



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1928 OF 2013**

**BENJAMIN MULE KIMOLI.....CLAIMANT**

**VERSUS**

**PARBAY SIYANI CONSTRUCTION LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant in this cause disputes his dismissal on the ground that he was involved in a racket in which the Respondent lost some money.
2. He averred that he was verbally employed by the Respondent initially as a casual worker and later as a loader.
3. On 7<sup>th</sup> October, 2011 he was asked to stop working by the foreman and told to report to the Respondent's head office where he was given the reason for his termination.
4. He complains that he was never issued with any show cause letter or afforded an opportunity to meet his accuser and to know the charges against him.
5. The Claimant therefore considered his termination unfair and unlawful and seeks an order for compensation from the Court amounting to Kshs.262,795/=.
6. The Respondent by a memo of defence filed on 13<sup>th</sup> January, 2014 disputes the Claimant's averments and more particularly averred that the Claimant was dismissed for being an active member and participant in a well organized theft racket.
7. According to the Respondent, the Claimant would in cohort and collaboration with the foreman deliver materials on site and once deliveries were signed, would deliver some of the materials to unknown destination for sale.
8. At the trial, the Claimant gave evidence reiterating the averments in his statement of claim.
9. He stated that he was initially employed as a stone dresser earning a daily wage of Kshs.365/- payable weekly. In April 2012 he became a loader earning Kshs.445 per day payable weekly.
10. Concerning his termination, he testified that he was asked to see the Transport Manager Mr. Nahendra who gave him a list to check whether his name was in there. He did not see his name. He was then asked by Nahendra to go and see a Mr. Yatin but Mr. Yatin again referred him to Mr. Nahendra. He finally decided to report the matter to the Labour Officer but still the Respondent

did not give a reason for his termination.

11. The Respondent in its part called a Mr. Daniel Mutua Musau who stated, he worked as a Security Officer for the Respondent.

12. It was his evidence that on 26/8/2013 the Respondent received a report that sand delivery to the site was not unloaded despite being signed for as delivered. The lorry carrying the sand left and diverted it to another site.

13. The foreman at the site was arrested and gave detailed account of what had been happening. According to Mr. Musau, the driver of the lorry where the claimant was the turn boy was involved in the racket. It was his evidence that the driver and the Claimant were never arrested over the issue and that the case against the foreman was withdrawn and the matter resolved.

14. In cross-examination he stated that the Claimant was not asked to explain his alleged involvement in the sand theft.

15. Section 43 (1) of the Employment Act places the onus of proof of reason or reasons for terminating the services of an employee on the employer. Where the employee fails to so prove, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.

16. A termination of employment shall be considered unfair if the employer fails to prove that the reason for termination is valid and that the reason for termination is a fair reason. Further, the termination must be in accordance with fair procedure.

17. The Respondent terminated the claimant's services on account of the fact that he was part of a racket that diverted the deliveries to a different site once they were signed for.

18. Mr. Musau told the Court that the foreman who was part of the racket was arrested and charged in Court but later released after the issue was amicably resolved. According to him, this is the reason the claimant and the driver, a Mr. Aringo were not charged yet they were implicated by the foreman.

19. Can this be said to be sufficient proof of reason or reasons for termination as contemplated by section 43 (1) of the Act?

20. Proof contemplated by this section is proof on a balance of probabilities as in all civil claims. That is to say the Court at the conclusion of the evidence ought to be reasonably persuaded that it is more probable than not that the person accused did or omitted to do the act he is accused of doing or omitting to do.

21. The Respondent's only evidence was through Mr. Musau who informed the Court that the Claimant and the driver of the lorry were implicated by the foreman in the theft. No additional evidence was called to vouch for this allegation.

22. It would have been of more useful assistance if the investigating officer concerned with the criminal case could have been called to elaborate on the issue of the theft of the sand including possible identification of the sites where it was diverted. Production of the delivery notes showing dates and quantities delivered and signed for by the rogue foreman could have also been of useful assistance.

23. From the foregoing, the Court is of the view that although the reason for terminating the Claimant's employment would ordinarily amount to a valid reason as contemplated under section 45 of the Employment Act, the proof of the reason did not reach the threshold required in civil claims. To this extent, the Respondent failed to discharge the burden of proof placed on him by section 43(1) of the Employment Act with the consequence that the Court finds the dismissal

unfair.

24. Where the Court finds a dismissal unfair, it is empowered by law and taking into account the circumstances of each case, to award up to a maximum of 12 months wages as compensation for unfair dismissal.

25. Concerning unlawful termination, Section 35 provides that a contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall be deemed to be where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice.

26. Where the contract is to pay wages periodically at intervals of less than one month, it shall be deemed to be terminable by either party at the end of the period next following the giving of notice in writing.

27. The Claimant pleaded and subsequently testified that he was initially engaged as a casual worker earning a daily wage of Kshs.365 which was later improved to Kshs.445 when he became a loader attached to motor vehicle KAZ 872L. It was his averment and evidence that he worked between 26<sup>th</sup> October, 2011 and 7<sup>th</sup> October, 2013. This averment was broadly denied by the Respondent in their memo of defence and never disputed at the trial.

28. Whereas the Claimant testified that he was on a daily wage which was payable weekly, he appears to have been in continuous engagement with the Respondent for approximately 2 years.

29. Section 37 of the employment Act provides that where a casual employee works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1) (c) of the Act shall apply to such casual worker.

30. That is to say the employment contract of such employee shall be terminable by giving at least one month's notice of termination and that such employee shall subject to subsection 6 of section 35 of the Act be entitled to service pay for every year worked.

31. Mr. Musau conceded in his testimony in Court that he was not aware if the Claimant was handed a termination letter which he claims to have drafted.

32. According to the Claimant he was on 7<sup>th</sup> October, 2011 told not to work and instead report to head office and see the transport manager. This fact was not disputed by the Respondent who in fact justified the same by alleging that the dismissal was necessary as the claimant was involved in theft against the Respondent.

33. To this extent it can be reasonably concluded that the Claimant was not given the notice contemplated by section 35(1) (c) of the Employment Act. Considering that the Court has found that the reasons for dismissal were improper, the Claimant's dismissal cannot also be said to have been summary hence he was entitled to notice as stipulated under section 35 (1) (c) or payment in lieu thereof.

34. In conclusion, the Court finds in favour of the Claimant and awards him as follows:-

- (a) One month's pay in lieu of notice .....Kshs.11,570
- (b) Service pay at the rate of 15 days, pay per  
each year of service.....Kshs.5,780
- (c) Six month's pay as compensation for unfair

termination of service.....Kshs.69,420

**Kshs.86,770**

35. The Claimant shall have the costs of the suit and shall be issued with a certificate of service by the Respondent.

36. It is so ordered.

Dated at Nairobi this 20<sup>th</sup> day of January 2015

Abuodha J. N.

Judge

Delivered this 20<sup>th</sup> day of January 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge