



**REPUBLIC OF KENYA**

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

**CAUSE NO. 90 OF 2014**

**PHILIMONA AROMBA MBALASI**

**CLAIMANT**

**v**

**UNI-TRUCK WORLD LTD**

**RESPONDENT**

**JUDGMENT**

1. Philomona Aromba Mbalasi (Claimant) was employed by Uni-Truck World Ltd (Respondent) on 23 May 2006 in the stores department
2. On 4 April 2014, he filed a Memorandum of Claim in Court alleging that the Respondent had unfairly and unlawfully terminated his services summarily and seeking *two months' salary in lieu of notice, salary for 25 days worked in February 2014, accrued leave and 12 months general damages for unlawful termination of services*, a total of Kshs 164,951/96.
3. The Respondent filed a Response on 29 April 2014, and the Claimant filed a Reply thereto on 9 May 2014. The Cause was heard on 17 November 2014 and 16 December 2014.
4. The Claimant filed his written submissions on 14 January 2015, while the Respondent filed its submissions on 27 January 2015.
5. The Court has considered the pleadings, documents produced, testimonies of witnesses and the submissions and identified the issues for determination as, *whether the termination of the contract was unfair and appropriate remedies*.

**Whether termination of contract was unfair**

***Procedural fairness***

6. The Claimant pleaded that he was summarily dismissed verbally without being afforded an opportunity to be heard.
7. In testimony, he stated that one day in March he reported to work as usual and the Personnel Officer (Mutinda) called him and informed him that the Respondent's Director no longer needed his services and no reasons were given.
8. He stated that he was not issued with a show cause letter or notice prior to the dismissal.
9. In cross examination, the Claimant stated that he could not remember the exact date of dismissal but it was in February 2014 when the Stores Manager (Yatin Shah) directed him to go and see the

Personnel Officer and when he went to see him , he instructed him to surrender ‘my things’. He surrendered the work overall.

10. He also stated that the Stores Manager had told him that some 12 locks were missing and that the Director said the employees in the stores must produce the locks or he would call the Police and the next day he was called to the office and he was not asked to give an explanation. He also did not know whether other employees gave explanations and that he left after being asked to leave.

11. The Claimant denied that he did not return to work after breaking for lunch.

12. The Respondent’s pleaded case is that the Claimant walked away from work when he and other employees were asked to explain about some missing locks. The Claimant did not report back.

13. The Respondent called 3 witnesses. It’s first witness was Gladys Waitherero, a colleague of the Claimant. She stated that when the locks were found missing, the employees in the stores were asked to search for them but the Claimant refused.

14. Later, the Personnel Officer (Mutinda) asked the employees to explain in writing what they knew about the loss of the locks and that she and the other employees separately wrote statements.

15. The witness stated that she did not know what happened when the Claimant was called in by the Personnel Officer.

16. The Respondent’s second witness was an employee in the stores department. He corroborated the first witness’s testimony that the Personnel Officer requested the employees to explain in writing about the loss of the locks and that each employee individually wrote a statement but he did not know whether the Claimant also recorded a statement.

17. He also stated that the Claimant did not report back to work at 2.00pm but returned the next day and was summoned to the Managing Director’s office but he did not know what transpired in the office.

18. The Respondent’s third witness was its Personnel Officer, Augustus Mutinda. He stated that the Claimant absconded duty after he asked the employees in the stores department to give written explanations about the loss of 12 locks. 3 employees went to his office and made statements, but the Claimant did not and the next time he saw him was in Court.

19. In cross examination, the Personnel Officer stated that he did not issue the Claimant with a show cause letter to explain his absence.

20. Absence from work without lawful cause or permission is one of the grounds upon which an employer may summarily dismiss an employee by dint of section 44(4) (a) of the Employment Act, 2007.

21. But the dismissal on this ground is subject to the procedural fairness requirements of section 41 of the Employment Act, 2007. An employer should therefore endeavour or attempt to get explanations from an employee as to the absence where there is no permission.

22. But an employee is also under a common law obligation to report to the appointed place for the due performance of his contract. Failure to report to work without permission or lawful cause would be a repudiation of the employment contract/relationship.

23. An employee is also under an obligation to cooperate with the employer when the employer is carrying out investigations preliminary to a disciplinary process and during the disciplinary process when it is initiated. Such cooperation is universally implied in all contracts of employment.

24. A case such as this therefore poses a legal dilemma. An employee intentionally decides not to report to work (repudiation of contract) to avoid going through a disciplinary process, and the employer

deems he has deserted and does not invoke or seek to go through the formal process of hearing the employee out.

25. In the present case, the Court finds that the real reason for the Claimant's disappearance or absence from work was to avoid or short circuit the investigative and ultimately the disciplinary process initiated by the Respondent and the possible consequences.

26. By failing to give an explanation and disappearing from work, the Claimant was by his conduct intentionally compounding and frustrating the Respondent's ability to deal with misconduct in the workplace.

27. This conduct should have put the Respondent, which had a Human Resources Office, on notice to formalize the process or intimate it was accepting the repudiation. Records could tell the real story. Writing to the Claimant through his postal address could have cost only a postage stamp and envelope, or may it could have been a mobile phone call.

28. I say so based on the general rule in contract that a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party (see *London Transport Executive v Clarke* (1981) IRLR 166).

29. Further, it is true the Claimant frustrated the contract intentionally but the right to hearing is now so entrenched that the Respondent should have done a little bit more rather than wait for a suit to be filed. Regrettably, that appears to be the harsh effect of the law.

30. The Court is therefore inclined to find that the Respondent did not comply with the requirements of section 41 of the Employment Act, 2007.

31. In the circumstances, it is not necessary to discuss whether the Respondent had any valid or fair reasons to dismiss the Claimant.

### **Appropriate relief**

#### ***Two months' salary in lieu of Notice***

32. The Claimant sought Kshs 20,758/- under this head. With the conclusion reached the Court would award the Claimant one month pay in lieu of notice pursuant to section 35(1)(c) of the Employment Act, 2007.

#### ***Salary for 25 days worked in February 2014***

33. The Claimant as of right is entitled to earned wages. He quantified the amount as Kshs 9,266/-. The Court would grant him the same.

#### ***General damages for unfair termination***

34. Under this head, the Claimant sought Kshs 124,548/-. Because of the Claimant's lack of cooperation with the Respondent, this is not a fit case to award compensation, which is a discretionary remedy.

#### ***Accrued leave***

35. The Claimant sought Kshs 10,379/- on account of accrued leave. He testified that he did not go on leave for 2013/2014.

36. An employer should keep leave records of employees. No such records were produced in Court. Pursuant to section 10(3) of the Employment Act, 2007, the Claimant succeeds on this head of claim and

is entitled to the equivalent of 1 month basic wage in lieu of leave.

### **Conclusion and Orders**

37. The Court finds and holds that the Respondent did not comply with the procedural fairness requirements of section 41 of the Employment Act, 2007 and so the termination of the Claimant was procedurally unfair and awards and orders the Respondent to pay him

a) One month pay in lieu of Notice      Kshs 9,025/-

b) Earned wages for February 2014      Kshs 9,266/-

c) Accrued leave                              Kshs 9,025/-

**TOTAL    Kshs 27,316/-**

38. All the other reliefs are declined.

39. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of March 2015.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant      Mr. Wamaasa instructed by Wamaasa, Masese & Nyamwange & Co. Advocates

For Respondent      Mrs. Kairu instructed by Sheth & Wathigo Advocates