



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 899 OF 2015**

**DOMINIC OKOTH WAGUMA.....CLAIMANT**

**VS**

**SHIVA CARRIERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 5.6.2015. The respondent has denied liability for unfair termination of the claimant's employment and avers that it is the claimant who terminated the contract through desertion.

2. The suit came up for hearing on 13.7.2016 when the parties agreed to adopt their witness statements and the documentary evidence and file written submissions.

**Claimant's case**

3. The claimant stated that he was employed by the respondent on 25.8.2009 for a salary of kshs. 25,000 which was later increased to kshs.26,044 per month. That he worked diligently until May 2015 when he was granted his annual leave but when he reported back he was told by Mr. Runi, the HR Manager, that there was a disciplinary meeting against him. That on 5.6.2015, he was verbally dismissed by the Fleet Manager Mr. Hadi. That the dismissal was unfair because he was not told the reason and he was not accorded any fair hearing as required under section 41 of the Employment Act.

**Defence case**

4. Mr. Dickson Ouko Oyenga filed statement as the only defence witness. He stated that the claimant was employed by the respondent as a driver. He denied the claimant's allegation that he was dismissed by the respondent's management. That according to him the claimant absented himself from work and has upto date not reported back. That as a result of the claimant's absentia, the respondent has suffered financial loss due to the unperformed work. He therefore concluded that it is the claimant who breached the contract and as such he is not entitled to the compensation sought by the suit.

**Analysis and Determination**

5. There is no dispute that the claimant was employed as a driver by the respondent. The issues for

determination are:

**a. Whether the claimant deserted work or he was unfairly dismissed on 5.6.2015.**

**b. Whether the dues sought should be granted.**

**Desertion or unfair termination**

6. The claimant has contended that he went for his annual leave in May 2015 and when he reported back to work he was dismissed by Mr. Hadi on 5.6.2015. That before the dismissal he had been alerted by the HR Manager that he had a case to answer before a disciplinary meeting. However Mr. Oyenga denied that the claimant was dismissed and maintained that it is the claimant who deserted work.

7. After careful consideration of the material presented, I find that the defence has not proved on a balance of probability that it is the claimant who deserted work. The Master Roll produced by the defence titled ADIS FLEET indicates that the claimant worked for 4 days only and was absent for the rest of the unknown calendar month. The month in the said Master roll is not known because there is no indication of any date on the document.

8. On the other hand however, I find that the claimant has proved on a balance of probability that he was dismissed from work by the Fleet Manager Mr. Hadi after he reported back from his leave on 5.6.2015. His contention that he went for leave in May 2015 and that he was dismissed on 5.6.2015 was not contested and rebutted by Mr. Hadi and Mr. Runi. Infact, it has not been denied that the said two officers are managers in the respondent company. In addition, no leave records were produced to show that the claimant was not on his annual leave.

9. In this courts assessments, Mr. Oyenga was not a competent witness to represent the respondent to rebut the claimant's evidence. It is clear from his witness statement of one paragraph that, he was deficient of the relevant facts of this case. The statement merely made broad and generalized statements which made no reference to any specific dates when the claimant allegedly absented himself from work.

10. Under section 45(2) of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following fair procedure. In this case the claimant contended that he was never told the reason for his dismissal. The defence has corroborated the foregoing contention by not proving any reason for the dismissal as required under section 43 and 45 2(a) 8(b) of the Act and instead maintained that the claimant deserted work. Consequently, I find that the claimant was dismissed for a reason unknown to him and which was not proved and justified by the respondent herein.

11. In addition, the respondent has failed to prove herein that the claimant was accorded a fair hearing as required under section 41 of the Employment Act, which involves:

**a. explaining the offence to the employee in a language he understands and in the presence of a fellow Shop floor union representative of his choice the reason for the intended dismissal, and**

**b. Hereafter inviting the employee and his chosen companion to air their representations for consideration before the dismissal is decided.**

12. In view of the finding above that the reason for the dismissal was not proved herein and that the procedure followed was not in tantem with the provisions of section 41 *supra*, I find and hold that the termination of the claimant's employment contract was unfair within the meaning of section 45 of the Employment Act.

**Reliefs**

13. Under section 49 of the Employment Act, I award to the claimant one month salary in lieu of notice being kshs.26,044 plus 6 months salary as compensation for unfair termination. In awarding the said compensation, I have considered the long period served by the claimant and the fact that he did not contribute to his dismissal through any proven misconduct.

14. The claim for 5 years leave is dismissed for lack of particulars and evidence. The claimant has merely alleged that he took two annual leaves and accumulated five. That is vague piece of pleading and it will yield no remedy because it is unsubstantiated by evidence.

15. The claim for the salary for 11 years left before retirement is also dismissed for lack of legal or contractual basis.

16. The prayer for Certificate is however granted as prayed because it is a statutory right provided under section 51 of the said Act.

### **Disposition**

17. For the reasons stated herein above, I enter judgment for the claimant in the sum of **kshs.182,308** plus costs and interest. The claimant will also be issued with Certificate of Service.

**Signed, dated and delivered at Mombasa this 9<sup>th</sup> day of December 2016.**

**O.N. MAKAU**

**JUDGE**