opinion that this claim is distinct and unrelated to the cause of action in ELRCC 230 of 2015 and therefore proceeded to write separate judgments. In doing so I satisfied myself that no prejudice will be suffered by any party because interestingly the parties filed separate documents and submissions in each suit despite the order for consolidation.

**Claimant's case**

3. The claimant started in his statement that he was employed by the respondent on 24.6.2009 as a Heavy Commercial Driver on permanent basis. That his salary was kshs.22,000 per month exclusive of House Allowance. That he worked well until 30.8.2014 when he was unfairly and unlawfully dismissed by the respondent Director Mr. Muhamed Kassim on ground that he had damaged the company truck while transporting goods along Isiolo-Marsabit road. The claimant contended that the termination was unfair because the reason for the dismissal was not true and that he was not given any hearing to defend himself before the termination. He further contended that the termination was also unfair and unlawful because he was not served with a one month prior notice.

4. He therefore prayed for one month salary in lieu of notice, unpaid House Allowance, 105 leave days, overtime, certificate of service and compensation for unfair dismissal.

**Defence case**

5. The respondent called her Head of HR Mr. Ibrahim Hussein Mangale as her only witness. Mr. Mangale admitted in his statement that the claimant was employed by the respondent as a long distant truck driver. That his gross salary was kshs.22,000 and which was subjected to PAYE, NHIF and NSSF. That on 23.8.2014 the respondent was sent to deliver cargo at Marsabit along Marsabit Isiolo road. That on his way back, the claimant unlawfully and without authority, loaded building stones on to the truck. That in addition to the said offence, the claimant overloaded the truck as a result of which the floor and the walls of the truck suffered deep dents. That when the claimant was questioned by the Director about the damage on the truck, the claimant started altercation which degenerated to a physical confrontation and he left the respondents premises and never returned. Mr. Mangale concluded by contradicting the respondent's pleadings in the defence when he stated that the claimant was never dismissed but he left his employment voluntarily.

### **Analysis and Determination**

6. There is no dispute that the claimant was employed by the respondent as a long distance truck driver until 24.8.2014 when he was summarily dismissed by the respondent on ground of an alleged misconduct. The issues for termination are:-

**(a) Whether the dismissal of the claimant was unfair.**

**(b) Whether the reliefs sought should be granted.**

### **Unfair termination**

7. Under section 45 of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was founded on valid and fair reason(s) and that it was done after following a fair procedure. In this case, although the respondent admits in her defence that she dismissed the claimant due to poor performance of his duties. The defence witness has however not proved that the said reason for the dismissal was valid and fair. He has also not proved that the dismissal was done after following a fair procedure. Instead, the witness has contradicted the defence filed and accused the claimant of terminating his employment through desertion. That the said evidence is not supported by the pleadings and as such it is either an afterthought or outright lie. Consequently, I find that the respondent has not proved on a balance of probability that the claimant caused damage to the truck he was assigned to drive to Marsabit and back to Mombasa. She has also not proved on a balance of probability that she accorded a fair hearing to the claimant before the dismissal. Section 41 of the Employment Act, requires in mandatory terms that before dismissing his employee on ground of misconduct or poor performance or physical incapacity, under section 44 of the Employment Act the employer must first explain the offence to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter allow the employee and his chosen companion to air their defence for consideration before the dismissal is decided. In view of the foregoing I find and hold that the termination of the claimant's services by the respondent on 24.8.2014 was unfair within the meaning of section 45 of the Employment Act.

### **Reliefs**

8. Under section 49 of the Employment Act I award the claimant one month salary in lieu of notice and 8 months salary as compensations for unfair termination. The claimants salary was kshs.22,000. He will therefore get kshs.22,000 in lieu of notice and kshs.176,000 as compensation for unfair termination. In making the said award I have considered the fact that the claimant had served the respondent for a fairly long period. I have also considered the fact that with due diligence, he could secure alternative employment within 8 months after the dismissal.

9. The claim for leave was not rebutted by evidence and as such the claimant is awarded the claim for 105 leave days because the claim was filed within 12 months immediately after the dismissal and as such it was not time barred under section 90 of the Employment Act. He is therefore awarded kshs.88,846.15 for the outstanding leave. However the claim for unpaid House Allowance is dismissed for lack of any

evidence and legal basis. Likewise the claim for overtime and punitive damages is dismissed for lack of particulars, evidence and legal basis for the same. The claim for Certificate of Service is however granted because it is a right to the claimant under section 51 of the Employment Act.

**Disposition**

10. For the reasons started above, I enter judgment for the claimant in the sum of **kshs.286,846.15** plus costs and interest.

**Signed, dated and delivered this 14<sup>th</sup> day of October, 2016**

**ONESMUS MAKAU**

**JUDGE**