



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**

**CAUSE NO. 376 OF 2013**

**HAMISI ABDALLAH MWANYANGASI.....CLAIMANT**

**v**

**AUTO CONTINENTAL LTD.....RESPONDENT**

**JUDGMENT**

1. Hamisi Mwanyangasi (Claimant) lodged a Memorandum of Claim against Auto Continental Ltd on 8 November 2013 stating the issue in dispute as *non-payment of salary in lieu of notice, leave, unlawful termination and compensation* under various sections of the Industrial Court Act, Employment Act, Labour Institutions Act and the Industrial Court (Procedure) Rules, 2010. The Memorandum of Claim was filed by the Claimant acting in person and was inelegantly drafted( an advocate later came on record but no Amendments were sought/done).

**Claimant's case**

2. The Claimant case was that he was employed by the Respondent (engaged in transport business) as a turner in March 2009 at a salary of Kshs 15,000/- but was not issued with a written contract. The Respondent used to issue him with a pay slip (January 2013 pay slip was attached to Memo of Claim and was admitted). The pay slip indicated that the monthly wage was Kshs 21,959/- or thereabouts. He used to sign a time sheet.

3. The Claimant also asserted that he used to work Monday through Sunday and during public holidays, and did not go on leave for two years.

4. At some point, the Claimant was assigned duties as a pump attendant.

5. According to the Claimant, sometime in July 2013, his services were terminated after being sent on compulsory leave. He was issued with a termination letter but the same was taken back by Respondent's office people while he was still reading it but it had something to do with a fuel shortage. In his testimony, it was not his responsibility to keep fuel records as that was done by the Respondent's Arif Pasta.

6. The Claimant further testified that the termination was unfair because he was not given an opportunity to defend himself. He stated he received a previous warning letter on 25 February 2012, but not the ones dated 23 October 2012 and 27 June 2013 or a show cause letter dated 5 July 2013.

7. In cross examination, the Claimant confirmed attendance would be recorded in a time sheet. In regard

to the keeping of fuel records, the Claimant stated that he would take the readings from the pump (opening and closing stocks) and take to the people in the office to record.

8. The Claimant sought the reliefs outlined in the Memorandum of Claim.

### **Respondent's case**

9. The Respondent opted to rely on its Statement of Response and supporting documents filed in Court and did not call oral evidence. In an equally inelegantly drafted Response, the Respondent denied most of the pleas by the Claimant and put him to strict proof.

10. The termination, according to the Respondent was lawful and the Claimant was paid all his dues which he acknowledged. The Claimant, it was pleaded was not being underpaid, took all his leave, did not work overtime, was a member of the National Social Security Fund and was issued with a notice of intention to terminate his services.

11. The Respondent exhibited employment records of the Claimant and used the same to cross examine him.

### **Questions for discussion**

12. As with any other complaint of unfair termination/wrongful dismissal, the issues arising for determination follow the legal obligation(s) placed upon employees and employers by sections 10(3) and (7), 35, 41, 45 and 47(5) of the Employment Act.

13. Broadly the issues are whether the termination was unfair and if the answer is yes, appropriate remedies.

### **Whether the termination was unfair**

#### ***Procedural fairness***

14. Sections 41 and 45(2)(c) of the Employment Act has placed an obligation upon an employer to follow a fair procedure before terminating the services of an employee. The procedure require notification of charges/reasons and hearing of any representations to be made by the employee.

15. The Respondent exhibited a letter dated 27 June 2013 addressed to the Claimant informing him that a shortage of 1408 litres of diesel had been detected and that he had failed to produce the records for reconciliation and giving him a final warning to produce the same within 72 hours.

16. The letter was followed up with another letter dated 5 July 2013 requiring the Claimant to attend a meeting on 9 July 2013 to give an explanation either in writing or verbally on the failure to produce the records before a decision to dismiss was taken.

17. The Claimant in examination in chief and on cross examination denied receiving the letters of 27 June 2013 and of 5 July 2013 respectively. With this denial, an evidentiary burden fell upon the Respondent to demonstrate that these two show cause letters were indeed brought to the attention of the Claimant. The Respondent opted not to call any oral testimony.

18. Under these circumstances, the Court is constrained to reach the conclusion that the Respondent did not comply with procedural fairness or follow a fair procedure before taking the decision to dismiss the Claimant.

19. With the above conclusion and cognizant of section 45(2)(c) of the Employment Act the Court need not consider whether the Respondent has proved the reason(s) for termination and that the reason(s) were valid and fair reasons.

## **Appropriate relief**

### ***Salary in lieu of Notice***

20. The Claimant was being paid by the month. Pursuant to sections 10(7), 35(1)(c), 36 and 49(1)(a) of the Employment Act, the Court finds in favour of the Claimant. The pay slip exhibited show that at the time of dismissal the Claimant's monthly salary was Kshs 21,959/-.

### ***House allowance***

21. The Claimant sought Kshs 137,739/- as house allowance. The two pay slips exhibited by the Claimant leave no doubt that his salary of Kshs 21,959/- included a 15% house allowance component. This head of claim is dismissed.

### ***Leave***

22. Under this head, the Claimant sought Kshs 32,266/- on account of outstanding leave for 2 years. The documents exhibited by the Respondent show that the Claimant applied for and was granted 7 days leave for 2009 leaving a balance of 43 days; applied for cash in lieu of leave due upto 16 January 2012; applied for 23 days leave on 31 October 2012 and had a balance of 20 days.

23. The Respondent did not produce any records to show whether the Claimant took the 20 days leave balance or got paid off. The Claimant would therefore be entitled to cash equivalent to 20 days which the Court assesses at Kshs 16,891/- using the correct formula.

### ***Unpaid salary for July 2013***

24. The Claimant under this head sought Kshs 22,000/- as unpaid salary for July 2013. The Respondent did not suggest that it paid the Claimant the wages for July 2013 or how much the Claimant should have earned despite the dismissal coming on 17 July 2013.

25. The Court would find in favour of the Claimant under this head and finds him entitled to Kshs 21,959/-.

## **Compensation**

26. One of the primary remedies where a finding is made of unfair termination is an award of compensation not exceeding twelve months gross wages. The remedy though is discretionary.

27. The Court despite finding in favour of the Claimant declines to exercise its discretion to award compensation.

## **Costs**

28. The Claimant was directed to file and serve submissions on or before 4 April 2014. By the time of writing this judgment no submissions had been filed. The Court therefore declines to make a costs order in favour of the Claimant.

29. Before concluding the Court must observe that the pleadings herein were inelegantly drafted. Both parties were represented by learned counsel during the hearing. The approach taken by both of them was dilatory.

## **Conclusion and Orders**

30. In conclusion, the Court finds and holds that the termination of the Claimant was not carried in accordance with the requirements of procedural fairness and was unfair.

31. The Claimant is awarded and the Respondent is ordered to pay him

a. One month salary in lieu of notice	Kshs 21,959/-
b. 20 days leave	Kshs 16,891/-
c. Unpaid salary for July 2013	Kshs 21,959/-
<b>TOTAL</b>	<b>Kshs 60,809/-</b>

32. The Claims for house allowance and underpayments are dismissed.

33. Each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 30<sup>th</sup> day of May 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Anaya instructed by Matete Mwelese & Co. Advocates for Claimant

Mr. Chamwada instructed by Mutisya Bosire & Co. Advocates for Respondent