



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

**CAUSE NO. 65 OF 2013**

**(Originally Nairobi Cause No. 1272 of 2011)**

**LUKA OSAKA.....CLAIMANT**

**v**

**TIMSALES LTD.....RESPONDENT**

**JUDGMENT**

1. Luka Osaka (Claimant) was employed as a driver by Timsales Ltd (Respondent) in 2001.
2. On 28 July 2011, the Claimant commenced legal action against the Respondent alleging unlawful summary dismissal. The Respondent filed a Response on 29 May 2012. The Claimant thereafter filed an Amended Memorandum of Claim on 21 April 2015 after leave was granted. The Respondent filed an amended Response on 15 May 2015.
3. The Cause was heard on 15 July 2015. The Claimant gave sworn testimony while the Respondent called one witness, a former colleague of the Claimant.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the summary dismissal of the Claimant was unfair and appropriate remedies/orders including any entitlements due to the Claimant.*

**Whether summary dismissal was unfair**

***Procedural fairness***

5. The Claimant was dismissed through a letter dated 9 September 2010. The reason given was that he had absconded duty from 25 August 2010.
6. In his testimony, the Claimant stated that he was not afforded an opportunity to be heard before dismissal and that the guards would not allow him into the Respondent's premises when he reported back to work on 25 August 2010 after a 14 days leave.
7. The Respondent's witness, a colleague and neighbour to the Claimant stated that the Respondent's Transport Manager sent him to the Claimant to ask him to report to work. When he informed the Claimant, the Claimant responded that the Respondent had been disturbing him.
8. This testimony was not challenged or controverted. Having failed to report back to work, it is probable that the Claimant was not ready to cooperate with the Respondent. The Claimant's testimony was also

inconsistent, and not clear as to why he was not at work between 24 August 2010 and 27 August 2010.

9. Employees are under an obligation to cooperate with employers even in a disciplinary process.

10. Failing to appear at the appointed place of work without permission or lawful cause is one of the grounds given in the law to warrant summary dismissal. It is also a breach of contract.

11. But before dismissing an employee for not reporting to work, an employer is under a statutory obligation to conduct a hearing. The hearing can be face to face, or through correspondence.

12. In this regard, the employer should issue a show cause to the defaulting employee to show cause and explain his absence or whereabouts.

13. The Respondent made attempts through a colleague of the Claimant to have him report to work but he rebuffed those attempts. He was not ready cooperate with the Respondent.

14. The Court finds that the Respondent acted reasonably in trying to get the Claimant back to work and he rebuffed the efforts. A hearing under the circumstances was impractical and the Claimant cannot benefit from such failure to hold a hearing.

### ***Substantive fairness***

15. The Court has already alluded to the reason given for the Claimant's dismissal. In his testimony, the Claimant stated that he was arrested by the Police on 9 July 2010 and was released the same day.

16. What is indisputable is that the Claimant was absent from work for some days after his leave ended.

17. But according to him, his attempts to resume work were thwarted by the Respondent's guards and that he did not make any complaint to the Ministry of Labour.

18. The Claimant did not challenge the Respondent's witness testimony that he (witness) was sent to ask him to report to work. It is there improbable that the guards denied him entry when the Respondent made efforts to have him report at work.

19. Further, the Claimant pleaded that he was a member of a union but he did not taken it up in evidence. It is open to debate whether he should have reported to the Union if he had been denied entry.

20. Considering the Respondent's witness testimony that he informed the Claimant of the request to report to work and that the Claimant did not heed the request, the Court finds that the Respondent had and has proved a valid and fair reason to dismiss the Claimant.

### **Appropriate remedies/Orders**

21. The Claimant had sought a declaration that the dismissal was unfair, pay in lieu of notice and compensation.

22. With the conclusion reached on the question of fairness of the dismissal, these remedies are legally untenable.

23. The upshot is that the Court orders that the Claim herein be and is hereby dismissed. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of November 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ikua instructed by Ikua Mwangi & Co. Advocates

For Respondent Mr. Ambenge, Executive Officer, Federation of Kenya Employers

Court Assistant Nixon