



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

**AT MOMBASA**

**CAUSE NO. 78 OF 2015**

**ALI MUHAMMED ..... CLAIMANT**

**VERSUS**

**AWAL TRANSPORTERS LTD ..... RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim about unlawful termination of employment of by the employer by which the claimant seeks to recover kshs.99,000 as his accrued employment dues plus compensation for unfair termination. The gist of the claimant's case is that he was employed by the respondent on 4.1.2010 as a Lorry Turn-boy earning kshs. 6000 per month and worked continuously until 16.12.2013 when he was dismissed by the respondent after contracting Tuberculosis (T.B). According to the claimant the dismissal was unfair and unlawful because there was no justifiable reason for the dismissal without notice.
2. The respondent admits that she employed the claimant as a Turn-boy from 16.11.2013 until 23.12.2013 when he deserted work after the respondent discovered that some items valued at kshs.34020 had disappeared while in the claimant's custody. It is the defence case that the claimant had been employed by a subcontractor of the respondent and was only temporarily working for her when he was on leave from 16.11.2013.
3. The case was heard on 9.6.2015 when the claimant testified as CW1 while the respondent called Mr. Mohammed Sheikh as RW1 and thereafter both parties filed written submissions.

**Analysis and Determination**

4. After carefully considering the pleadings, evidence and the submissions, it is clear that CW1 was employed by the Respondent as a Turn-boy. The issues for determination are:
  - a. Whether the claimant was dismissed on 16.12.2013 or he deserted work from 21.12.2013.
  - b. Whether the dismissal was unfair and unlawful.
  - c. Whether the reliefs sought should be granted.

**Desertion vs. Dismissal**

5. According to RW1, the claimant returned to Mombasa on 21.12,2013 after official duty to Uganda and disappeared after it was discovered that a spare wheel, bottle jack, Diesel pipe, pressure pipe

and rim valued at kshs.34020 and which were in his custody were missing. That when he reappeared on 23.12.2013 and was asked the whereabouts of the missing items, the claimant responded by threatening RW1 that he did not know the law. That, later on the claimant served him with a demand letter followed by this suit. He denied that the claimant was paid any salary for November and December 2013.

6. The claimant has however maintained that he returned to Kenya from South Sudan on 16.12.2015 and upon attending hospital he found to have T.B. and obtained 10 day sick leave which was extended for another 10 days. That he was only paid salary for the 16 days worked in December 2013 and was never allowed back to work. He denied ever deserting work and maintained that he was lawfully away on sick leave and when he returned to work he was told that his employment had ended. Logically, and on a balance of probability, the effective date of the said termination of the claimants employment was 16.12.2013 and not 21.12.2013 because he was not paid the days when he was supposed to be on sick leave.

### **Unfair and unlawful termination.**

7. The court is persuaded to believe the evidence by the claimant that he was unfairly and unlawfully terminated, and dismiss the defence by the respondent. The main reason for the foregoing view is that the respondent failed to produce any employment records for the claimant. Under section 74 of the Employment Act (EA) an employer is duty bound to keep proper records of his employee and under section 10(7) of the EA the employer is obligated to produce such records in court or else the burden of disproving any term of the contract alleged by his employees in any court proceedings lies with the employer.
8. In this case the respondent never produced any leave records or travel records for the claimant in respect of the days she alleged that he was in Uganda. He also did not produce any other evidence to prove that the claimant was not her employee but rather an employee of a subcontractor between 2010 and mid November 2013. She also never produced records to prove that the claimant's salary was kshs.8000 per month and not kshs.6000 as alleged by the claimant. Consequently and on a balance of probability, the court finds and holds that the claimant never deserted work as alleged by the Rw1 but was unfairly and unlawfully dismissed by the respondent.
9. The dismissal was unfair and unjustified because the respondent did not prove any valid reason to warrant the dismissal and the procedure followed was not fair. Section 45 of the EA deems termination of employment unfair unless the employer proves that there was a valid and fair reason to justify the termination and that a fair procedure was followed namely, giving the employee an oral hearing under section 41 of the EA. In this case the claimant fell ill and was given sick leave but then he was dismissed with effect from the date he commenced his sick leave.

### **Reliefs**

10. In view of the finding above, the court makes declaration that the termination of the claimant's employment by the respondent was unfair and unlawful. Under section 49 (4) of EA the court is required to take into account several matters, including the wishes of the employee, in deciding which relief to award. In this case, the claimant wishes to be awarded damages and not to be reinstated.
11. Consequently he is awarded damages under section 49 (1) of EA including kshs 6000 being one month salary in lieu of notice, kshs 8400 for accrued leave for 2 years, kshs. 9000 being service pay for 3 years served and kshs. 36000 being 4 months' salary compensation for unfair termination. In this court's view the claimant could, with due diligence, secure alternative job as turn-boy within 4 months.

### **Disposition**

11. For the reasons stated above, judgment is entered for the Claimant against Respondent declaring the termination of the Claimant's employment unfair and unlawful, and awarding him Kshs. 59,400 plus costs and interest.

It is so ordered.

**Signed, dated and delivered at Mombasa this 25<sup>th</sup> day of September 2015**

**O.N. MAKAU**

**JUDGE**