



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 1016 OF 2012 CONSOLIDATED WITH CAUSE NO 1018 OF 2012**

**ABDULRAHMAN K. RAMADHAN.....1ST CLAIMANT**

**JOSEPH OMONDI OMUSI..... 2ND CLAIMANT**

**VS**

**EASY COACH LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. By consent of the parties, the 1st and 2nd Claimants' claims for unfair termination and refusal to pay terminal dues were consolidated on 4th April 2013. The case was then heard on 12th June 2013 and 24th July 2013 with Mr. Nyabena appearing for the Claimants and Mr. Masese for the Respondent. The Claimants testified on their own behalf and the Respondent's Fleet Manager, Kiruki Mwithimbu testified on behalf of the Respondent.

**The 1st Claimant's Case**

2. The 1st Claimant, Abdulrahman K. Ramadhan was employed by the Respondent as a Driver on 15th November 2011 at a basic salary of Kshs. 12,880 plus a house allowance of Kshs. 1,935. He worked until 18th January 2012 when he was dismissed on allegations of fuel pilferage.

3. The 1st Claimant wrote to the Respondent on the same day asking for particulars of the alleged offence but he got no response. He subsequently sought assistance from the Transport and Allied Workers Union who in turn wrote to the Respondent challenging the 1st Claimant's dismissal. The 1st Claimant's Advocate also wrote a demand letter to the Respondent but no response was received. It was the 1st Claimant's case that there was no valid reason for his dismissal and that the manner in which the dismissal was effected was procedurally unfair.

4. The 1st Claimant therefore claims the following:

- a. A declaration that the termination of his employment was unfair and unlawful
- b. 12 months' salary in compensation for unfair termination..Kshs. 236,232
- c. One month's salary in lieu of notice.....19,626
- d. Leave pay.....2,271
- e. Days worked.....13,629
- f. Salary underpayment (Kshs. 19,686-14,815).....4,871
- g. Overtime worked (4x6x4x13x1.5x757).....109,008
- h. Less amount paid.....(5,980)

- i. Certificate of service
- j. Costs and interest
- k. Any other relief the Court may deem just to grant

### **The 2nd Claimant's Case**

5. Joseph Omondi Omusi, the 2nd Claimant herein was employed by the Respondent on 24th November 2010 in the position of Driver at a basic salary of Kshs. 13,167.50 plus a house allowance of Kshs. 1,975. The 2nd Claimant worked for the Respondent until 18th January 2012 when the Respondent terminated his employment on allegations of fuel pilferage. Upon receipt of the letter of termination, the 2nd Claimant wrote to the Respondent seeking particulars of the said pilferage but no response was received from the Respondent.

6. The 2nd Claimant thereafter sought assistance from the Transport and Allied Workers Union who wrote to the Respondent challenging the termination of the 2nd Claimant's employment. Further, the 2nd Claimant's Advocate wrote a demand letter to the Respondent but there was no response from the Respondent.

7. It was the 2nd Claimant's case that there was no valid reason for the termination of his employment and that the procedure used by the Respondent in effecting the termination was procedurally unfair.

8. The 2nd Claimant therefore claims the following:

- a. A declaration that the termination of his employment was unfair and unlawful
- b. 12 months' salary in compensation for unfair termination..Kshs. 236,232
- c. One month's salary in lieu of notice.....19,686
- d. Leave pay.....19,686
- e. Days worked.....13,629
- f. Salary underpayment (Kshs. 4,543.5x13 months).....59,066
- g. Overtime worked (4x6x4x13x1.5x757).....1,417,108
- h. Service pay.....8,559
- i. Less amount paid.....(25,390)
- j. Certificate of service
- k. Costs and interest
- l. Any other relief the Court may deem just to grant

### **The Respondent's Case**

9. In its Statement of Response filed on 17th October 2012, the Respondent admitted having employed Abdulrahman K. Ramadhan, the 1st Claimant herein on 15th November 2012 as a Driver at a basic salary of Kshs. 12,880 and a house allowance of Kshs. 1,935.

10. On 9th January 2012, the 1st Claimant was issued with a show cause letter to explain allegations made against him with regard to pilfering of fuel from the Respondent's motor vehicles. The 1st Claimant did not respond to the show cause letter.

11. On 16th January 2012, the 1st Claimant was invited to a disciplinary meeting where the charges leveled against him were put to him. The 1st Claimant failed to explain the high fuel consumption on account of motor vehicles assigned to him and on 18th January 2012, he was summarily dismissed. Upon intervention by the Transport and Allied Workers Union, the summary dismissal was reduced to normal termination.

12. On 9th February 2012, the 1st Claimant collected his terminal benefits in full and final settlement thus discharging the Respondent from any further liability. It was the Respondent's case that at the time of termination, the 1st Claimant was on probation and he is therefore not entitled to

the reliefs sought.

13. With regard to the 2nd Claimant, Joseph Omondi Omusi, the Respondent admitted having employed him as a Driver at a basic salary of Kshs. 13,167.50 plus a house allowance of Kshs. 1,975 effective 24th November 2010.

14. On 9th January 2012 the 2nd Claimant was issued with a show cause letter requiring him to explain allegations of fuel pilferage made against him to which he did not respond. On 16th January 2012, the 2nd Claimant was invited to a disciplinary meeting where he stated that he did not know why the Respondent's motor vehicles under his command were consuming unusually high amounts of fuel.

15. On 18th January 2012, the 2nd Claimant was summarily dismissed for involvement in pilferage of fuel from the Respondent's motor vehicles. Upon request by the Transport and Allied Workers Union, the Respondent reduced the 2nd Claimant's summary dismissal to normal termination and on 9th February 2012, the 2nd Claimant collected his terminal benefits in full and final settlement and thus discharged the Respondent from any further liability.

### **Findings and Determination**

16. Before proceeding to address the Claimants claims for unfair termination, I need to dispense with the collateral issues raised by the Respondent on the status of the 1st Claimant's employment and the effect of the discharge vouchers executed by the 1st and 2nd Claimants to the effect that they had no further claims to make against the Respondent.

17. Section 2 of the Employment Act, 2007 defines a probationary contract as:

22. This is the gist of Section 45 (2) of the Employment Act, 2007 which provides that:

**(2) A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason-**

**(i) related to the employees conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer and that**

**(c) That the employment was terminated in accordance with fair procedure.**

23. The charge against the 1st and 2nd Claimants was that they had colluded with the Respondent's Manager at Nakuru to pilfer fuel from the Respondent's motor vehicles. The Respondent's witness, Kiruki Mwithimbu took the Court through the procedure for fueling of the Respondent's motor vehicles. Mwithimbu testified that before leaving Nairobi, each motor vehicle would be fueled to full tank and on the return journey, motor vehicles would be fueled at Nakuru with estimated fuel for the remainder of the journey to Nairobi. At the fueling point there was an attendant and the driver would sign for the amount of fuel taken.

24. Mwithimbu told the Court that in the month of December 2011, he carried out a routine analysis of fuel consumption by the Respondent's motor vehicles and noted that fuel consumption on account of motor vehicles driven by the 1st and 2nd Claimants during the period was excessive.

25. Specifically, motor vehicles registration number KBC 329Y and KBG 969R which were driven by the 1st Claimant, Abdulrahman K. Ramadhan on 1st and 22nd December 2011 had consumed excess fuel of 16 and 50 litres respectively. In similar fashion, motor vehicles registration number KBM 783B, KBJ 976E and KBK 043J which were driven by the 2nd Claimant Joseph Omondi Omusi on 4th, 23rd and 27th December 2011 had consumed excess fuel of 30 litres, 49 litres and 33 litres respectively.

26. From the evidence adduced by the Respondent, it would appear that the problem of excessive fuel consumption was widespread and when the Respondent sought an explanation from its Manager in Nakuru, he disappeared never to return. However, it seems to me that the Respondent did not carry out adequate investigations to link the Claimants with the alleged pilferage.

27. Mwithimbu told the Court that excessive fuel consumption could be caused by fuel leakage or mechanical fault. Apart from a general statement in the show cause letters dated 9th January 2012 that mechanical checks done on the subject motor vehicles had revealed that there were no leakages or mechanical faults, there was no evidence presented to the Court as to how this had been established. Moreover, the Claimants told the Court and the Respondent agreed that each fuel tank was fitted with a seal which could not be tampered with without detection. There was no evidence that any of the fuel tanks was tampered with.

28. In the submissions filed on behalf of the Respondent, it was submitted that since the Claimants had failed to assist the Respondent in identifying the persons involved in the fuel pilferage, it was the Respondent's conclusion that the Claimants were themselves involved in the pilferage. In my view, this is placing a burden where it does not lie.

29. The Claimants were employed as drivers and their only responsibility as far as the fueling procedure was concerned was to deliver their motor vehicles to the fueling point which was

manned by an attendant and the entire operation was under the command of a Manager. After fueling, the fuel tank would be sealed and the Claimants were not authorised to break the seal. To my mind, the Claimants cannot therefore be held responsible for what appears to have been a systemic failure within the Respondent.

30. For the foregoing reasons, I find that the Respondent failed to prove a valid reason for terminating the Claimants' employment as required under Section 43 of the Employment Act, 2007.

31. I will now examine the procedure adopted by the Respondent in effecting the termination of the Claimants' employment. The Claimants denied receiving the show cause letters dated 9th January 2012 and Mwithimbu told the Court that he did not know how or when the letters were served on the Claimants. The Court was therefore unable to determine whether these letters were indeed issued to the Claimants.

32. The Respondent produced some record of disciplinary proceedings signed by the Chairman of the Disciplinary Panel, Chrispine Owino. The Claimants denied attending any disciplinary meeting and since none of the disciplinary panel members was called to testify and the Claimants had not signed the proceedings, the Court was unable to establish whether disciplinary meetings took place. Curiously, the letters of summary dismissal dated 18th January 2012, made no mention of the disciplinary proceedings.

33. On the whole, I find that the procedure adopted by the Respondent in effecting the termination of the Claimant's employment did not meet the threshold set by Section 41 of the Employment Act, 2007.

34. In light of the foregoing, the Court finds the termination of the 1st and 2nd Claimants' employment unfair for want of substantive justification and procedural fairness and awards the 1st Claimant Abdulrahman K. Ramadhan 3 months' salary and the 2nd Claimant, Joseph Omondi Omusi 6 months' salary in compensation.

35. The 1st Claimant was paid Kshs. 3,005 as notice presumably because he was deemed to be on probation. In view of my finding on this point, I award him the shortfall in notice pay. I also award the 2nd Claimant Kshs. 1,975 being house allowance which should have been factored into his notice pay.

36. The 2nd Claimant was paid Kshs. 1,617 as leave pay and in the absence of evidence that he had either taken the rest of his leave or was compensated for it, I award him the shortfall. The 1st Claimant is also entitled to prorata leave and both Claimants are entitled to salary up to the date their employment was terminated.

37. With regard to the claims for underpayment, the Court finds that the Claimants' salary was within the minimum wage for bus drivers. In addition, the Court finds that the Claimants were paid standard overtime as set out in the Collective Bargaining Agreement negotiated between the Respondent and the Claimants' union. These claims therefore fail and are dismissed.

38. In the final analysis, I make an award in favour of the Claimants as follows:

**Abdulrahman K. Ramadhani (1st Claimant)**

- a. 3 months' salary in compensation for unfair termination.....Kshs. 44,445
- b. Notice pay shortfall (14,815-3005).....11,810
- c. Leave pay (1.75 days per month).....2,593
- d. Pay recovered during time of absence.....16,415

**Total.....Kshs.75,263**

**Joseph Omondi Omusi (2nd Claimant)**

- a. 6 months' salary in compensation for unfair termination.....Kshs. 90,855
- b. Notice pay shortfall.....1,975
- c. Leave pay shortfall (15,142.50x21-1,617).....8,983

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- d. Pay recovered during time of absence.....23,440

**Total.....Ksh.125,253**

Both Claimants are entitled to certificates of service and I award them the costs of this case.

These awards are subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JANUARY 2014**

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**In the Presence of:**

.....*Claimant*

.....*Respondent*