



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

**AT NAIROBI**

**CAUSE NO. 192 OF 2011**

**JOSEPH YASULWE MUKALAMA.....CLAIMANT**

**VERSUS**

**LOAD RUNNERS LTD.....RESPONDENT**

**JUDGMENT**

1. The claimant in this suit avers that on 18<sup>th</sup> January, 2010 he was employed by the respondent as a Field Officer Motorbike rider until 6<sup>th</sup> July, 2010 when his services were terminated without notice.
2. Upon termination of his services he sought help at the office of Ministry of Labour who ordered the respondent to pay the claimant his terminal dues if agreeable. He further averred that he worked overtime and during Sundays but was never paid. He complained that prior to dismissal he was never invited to show cause why he should not be dismissed.
3. The respondent on the other hand averred that the claimant was dismissed from employment on account of gross-misconduct. According to the respondent one of its trucks No.KBK 280J had been seen transporting sand from Malaba to Bungoma. The claimant was consequently called to Nairobi Office on 1<sup>st</sup> July, 2010 and asked to show cause why disciplinary action should not be taken against him for authorizing the respondent's truck to carry unauthorized cargo. The claimant failed to respond to the how cause letter and at the same time failed to attend the disciplinary hearing. For this reason the respondent had a valid reason to dismiss the claimant.
4. In his final submissions Counsel for the claimant submitted that the particulars of gross misconduct were never spelt to the claimant. The allegations that he used one of the respondent's trucks to carry unauthorized cargo was never made known to him. According to counsel, the claimant was not told of the allegations save from the respondent's documents filed in Court.
5. It was therefore his submission that there was no valid reason for terminating the claimant's services. Regarding procedure for termination, counsel submitted that the claimant was called to the head office on 6<sup>th</sup> July, 2010 and informed the respondent no longer needed his services. This communication according to counsel was verbal. Mr. Nyabena therefore submitted that the claimant was dismissed from service on 6<sup>th</sup> July, 2010 yet his dismissal letter was dated 12<sup>th</sup> July, 2010. There was no indication in the said letter that the claimant was asked to show cause neither was he summoned to a disciplinary hearing.

6. Ms. Kamau for the respondent on the other hand submitted that the claimant's actions amounted to gross misconduct, insubordination and misuse of the respondent's property warranting summary dismissal under section 44(4) (g) of the Employment Act. Further having failed to show cause or attend disciplinary hearing, the respondent was justified in dismissing the claimant.

7. Ms. Kamau submitted that in accordance with principles of natural justice, and the respondent's policy, the claimant was provided with an opportunity to defend and exonerate himself but squandered it.

8. In claims arising out of contract of employment the onus is usually on the employer to justify reasons for dismissal while an employee has a duty to prove that the dismissal was wrongful and unfair. According to the respondent, the reason for dismissing the claimant herein was as a result of absconding duty after he was allegedly summoned to the head office to show cause why he should not be disciplined for allowing unauthorized cargo to be carried in the claimant's vehicle.

9. The claimant on the other hand avers that he was terminated on 6<sup>th</sup> July, 2010 without any notice.

10. When the claimant filed his claim, he attached a document at page 14 of his bundle of documents. This document is the same as appendix 4 in the respondent's bundle of documents. Whereas the claimant does not make any reference to this documents in his pleadings, the respondent states at paragraph 10 of its memorandum of response that the document was written by the turnboy of the vehicle allegedly used by the claimant to carry unauthorized goods. The statement according to the respondent clearly indicated the carrying of illegal goods took place and the role the claimant played.

11. Confronted with such an incriminating document, the claimant attaches the same in his pleadings without making any reference to it and further when served with a memorandum of response by the respondent where the same was annexed he makes no reply to it. Parties are bound by their pleadings and failure to reply to weighty and at times incriminating averments or documents could be construed to be admission of such statements or documents.

12. Further, apart from picking issue with alterations on the dates on the memo and letter of dismissal attached to the respondent's memorandum or response, in submissions, the claimant did not deem it fit to file a reply to the memorandum of response to refute or deny receipt of the memorandum and letter of dismissal.

13. The allegations against the claimant contained in the statement by the turnboy implicating the claimant in use of the respondent's vehicle to carry unauthorized goods for pay were serious enough to warrant summary dismissal. Failure by the claimant to turn up for disciplinary hearing on 5<sup>th</sup> July 2010 and claim he was dismissed on 6<sup>th</sup> July, 2010 lends credence to the averments by the respondent that after being implicated in the scam, the claimant offered to abscond duty and claim he was dismissed without a reason.

14. In conclusion, the Court is not persuaded in the sincerity of the claimant in bringing the claim and further failure by the claimant to respond to such damning allegations against him leads to the conclusion that the claimant has failed to prove its claim to the requisite standards and the same is hereby dismissed with costs.

15. The respondent will however pay the claimant the admitted Kshs.3,297/= on account of accrued leave for 5 months.

15. It is so ordered.

Dated at Nairobi this 10<sup>th</sup> day of July 2015

Abuodha J. N.

Judge

Delivered this 10<sup>th</sup> day of July 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge