



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 129 OF 2013**

**BENARD MUDIRI CHANZU.....CLAIMANT**

**-VERSUS-**

**RIFT VALLEY RAILWAYS KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> March, 2014)

**JUDGMENT**

The claimant filed the memorandum of claim on 14.05.2013 through Gordon Ogola & Associates Advocates. The claimant prayed for 3 months pay in lieu of notice Kshs.113,938.00; provident fund; compensation under section 49 (1) (c) Kshs.455,736.00; damages for 20 years Kshs.9,114,720.00 and the total being Kshs.9,684,394.00.

The respondent filed the defence on 19.06.2013 through Nyachiro Nyagaka & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The claimant filed a response to memorandum of defence on 25.06.2013.

The case was heard on 12.02.2014. The claimant gave evidence to support his case. The respondent's 1<sup>st</sup> witness was Regional Rolling Stock Inspector based at Eldoret Peter Kungu Onyango (**RW1**), the 2<sup>nd</sup> was the Regional Locomotive Inspector Joseph Ngulutu (**RW2**) based at Nairobi and the 3<sup>rd</sup> respondent's witness was Caroline Okach (**RW3**), the Human Resources Business Partner based at Nairobi. The court has revisited the evidence on record and the circumstances and facts of the case are as follows.

The claimant was employed by the respondent as a train guard from 1.11.2006 to 23.08.2012. At termination, the claimant's monthly gross pay was Kshs.37,798.00. In the capacity of the train guard, the claimant's duties included being in charge of the train, ensuring that the train was well marshalled, confirming that the load was within stipulated weight, ensuring that the wagon seals were in order, ensuring that the doors were fastened and, before leaving the station, ensuring that the pressure of the last wagon was at 70 psi and that permission to start was given, known as "**line clear**".

The claimant was trained as a train guard at the Railway Training Institute in Nairobi and passed his examination. Prior to employment by the respondent, the claimant had served the Kenya Railways Corporation for 13 years in various capacities including track maintenance and ticket examiner on passenger trains.

On 29.06.2012, the claimant was booked to work on train No C3B 9214 with a load of 16 wagons weighing 759 tonnes. The train was scheduled to start at 1900 hours but after booking on duty with his driver, it was rescheduled to depart at 2300 hours. The train departed at 0035 hours after examination by

the relevant staff. The train shut down at the Nakuru Junction Menengai section. The scotches necessary for assisting the guard to apply the hand brakes on the wagons were missing in the train driver's cabin. The claimant detraind and managed to apply the hand brakes on the wagons with the help of small stones in lieu of the scotches. The time of shut down was 0125 hours. The claimant notified the control office in Nairobi who advised that assistance would come from Nakuru. The assistance arrived at 0535 hours by another light locomotive that was also used to push the shut down train to Menengai station arriving at 0605 hours. The fitters then jump-started the train No C3B 9214 using the other locomotive and the control office in Nairobi instructed the claimant, his driver and police officer to continue with the journey. They complied. The fitters did not identify the cause of the shut down.

At 0705 hours at Misoi- Sabatia junction, the train shut down again at 0854 hours. The crew secured the train and informed the control office. The assistance arrived at 1050 hours by another locomotive from Sabatia Section and the claimant's train was pulled to Sabatia per the instructions by the control office. At Sabatia, the control office instructed the locomotive be detached from the wagons. The claimant and his driver complied, the wagons were secured and their locomotive pulled to Maji Mazuri station as per the instructions by the control office. The crane driver one Otieno was the one at Maji Mazuri station. He jump-started the locomotive without finding out the cause of the shut down. The claimant and his driver then started to move at 1350 hours from Maji Mazuri, arrived at Sabatia station, attached the load and started the journey after confirming that all was well.

After moving for some distance, the locomotive shut down again. The claimant confirmed with his driver that the driver had engaged the driver's hand brake known as ODBV. The driver confirmed and the claimant detraind to secure the wagons by applying the hand brakes. The claimant testified that he had noticed the pressure was very low. While applying the hand brakes on the last wagon, the train started moving backwards. It capsized after moving a distance of 6.5 km backwards. The claimant informed control office. Assistance arrived at 0013 hours when RW2 arrived aboard another locomotive. RW2 did not inspect the wagons. He only inspected the locomotive. Later, inspection was done on 1.7.2012 in the absence of the claimant and the claimant's case was that it was a false report. The claimant wrote a letter being exhibit **BMC IX** on the respondent's list of documents essentially narrating the events of the shut downs.

The respondent undertook an investigative inquiry into the accident. The report of the joint inquiry committee of 11<sup>th</sup>-12<sup>th</sup> July 2012 is exhibit **BMC** on the memorandum of claim.

In the report, it was stated that RW2 attributed the accident to a malfunction of the locomotive and placing of the Oerlikon Driver's Brakes Valve (ODBV) in handle position (meaning failure to engage the driver's emergency driver's brake when the locomotive shut down) and which made it difficult to engage the wagon hand brakes. The depot superintendent Joseph Migwi stated at the inquiry that it was established that the cause of the engine shut down was governor tripping. The report also stated that the locomotive was not fitted with any data recording device due to lack of spares to maintain the Hasler recorders so that it was not possible to establish the driver's handling of the train or analyse the events. The report also states that the locomotive in issue exhibited intermittent engine shut down and it was not known when the ODBV was serviced. The report states the claimant had been on duty continuously for 20 hours 50 minutes and he must have been fatigued at time of the accident. The report's recommendations included:

- a. Improving training of crew on competence and safety performance in trains operations.
- b. Monitoring crew working hours for fatigue.
- c. Restricting crew working to a maximum of 12 hours.
- d. Engine control governor for 9214 (like one involved in the accident) be overhauled to further check the parts to establish the cause of tripping.
- e. Introduce monitoring system of locomotives with intermittent failures with no clear cause established. Such locomotives be stopped for diagnosis.

The respondent by the letter exhibit **XIV** on the memorandum of claim dated 24.07.2012 asked the claimant to explain his alleged gross misconduct thus, "**On June 30<sup>th</sup> 2012 while working train CB**

**9214 MZR-SBT you failed to secure the train adequately leading to the rake rolling backwards, running away and subsequently capsizing.”** The respondent viewed the alleged misconduct as gross and invited the claimant to explain within 72 hours. The letter allowed the claimant to seek extension time for replying to 96 hours. The letter further stated that the claimant was entitled to appear before the disciplinary committee to provide further evidence.

The claimant replied by his letter of 26.07.2012 exhibit **BMC XV** on the memorandum of claim. In the replying letter, the claimant requested to appear before the disciplinary committee with another employee or union representative for further evidence. By the dismissal letter, exhibit **BMC XI** dated 23.08.2012, the claimant was dismissed from the respondent's employment on account of failing to apply the hand brakes on the wagons which allegedly occasioned the accident namely, the capsizing of the rake.

On 12.02.2014, the respective Advocates agreed to 7 days each to file submissions. The court ordered the claimant to file and serve the submissions by 19.02.2014 and the respondent by 26.02.2013. Both parties failed to comply with the orders and therefore no submissions were taken into account in making the judgment.

There are two issues for determination in this case:

1. **Whether the dismissal was unfair.**
2. **Whether the claimant is entitled to the remedies as prayed for.**

For the 1<sup>st</sup> issue, the court has carefully considered the evidence on record. The court finds that the primary causes of the accident were the defective locomotive that shut down due to governor tripping; and the alleged failure to engage the driver's emergency hand brakes otherwise known as ODBV. The court finds that the evidence revealed that in the alleged absence of the engagement of the ODBV, the necessary pressure escaped and the claimant could not, in the circumstances, engage the wagons' hand brakes. The primary causes of the accident were therefore beyond the claimant's scope of duties and were not attributable to the claimant's failures.

The court has also considered that at the time of the accident, the claimant was most likely fatigued because he had been on bothersome duty for over 20 continuous hours. The court has also considered that the investigation report recommended the training and close monitoring of the crew staff including the claimant. Thus, the court finds that the reason for the termination was not valid and in view of that finding, the court further finds that the termination was unfair.

The court has also considered that the claimant was not accorded the hearing as promised in the show cause letter and as envisaged in section 41 of the Employment Act, 2007.

Accordingly, the court finds that the termination was unfair both in substance and procedure.

The claimant had served the respondent for over 6 years and in capacity that he had been training and improving himself for over 18 years. The claimant had several years left to attain the mandatory retirement age. The court considers that the respondent's decision to unfairly dismiss the claimant was grossly not proportionate in view of the inquiry findings, recommendations and all circumstances of the case. The court finds that ends of justice will be met by the respondent paying the claimant **Kshs.453,576.00** being 12 months gross salaries at the last monthly pay of Kshs.37,798.00 and awarded under section 49 (1) (c) of the Employment Act, 2007 for the unfair dismissal.

The second issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

1. The claimant did not establish the basis for praying for 3 months pay in lieu of the termination notice. The court finds that the claimant is entitled to one month pay under section 35(1)(c) of the Employment Act, 2007 and is awarded **Kshs.37,798.00** for that prayer.

2. The claimant has prayed for 20 years pay for lost future earnings having been dismissed at the age of 40 years and being entitled to retire at the age of 60 years. The court has considered the provisions of section 49(4) (f) which provides that in determining any of the remedy to award as provided for under section 49 of the Act, the court will, among other factors, take into account the reasonable expectation of the employee as to the length of time for which his employment with the employer might have continued but for the termination. The court's considered opinion is that the section does not entitle the claimant to pay for the 20 years as claimed but the court is to consider the 20 years in exercising its discretion in awarding payment under section 49(1) (c) of the Act. In this case, the court has already considered the 20 years and awarded the claimant maximum 12 months gross salaries for unfair termination. For the reasons stated, the court finds that the prayer will fail.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.491,394.00** by 1.4.2014, failing interest at court rates to be payable from the date of this judgment till full payment.
3. The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 7<sup>th</sup> March, 2014.**

**BYRAM ONGAYA**

**JUDGE**