



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 68 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> November, 2016)

**BARRACK OTIENO OMBIMA .....CLAIMANT**

*VERSUS*

**MR. FAROUK .....1<sup>ST</sup> RESPONDENT**

**IBRAHIM MOHMOUD .....2<sup>ND</sup> RESPONDENT**

**EAST WEST AFRICA LIMITED .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed his claim on 22.1.2015 in person claiming unlawful and unfair dismissal and seeking the following orders:

***a. That, the Industrial Court finds his termination as very inhuman, unprocedural, wrongful and very unfair.***

***b. That the Honorable Industrial Court makes orders for unconditional reinstatement of services which were inhumanly and unfairly terminated.***

***c. That if in the opinion of the Court, reinstatement is not practically possible, then the Court make orders for payment of terminal dues as in Annexure 5.***

***d. That the costs of the case be provided for.***

**Facts of the claim**

2. The Claimant herein was employed by the Respondent as a Commercial Truck Driver as from May 2012 at a consolidated salary of Ksh 25,000.00 per month, until 1<sup>st</sup> September 2014 when he was unprocedurally, unfairly and wrongfully terminated.

3. Before his termination, the Claimant left Nairobi with the company salesman for Kisumu but his lorry started over-heating on the way. He informed his Director and was instructed to take it to the garage.

4. The Director went to Kisumu, found them and took the salesman to Imperial Hotel in Kisumu for a night leaving the driver out in the cold. As the journey took longer than expected, he had exhausted his allowance and could not pay for room or food for the two days he was in Kisumu.
5. On the third day, the Director called him and gave him his personal car to drive to Nairobi, which he did but again he did not receive an allowance. Upon his arrival, he was instructed to go home for ten days to rest and await a call back. He was called after the stated duration but when he reported he was handed over a termination letter.
6. The Claimant made several attempts to get an explanation as to his termination but none was forthcoming. He was never given an opportunity to be heard which is unfair nor was he issued with his terminal dues.
7. He had written to the Respondent on several occasions, using a third party to deliver the letters, and reported the matter to the Labour Cabinet Secretary under Section 62 of the Industrial Relations Act 2007, but was advised to take the matter to Court. The Claimant prays for the Court to award as prayed.
8. The Respondents filed a Response to the Memorandum of Claim dated 3<sup>rd</sup> May 2016 on 16.5.2016 through the firm of M/S Laichena Mugambi & Company Advocates where they deny each and every allegation set out in the claim.
9. They state that the Claimant was dismissed for gross misconduct and was paid in full after his termination which monies the Claimant accepted and acknowledged. They state that the Claimant has failed to give particulars of the unfair and unlawful termination of employment, moreover, he did not serve the Respondent with any demand and they put the Claimant to strict proof thereof.
10. They state that the Claimant's claim is tainted with falsehoods and is calculated to mislead the Honorable Court. They state that the Claimant is not entitled to the reliefs sought and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been wrongly sued in these proceedings.
11. To support his case, the Claimant brought forward two witnesses. The first was the Claimant himself who fully relied on the pleadings.
12. The second one was George Odera, an Industrial Relations Officer with the Kenya Hotels & Allied Workers Union who testified that he was assigned by the Claimant, tasked him with serving the Respondent with various statements, which he did to one Ibrahim who refused to acknowledge receipt.
13. He was directed to S. M Manga on Mamlaka Road who equally refused to acknowledge receipt but was willing to engage him in the subject matter. They agreed that he was to deliberate on reinstatement and payment of dues and come back to him within a week, but he never did. In cross examination, he acknowledged that the service and negotiation was done as a friend and not in an official capacity.
14. The Respondent provided a witness, Mr. Ibrahim Mahmoud Rahim a Manager of the 3<sup>rd</sup> Respondent. He stated that when Mr. Farouk went for the truck after it got a problem, he found that it had not been serviced and the oil had not been changed. The invoices submitted were also fake.
15. He stated that the Claimant received an allowance of Kshs. 2,500.00 a day and was unaware how he came back to Nairobi. He stated that on termination he gave him 1 months' salary that is 20,877.00. He worked for the company for less than a year and annual leave was taken at the end of the year during Christmas break when the office closed that is between 20<sup>th</sup> December and 10<sup>th</sup> January. He stated that the Claimant was therefore not entitled to the reliefs sought.
16. Having considered the evidence of both parties, the issues for determination are as follows:

***1. Whether 1<sup>st</sup> and 2<sup>nd</sup> Respondents are properly enjoined in the matter.***

**2. Whether there were valid reasons to warrant dismissal of the Claimant.**

**3. Whether due process was followed before the Claimant was dismissed.**

**4. Whether the Claimant is entitled to remedies sought.**

17. On the 1<sup>st</sup> issue, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied that they are Directors of 3<sup>rd</sup> Respondent. The Claimant didn't go further to adduce any evidence of the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with the 3<sup>rd</sup> Respondent.

18. The 3<sup>rd</sup> Respondent in Claimant's pleadings is described as an establishment manufacturing paint but as its name suggest, the 3<sup>rd</sup> Resopondent is a Limited Liability Company and therefore following the holding in **Solomon vs. Soloman (1896) UKHL I**, the 3<sup>rd</sup> Respondent has a distinct personality from its members/directors and it was not therefore necessary to sue the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I therefore, find the enjoining of 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the suit is unnecessary and I therefore strike them out of the proceedings.

19. On the 2<sup>nd</sup> issue, the Claimant avers that he was dismissed for no apparent reason after being forcefully sent on leave for 10 days. The Respondents on their part aver that he was guilty of gross misconduct for not taking the vehicle for service.

20. The averment by the Respondent however is not supported by any proof that indeed there was instruction to service the vehicle which service was never done.

21. On his part, the Claimant stated that there was no omission he committed and that the vehicle developed mechanical problem not of his making.

22. Under Section 43 (1) & (2) of Employment Act 2007:

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

23. The Respondent is therefore obliged to prove the reason/s for termination which in this case I find that there were no valid reasons to warrant dismissal of the Claimant.

24. On the 3<sup>rd</sup> issue, the due process expected is as provided for under Section 41 of Employment Act 2007 which states thus:

**(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.**

25. It is apparent that from the way the events occurred as enumerated from the evidence of the Claimant, he was not accorded any hearing as envisaged under Section 41 of Employment Act. He was denied a hearing and condemned unheard.

26. Under Section 45(2) of Employment Act which states that:

**“(2) A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair**

**reason:-**

**(i) related to the employees conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure.**

27. It is therefore my finding that the termination of Claimant was unfair and unjustified and I declare it so. I convert it to a normal termination.

28. In terms of remedies, I find Claimant is entitled to the following remedies:

**1. 12 months' salary as damages for unlawful termination =  $12 \times 25,000 = 300,000/=$ .**

**2. 1 months' salary as notice = 25,000/=.**

**3. Leave not take – 1 months' salary = 25,000/=.**

**4. Salary for 5 days worked in October 2014 = 4,167/=.**

**5. Service pay being 15 days salary for each completed year of service being 2 years =  $12,500 \times 2 = 25,000/=$**

**TOTAL = 379,167/=**

**6. Certificate of Service.**

**7. Respondent to pay costs of this suit.**

**Read in open Court this 14<sup>th</sup> day of November, 2016.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant in person

K'Opere holding brief for Mugambi for Respondent