



**REPUBLIC OF KENYA**

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

**CAUSE NO.1463 OF 2013**

**EDWARD MUKALA AGUMONYO ..... CLAIMANT**

**VERSUS**

**EXPRESS CONNECTIONS LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the unfair termination/dismissal of the Claimant and the non-payment of his terminal dues by the respondent.
2. The claim was filed on 9<sup>th</sup> September 2013. The Respondent was served and an Affidavit of Service sworn by Geoffrey Anami and dated 24<sup>th</sup> October 2013 filed on 4<sup>th</sup> November 2013 confirming such service. The Respondent did not enter appearance or file any defence. The Claimant was heard in his case and directed to file written submissions. On the due date, 30<sup>th</sup> September 2015, there was appearance for the Respondent by Mr Issa holding brief for Mr Okatch Advocate. Counsel sought leave to file defence out of time and to be heard on their case. The Court observed that despite giving the respondent's counsel a chance to address the court, there was no formal appearance or any application seeking to stay the proceeding to enable the Respondent file such a defence and or appearance. Judgement was scheduled for 15<sup>th</sup> October 2015, a period of over 15 days. In the interim, the Respondent has not moved the Court or made any effort to file any defence or enter appearance.

**The claim**

3. The Claimant was employed by the Respondent from August 2007 as a Driver at a monthly salary of KShs.14, 564.00 per month. He served diligently since his employment but was issued with a written contract on 2<sup>nd</sup> April 2009 and placed under one month probation. On 8<sup>th</sup> June 2013 at around midnight the Claimant received a call from his manager with information that the human resource manager had directed that there was no longer work for him with the respondent. His contract was effectively terminated. Upon asking for the reason, nothing was forthcoming. On 9<sup>th</sup> June 2013 the Claimant went to his place of work but he was again informed that his services were no longer required by the respondent. Despite making efforts to be reinstated, the Respondent was adamant and refused to oblige.
4. The claim is also that the Claimant was never given any reasons for his termination. There was no prior notice that he would lose his employment in a summary manner. He was not given a hearing to know what error had been committed or given a chance to argue his case. Due process was not followed before his summary dismissal.

5. The Claimant had served the Respondent for over 6 years without warning in, disciplinary action or any misconduct. He was entitled to a hearing before summary dismissal. He was also entitled to notice or hearing before his termination of employment in a summary manner. He is therefore seeking compensation for the unfair termination of his employment.

6. The Claimant is seeking notice pay; unpaid salary for May 2013; payment in lieu of untaken leave for 3 years; service gratuity; and compensation. The Claimant sent a demand notice to the Respondent but they refused to pay his dues. He is therefore seeking costs for the suit.

7. In evidence, the Claimant testified in support of his claim and noted that since his employment his salary had been increased and lastly was earning kshs.17, 759.00 per month. Due to the nature of work he had, he was forced to wake up very early at 5am and to retire for the day at 11pm in the night each day. In a month he got 8 day off but on 5<sup>th</sup> June 2013 when he left work as usual he was called by the Respondent officer and told that his vehicle was consuming a lot of fuel per day. The director wanted to know why this was the case but the Claimant noted that his vehicle was getting old and he was using a very difficult route, from Ambassador hotel in central business district to the Jomo Kenyatta international airport and would end up as Koma Rocks in the evening. On several occasions he was sent to the mechanic so as to find out why his vehicle was consuming a lot of fuel and the mechanic noted that the vehicle was old hence the high fuel consumption. The mechanic recommended to the Respondent that a new vehicle was necessary so as to reduce consumption costs. The Claimant explained these details to the human resource and proceeded to work for 2 more days. The director insisted that the Claimant should stop work as the vehicle was such a high consumer of fuel. These details were however verbal. When the Claimant tried to discuss the matter with the Respondent he was chased away and told never to report back to work.

8. The Claimant also testified that the Respondent had other vehicles that he could have used. He was however chased away without notice or payment of his terminal dues hence his claim before court. He was paid his lunch allowance; NSSF and NHIF; he took leave for one year; despite deductions of NSSF dues, the Respondent did not remit for all the months.

### **Submissions**

9. The Claimant submitted that he was dismissed on suspicion of siphoning fuel but there was no such evidence. The Respondent directed that a mechanic should inspect his vehicle to establish what was wrong and the report was clear that he had a very old vehicle that should have been disposed. The subsequent termination through summary action was not justified or reasonable a due process was not followed. Even where the Claimant was suspected of wrongdoing, he was not given a hearing to know what error he had committed. There was no written notice issued to the Claimant for him to know the exact reasons leading to his summary dismissal or to justify the termination of his employment. Section 41, 43 and 47 of the Employment Act were not followed. The resulting termination was therefore unfair under the provisions of section 45 of the employment Act.

10. The Claimant is entitled to notice pay and salary for May 2013 that was never paid to him. He is also seeking lave pay for the 3 years he was never on his annual leave. Service gratuity is due noting that the Respondent deducted statutory dues but never remitted as required in law. Damages are also due in this case.

### **Determination**

11. Where there is a written contract of employment, section 35 of the Employment Act demands that termination of such a contract should be in writing. Such a provision is mandatory as in such written notice of termination, an employee is able to know the reason or reasons for such termination. The employee has the right to challenge the reasons for termination where he feels aggrieved. It is therefore imperative to employers to respect the law this far and issue written communication to their employees. Such written communication is to facilitate keeping of work records that are required in matters such as this one and also in compliance with the law.

12. In this case, the Respondent failed to enter appearance or defend the claim and despite the effort of attending Court through their representative on 30<sup>th</sup> September 2015 seeking to file a defence, and despite the Court noting that the matter was up for judgment, I find no effort to mitigate the circumstances of non-appearance or failure to file any defence. I take it then the Respondent is not keen to defend the claim despite knowledge of the same being filed against them.

13. To terminate the Claimant without written notice or payment of terminal dues is contrary to the provisions of section 41 and 43 of the Employment Act. It is not just sufficient that the Respondent suspected wrongdoing on the part of the Claimant with regard to missing fuel, such allegations must be followed up properly and where they are found to have justification, the law allow summary dismissal or written notice giving reasons for the termination. In the absence of such written notice, the resulting termination is unprocedural and cannot find justification and is therefore unfair.

14. In this regard therefore, notice pay is due. The 2012 pay slips issued to the Claimant indicate he earned kshs.24, 815.30 but in his evidence he stated his salary as being Kshs.14, 564.00. A keen look at the pay slip is that the sum of kshs.14, 546.00 is the basic pay while there was a housing allowance of kshs.2, 185.00. Total dues payable each month is kshs.16, 731.00. Notice pay awarded is kshs.16, 731.00.

15. Salary for May 2013 is claimed. This is awarded at kshs.16, 731.00.

16. Payment for leave untaken is claimed on the basis that the Claimant did not take leave for 3 years. In evidence the Claimant stated that in every month he would take 8 days off. Based on the rest day rule, where such 8 days were awarded, the Claimant has over a week rest every month. This must be quite generous noting that his overtime was also paid as per the various pay slips indicate. To award leave on the basis of this evidence would be double payment for the leave that I find to have sufficiently been compensated in the 8 days rest and or off. This is declined.

17. Service pay is due where statutory deduction are not made or where made they are not remitted to the relevant bodies. The statement of the NSSF dues is staggered and indication that the Respondent never made the requisite submissions. This should attract a heavy penalty. For the Claimant he is entitled to service pay from the date of his contract being 2<sup>nd</sup> April 2009 to the date of dismissal, the 6<sup>th</sup> of June 2013. This is a period of 4 full years and service pay due is kshs.34, 462.00.

18. Compensation is due. This is awarded at 6 months' pay all being kshs.100, 386.00.

## **Conclusion**

**Judgement is hereby entered for the claimant in the following terms;**

- a) The termination was procedurally unfair;**
- b) Compensation awarded at Kshs.100, 386.00;**
- c) Notice pay Kshs.16, 371.00;**
- d) Salary for May 2013 Kshs.16, 371.00;**
- e) Service pay Kshs.34, 462.00; and**
- f) Costs of the suit.**

**Delivered in open court at Nairobi and dated this 14<sup>th</sup> day of October 2015.**

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant