



**REPUBLIC OF KENYA**

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

**CAUSE NO 351 OF 2014**

**MARTIN KALANI VODONGO.....CLAIMANT**

**VERSUS**

**ROY HAULIERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 5<sup>th</sup> March 2014 and filed in Court on 7<sup>th</sup> March 2014, the Claimant has sued the Respondent seeking compensation for wrongful dismissal.
2. The Respondent filed a Statement of Defence on 16<sup>th</sup> April 2014 and the matter proceeded to hearing with the Claimant testifying on his own behalf. Dr. Simon Mwangi Muiruri and Jessica Mumo testified for the Respondent.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 15<sup>th</sup> September 2011 as a Driver in the Operations Department. His last monthly salary was Kshs. 22,265. On 19<sup>th</sup> March 2013, while driving along the Moyale-Marsabit Road, the Claimant was involved in an accident in which he sustained injuries.
4. As a result of the accident the Claimant was hospitalized for about three weeks before being discharged to recuperate at home. In July 2013, he was assigned light duties. On 20<sup>th</sup> December 2013, the Claimant's Doctor recommended that the Claimant continues with light duty pending full recovery. The Respondent's Doctor however recommended resumption of full truck driving duties. The Claimant asked for further review by an independent Doctor but the Respondent declined.
5. On 21<sup>st</sup> December 2013, the Claimant was summarily dismissed on allegations of refusal to acknowledge a truck allocation letter of 20<sup>th</sup> December 2013.
6. It is the Claimant's case that his summary dismissal was unlawful and unfair.

He claims the following:

- a) A declaration that the dismissal was unlawful and unfair
- b) One months' salary in lieu of notice.....Kshs. 22,265

- c) Salary for 21 days worked in December 2013.....15,585
- d) 12 months' salary in compensation.....267,180
- e) Costs plus interest

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

7. In its Statement of Defence filed on 16<sup>th</sup> April 2014, the Respondent states that the Claimant's employment was littered with cases of indiscipline which culminated with him being summarily dismissed on 21<sup>st</sup> December 2013 for gross misconduct.

8. The Respondent avers that the Claimant was given specific instructions by the Operations Director to resume his driving duties. The Respondent's decision was informed by a medical evaluation carried out by its Doctor who certified that the Claimant was fit to drive.

9. In disobedience of these instructions, the Claimant refused to resume his duties and instead brought a parallel medical report arguing that he was not fit to drive. The Respondent regarded his conduct disrespectful and in breach of his terms of employment and therefore decided to terminate his employment.

10. The Respondent denies that the Claimant was involved in an accident as alleged. In any event, any injury sustained by the Claimant was wholly caused by his negligence, namely jumping out of a moving vehicle. Moreover, the Respondent took care of the Claimant and facilitated compensation under the Work Injury Benefits Act, 2007.

11. The Respondent denies that the Claimant was hospitalized. Further, the Respondent avers that the Claimant was given adequate time to recuperate and it was only on the recommendation of his own Doctor through a treatment note dated 24<sup>th</sup> June 2013 that the Respondent allowed the Claimant to begin performing light duties.

12. On 19<sup>th</sup> December 2013, six months after the Claimant had begun performing light duties, the Respondent's Doctor gave a medical report based on his own evaluation to the effect that the Claimant was fit to resume full truck driving duties noting that the Claimant had fully recovered.

13. The Respondent was confused when on 20<sup>th</sup> December 2013 the Claimant brought a conflicting report from his Doctor, whom he had not seen for six months, to the effect that the Claimant was not fit to resume normal duties.

The Respondent states that this turn of events appeared to be in bad faith since the Claimant had not seen his Doctor for six months, implying that he had fully recovered.

14. The Respondent denies that the Claimant requested for an independent review. Furthermore, nothing prevented the Claimant from seeking a third Doctor's opinion for presentation to the Respondent. In the circumstances, the Respondent relied on the recommendation by its own Doctor.

15. It is the Respondent's case that the Claimant was guilty of gross misconduct rendering himself liable to summary dismissal, without terminal benefits.

### **Findings and Determination**

16. There are three issues for determination in this case:

- a) Whether the Respondent had a valid reason to summarily dismiss the Claimant;

b) Whether in effecting the dismissal the Respondent observed due procedure;

c) Whether the Claimant is entitled to the remedies sought.

### **Reason for the Dismissal**

17. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for terminating the employment of an employee. In determining whether the employer has discharged its obligation under this provision, the Court asks what a reasonable employer would have done in the circumstances of the case.

18. The Claimant's dismissal was communicated by letter dated 21<sup>st</sup> December 2013 stating as follows:

**“RE: SUMMARY DISMISSAL**

*The above subject matter refers;*

*Subsequent to your request for employment and the interview conducted, you were considered at our operations department and issued with an appointment letter dated 15<sup>TH</sup> SEP 2011.*

*Reference is made to the Truck allocation letter dated 20<sup>th</sup> Dec 2013 issued to you which you declined to acknowledge for reasons only known to yourself.*

*As you are very much aware of (sic), in reference to our Company's policies and procedures which is in line with the revised Employment Act of 2007 (section 44(4)(E), the aforementioned cannot be condoned hence we are left with no option than to dispense (sic) your services effective immediately.*

*Kindly sign below to acknowledge receipt of this letter and thereafter proceed and clear with the relevant departmental heads in regards to Company property and unpaid dues if any.*

*Yours Faithfully,*

*(Signed)*

***Sarafaz Yakub***

***Operations Director***”

19. From this letter and further evidence adduced before the Court, the Claimant's dismissal was triggered by his declining to resume full driving duties following an accident on 19<sup>th</sup> March 2013.

20. By letter dated 20<sup>th</sup> December 2013 the Claimant was allocated truck registration No. KBP 421T. According to this letter, the Respondent's decision was informed by a medical report by the Company Doctor, Muiruri S.M. issued on 19<sup>th</sup> December 2013 certifying that the Claimant was fit to resume driving duties.

21. On 21<sup>st</sup> December 2013, the Claimant wrote to the Respondent contesting the findings in Dr. Muiruri's report, stating that he was still in pain. The Claimant also forwarded a report from his Doctor, G. Gikenye dated 20<sup>th</sup> December 2013 recommending that the Claimant keeps off driving duties.

22. Evidently, there were two conflicting medical reports from two medical doctors and the Respondent chose to go with its own Doctor. The Claimant testified and Dr. Muiruri confirmed that prior to issuing his report, the Doctor conducted a physical examination on the Claimant. He did not have the benefit of x-ray films. Dr. Muiruri also told the Court that the Claimant was complaining of pain. Dr. Gikenye on the other hand relied on an x-ray done on the same day.

23. In light of the circumstances of this case what should a reasonable employer have done? Faced with two conflicting medical reports, the Respondent ought to have called for a third independent opinion. There was no justification as to why the Respondent chose to ignore Dr. Gikenye's opinion yet there was evidence that this was the Doctor who had attended the Claimant after the accident. Moreover, being a long term Doctor for the Respondent Company, Dr. Muiruri could not be said to have been independent.

24. In light of the foregoing, the Court finds that the Claimant had a justifiable reason for declining to resume driving duties and this could not therefore have been a valid reason for summary dismissal. Consequently, I have reached the conclusion that the Respondent had no valid reason for dismissing the Claimant.

### **Dismissal Procedure**

25. Apart from establishing a valid reason for terminating the employment of an employee, an employer is required to follow a strict disciplinary procedure in effecting the termination. This procedure is set out in Section 41 of the Employment Act.

26. There was no evidence of any attempt by the Respondent to follow the disciplinary procedure provided under Section 41 and the dismissal was procedurally unfair as well.

### **Remedies**

27. Having found the Claimant's dismissal both substantively and procedurally unfair I award him eight (8) 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 dismissal transaction. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for 21 days worked in December 2013.

28. Finally I enter judgment in favour of the Claimant as follows:

a) 8 months' salary in compensation.....	Kshs. 178,120
b) 1 month's salary in lieu of notice.....	22,265
c) Salary for 21 days worked in December 2013.....	<u>15,586</u>
<b>Total.....</b>	<b>215,971</b>

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

30. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mulaku for the Claimant

Mr. Mwangi for the Respondent