



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

**CAUSE NO. 243 OF 2013**

**BENJAMIN MUTINDA KYALO**

**CLAIMANT**

**v**

**AUTO CONTINENTAL LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Benjamin Mutinda Kyalo (Claimant) was employed by Auto Continental Limited (Respondent) on 2 October 2010 as a Mechanic at a gross salary of Kshs 16,748.49 per month.
2. On 8 April 2013 the Respondent notified the Claimant in writing of its intention to terminate his services with effect from 8 May 2013. The reasons given in the notice was performance and conduct.
3. The Claimant was dissatisfied with the termination and on 5 August 2013 he lodged a Memorandum of Claim against the Respondent stating the issues in dispute as *non-payment of salary in lieu of notice, leave, unlawful termination and compensation*. Various provisions of law breached were cited.
4. The Respondent was served and on 23 August 2013 it filed a Reply to Claim and an Amended Reply to Claim on 13 November 2013.
5. As a result of the amendments, the Claimant filed a Reply to Amended Reply on 24 February 2014.
6. The Cause was heard on 26 February 2014 and 7 April 2014.

**Claimant's case**

7. The Claimant pleaded that he was working Monday to Sunday and did not go on leave for one year and sought a declaration that the termination was unlawful and Kshs 160,606/47 as terminal/final dues.
8. In testimony, the Claimant stated that he was employed by the Respondent as a mechanic on 2 October 2010 at a monthly salary of Kshs 16,748/49 (copy of pay slip produced) and was working 7 days in a week without payment of overtime. He explained that on Sundays he would work from 9.00 am to 4.00pm.
9. The Claimant also testified that in 2011 he did not go on leave.
10. Regarding the termination, the Claimant stated that on 8 April 2013 he reported to work but was told to wait on a bench and was in the course of the day given a notice of termination letter (produced). The letter made reference to performance and conduct as the reasons for termination.
11. According to the Claimant, his performance and conduct was good and he had not been issued with any warning letters or taken through a disciplinary process. No one had complained of his conduct or performance and that his termination was because he had failed to report to work on

Sunday, 7 April 2013.

12. In cross examination, the Claimant was shown attendance registers from October 2010 to April 2013 and he confirmed that he signed in on 21 November 2011 a Sunday. He also confirmed signing in on 9 January 2011, 12 June 2011 and 10 July 2011.
13. The Claimant also confirmed escorting the Respondent's vehicle to Uganda in April 2011 and being paid subsistence allowance.
14. On the termination, the Claimant stated he could not remember repairing a motor vehicle KBP 466L, getting instructions to repair it at Miritini or causing damage worth Kshs 16,350/- and that when he reported to work on 8 April 2013 he was given the termination notice and was not given an opportunity to defend himself.

### **Respondent's case**

15. In its Amended Reply, the Respondent mainly denied the pleas by the Claimant and put him to strict proof, but otherwise pleaded that the termination was lawful and the Claimant was paid and acknowledged all final dues.
16. Further, it was pleaded that the reasons for termination were set out in the termination letter which was copied to the local labour officer; a joint meeting was held prior to termination; that the Claimant is not entitled to severance pay being a member of the National Social Security Fund and that Claimant took all his leave and did not work on Sundays.
17. The Respondent called its Transport Coordinator, Julius Aruyaru to testify on its behalf.
18. The witness stated that the Claimant was employed as a mechanic and worked from Monday to Saturday and that employees working on Sundays would sign in (attendance registers produced). At times, the Claimant would escort vehicles and would be paid a subsistence allowance.
19. On leave, the witness stated that the Claimant took 21 days leave from 2 October 2012 to 26 October 2012 (time sheet produced).
20. Concerning the termination, the witness testified that the Claimant was given one month notice of termination dated 8 April 2013 and the reasons for termination were performance and misconduct and that prior to the notice the Claimant had been given a show cause letter dated 20 March 2013 (produced) and he himself had talked to the Claimant about his work.
21. The witness also stated that while serving under notice (17 April 2013), the Claimant was instructed to repair a vehicle KBP 466L which had broken down after repairs by the Claimant as a result of which the Claimant was served with a letter dated 18 April 2013 asking him to meet the cost of repairs worth Kshs 16,350/-(produced) but after which the Claimant then disappeared.
22. According to the witness, the Claimant last signed the attendance register on 18 April 2013 and thereafter deserted duty without even handing over.
23. On final dues, the witness stated that the Claimant was paid through his account Kshs 14,591/- at the end of April 2013 while a cheque of Kshs 7,964/18 was paid to Claimant's Advocate (copy produced).
24. In cross examination, the witness stated that the Claimant did not sign the show cause letter dated 25 March 2013 and that a meeting was held with Claimant on 25 March 2013 but minutes were not available and that the Claimant deserted duty, but the Respondent did not write to the Claimant after the desertion. He denied knowing whether Claimant was denied access to the Respondent's premises after 18 April 2013 by security guards.
25. The witness admitted that the Claimant did not go on leave in 2011 and had 27 outstanding leave days but this was factored in the final dues paid to the Claimant. He denied that the Claimant is owed overtime payments.

### **Issues for determination**

26. From the pleadings, evidence and submissions and this being a complaint regarding unfair termination, the issues arising are whether the termination was unfair and if so appropriate remedies.

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

### ***Procedural fairness***

27. Section 41 of the Employment Act has made procedural fairness part of the employment relationship. The procedural fairness is akin to natural justice in administrative/public law.
28. Under the section, an employer should notify an employee of the charges/reasons it is contemplating using to terminate the services of the employee. After being notified of the charges, an employee has a concomitant right to an opportunity to defend/state his/her case. The employee also has a right to have a fellow employee present or to be represented by a shop floor union representative, if a member of the union, during the disciplinary hearing.
29. The Respondent contended that a show cause letter dated 20 March 2013 was given to the Claimant. A copy of such letter was produced. The Claimant denied receiving the letter. The letter produced does not have the details or names of the addressee.
30. In submissions, the Claimant asserted that the notice of termination letter, though dated 8 April 2013 was given to the Claimant only on 19 April 2013 and therefore invalid and hence the termination was unfair. This submission is not founded either on the pleadings and evidence given in Court. The Claimant admitted in evidence he was served with the letter on 8 April 2013.
31. However, in the view of the Court, an uncommunicated decision to terminate an employee cannot effect a termination. In the case under discussion a notice was given/communicated on 8 April 2013.
32. The Respondent has not however, shown that it gave or notified the Claimant prior to giving him the termination letter, of the reasons it was contemplating to use to terminate his services or that it gave him an opportunity to defend himself. The show cause letter as already stated does not even have the name of the addressee.
33. The Respondent was not in compliance with the procedural fairness safeguards required by section 41 of the Employment Act.

### ***Substantive fairness***

34. The obligation to prove the reasons for termination, and that the reasons are valid and fair reasons are squarely placed upon employers. That is the import of sections 43, 45(2) and 47(5) of the Employment Act. This is a big contrast to the normal evidentiary principle that he who asserts must prove.
35. The notice of termination letter given to the Claimant cited two grounds for termination. These were performance and conduct.
36. Performance relates to whether an employee is doing his job properly and the ingredients of performance may be, sufficient output, acceptable quality, adherence to company operational procedures, effort of employee or ability to perform the job to required standard. In short, performance is all about ability.
37. The notice letter did not make any reference to any specifics about the performance of the Claimant that was wanting. The only plea put by the Respondent in the Amended Reply to Claim was that the Claimant did not attend any recognised mechanical institution or attain any formal grade.
38. In testimony, it was stated that the Claimant was not doing his work properly and that vehicles would break down after he had repaired them.
39. No details were given in testimony except the reference to repairs to motor vehicle KBP 466L on 17 April 2013. But this cannot do because this occurred after the Claimant had been issued with a notice of termination.
40. To my mind this line of response (poor performance) cannot assist the Respondent. When it employed the Claimant it must have interviewed him and satisfied itself that he was able to perform the tasks for which he was being employed.
41. Further, if the Claimant's performance was not up to standard, it was incumbent upon the Respondent to bring this to his notice and give him an opportunity to upgrade himself.
42. Conduct, on the other hand, concerns behaviour. The Amended Reply did not allude to the behaviour of the Claimant which the Respondent considered abhorrent which merited termination. Even in evidence no details were brought up.
43. In the course of testimony, the Respondent's witness brought up the reason that the Claimant

- deserted duty or did not report back after 18 April 2013. This was in the course of the Claimant serving notice of termination.
- 44.Desertion is a distinct ground upon which an employer would be entitled to terminate the services of an employee. But before terminating the services of an employee on the ground of desertion, an employer is still under an obligation to follow a fair procedure.
- 45.The alleged desertion occurred while the Claimant was serving notice. According to the Claimant, the security guards had refused him access to the Respondent's premises. This evidence was not rebutted. In these circumstances it is not open to the Respondent to substitute or to rely on a reason which was not the reason given in the termination notice.
- 46.The Respondent ought to have given the Claimant a fresh notice that it was bringing the relationship to an end because of desertion.
- 47.The employment relationship subsists until the end of the notice period and termination on the basis of desertion was also subject to procedural fairness. I say so aware that the giving of a notice by an employer does not deprive the employer of the right to dismiss the employee before the notice expires upon other reasons after following fair procedure.
- 48.In my view, the Respondent has failed to prove the reasons for termination and that the reasons were valid and fair reasons. The termination was substantively unfair.

### **Remedies**

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

- 49.The Claimant was given notice and was serving under notice and therefore this head of relief is not appropriate.

#### ***Severance pay***

- 50.Claimant was not declared redundant and this relief is not applicable.

#### ***Leave***

- 51.The Respondent's witness admitted the Claimant did not go on leave in 2011. Records for 2012 produced indicated that the leave for 2012 was taken.
- 52.Based on section 28 of the Employment Act, the Claimant is entitled to 21 days paid annual leave. This relief has been proved.

#### ***Unpaid Sundays***

- 53.The Claimant testified that he used to work on 7 days a week. He therefore sought payment for the equivalent of 120 days. The attendance registers from October 2010 to April 2013 produced by the Respondent show that save for very few Sundays, the Claimant was not working Sundays.
- 54.On the basis of documentation placed before Court, the Court is unable to find in favour of the Claimant.

#### ***Underpayments***

- 55.No material was placed before Court in regard to this head of claim nor was there a suggestion that the Claimant was being paid below the gazetted minimum wages. This relief is dismissed.

#### ***Compensation***

- 56.At paragraph 12 of the Memorandum of Claim the Claimant sought compensation pursuant to the Labour Institutions Act. The Court notes that the Claim was filed by the Claimant acting in person and therefore the Claim was inelegantly drafted. But later an advocate came on record, but no amendments were made.
- 57.Compensation equivalent to not more than 12 months' gross wages is one of the primary remedies

- where unfair termination has been shown. However, the remedy is discretionary and is subject to some 13 factors stated in section 49(4) of the Employment Act.
58. A party desirous of having the Court exercise this discretion in his favour ought to present material before Court, of which of the factors the Court should consider. The Claimant served the Respondent for a relatively short time (about 3 years), and as a mechanic his chances of securing alternative employment or self employment are above average.
59. Considering the factors mentioned above, the Court is of the view that compensation equivalent to 4 months wages would be just.

### **Costs**

60. The Claimant was directed to file submission on or before 22 April 2014. The same were not filed within the timelines but were instead filed on 24 April 2014. For this reason, the Claimant is denied costs.

### **Conclusion and Orders**

61. The Court finds and holds that the termination of the Claimant was unfair and awards him and orders the Respondent to pay him

- |                                   |               |
|-----------------------------------|---------------|
| a. Outstanding leave for 2011     | Kshs 16,748/- |
| b. 4 months wages in compensation | Kshs 66,993/- |

TOTAL **Kshs 83,741/-**

62. The Claims for salary in lieu of notice, severance pay, unpaid Sundays and underpayments are dismissed.

**Delivered, dated and signed in open Court in Mombasa on this 13<sup>th</sup> day of June 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ngaira instructed by Muranje & Co. Advocates

For Respondent Mr. Bosire instructed by Mutisya Bosire & Co. Advocates