



**REPUBLIC OF KENYA**

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

**CAUSE NO 1131 OF 2013**

**SETH ASHAMUNDA DUYANI.....CLAIMANT**

**VS**

**ARIPHAT INDUSTRIES LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim dated 17th July and filed in Court on 18th July 2013 seeks compensation for unlawful and unfair termination of employment. The Respondent filed a reply on 20th August 2013 but did not call any witnesses. The Claimant testified on his own behalf. Both parties filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a driver at a monthly salary of Kshs. 11,776 from July 2011. He worked as such until 28th March 2012 when he was summarily dismissed on allegations of stealing a neighbour's dog.

3. It is the Claimant's case that there was no valid reason for the termination of his employment and that he was not afforded an opportunity to defend himself. He therefore claims the following:

- a. A declaration that the termination of his employment was unlawful and unfair
- b. 12 months' salary in compensation for loss of

employment.....Kshs. 141,312

- c. 1 month's salary in lieu of notice.....Kshs. 11,776
- d. Certificate of service
- e. Costs and interest

**The Respondent's Case**

4. In its reply filed on 20th August 2013, the Respondent admits having employed the Claimant as stated in the Memorandum of Claim. The claim for unlawful and unfair termination is however denied.

5. It is the Respondent's case that the Claimant's employment was terminated upon his admission that he had stolen a neighbour's dog. The Respondent therefore avers that its conduct was lawful.

## **Findings and Determination**

6. The following are the issues for determination in this case:

- a) Whether the termination of the Claimant's employment was justifiable and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

7. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for the termination of the employment of an employee. In its reply, the Respondent states that the Claimant's employment was terminated upon his admission that he had stolen a neighbour's dog.

8. The Claimant however denied this allegation. He testified that he was arrested on 28th March 2012 but was released the same day because there was no evidence against him. The Respondent did not lead any evidence to prove its assertion and the Court finds that there was no valid reason for the termination of the Claimant's employment.

9. The allegation made against the Claimant which led to the termination of his employment falls under what is commonly known as misconduct and Section 41 of the Employment Act sets out the following mandatory procedure for handling of such cases:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative.

10. There was no evidence that the Claimant was taken through any disciplinary procedure akin to what is set out under Section 41 and the Respondent therefore failed the procedural fairness test as well.

### **Remedies**

11. Ultimately the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and awards him six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's callous conduct in the termination process.

12. From the evidence on record, the Claimant was paid salary for the month of April 2012 although his termination took effect on 28th March 2012. In my view, this served as pay in lieu of notice and this claim therefore fails and is dismissed.

13. Consequently, I make an award in favour of the Claimant in the sum of Kshs. 70,656 being compensation for unfair termination of employment.

14. The Claimant will have the costs of this case.

15. It is so ordered.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21<sup>ST</sup> DAY OF**

**AUGUST 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mwang'ombe for the Claimant

Mr. Omega for the Respondent