



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

**AT MOMBASA**

**CAUSE NO. 200 OF 2013**

**PAUL N. LUSWETI.....CLAIMANT**

**VERSUS**

**MIAMI ENTERPRISES CO. LTD.....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

The claim before the court is for employment terminal benefits plus compensation for unlawful termination of employment in 6/2/2013. In total the claimant seeks to recover ksh.595,518 according to the Amended Memorandum of Claim filed on 16/9/2013. The respondent has denied liability for the alleged unlawful termination and contended that the summary dismissal was lawful because of misconduct on the part of the claimant. According to the defence the claimant's misconduct occasioned a loss of ksh.110,671.88 and as such claimant is not entitled to any terminal benefits after summary dismissal. The respondent has counter-claimed for the loss of ksh.110,671.88 less ksh.45,278.95 recovered from the claimant's salary.

When the suit came up for hearing on 20/5/2014, the parties recorded settlement for prayer (c) (I) and (g) of the Amended Memorandum of Claim. The settlement was in respect of underpayment, 18 days leave and certificate of service. Thereafter the claimant was heard as CW1 while the respondent called Carolyne Okwiri as RW1 on 22/5/2014.

**CLAIMANT'S CASE**

CW1 produced a contract letter signed on 27/12/2011 but stated that he was employed by the respondent on 27/2/2008 as a driver and salesman. He worked until February 2013. He was earning kshs.10,000/salary per month and was entitled to 21 days leave per year. CW1 contended that for the whole period of 5 years service, he took only 15 days leave. He was also never paid any transport allowance to work for the whole period of service.

On 12/2/2013 he worked the whole day well but in the evening after returning to the depot he was told that the Likoni depot was being closed down and asked to go home and wait because new distributor was being given the depot. CW1 waited for 2 months and returned to Ukunda depot to enquire about his fate. The depot manager told CW1 that they had enough drivers and he should seek employment from the new distributor at Likoni. He was not paid any terminal benefits and salary for February 2013. That prompted him to report the matter to the labour office for assistance. The labour officer summoned respondent and he allegedly agreed to pay terminal dues but that was never to be hence this suit.

CW1 denied the alleged wrong doing as pleaded in the defence and the counter-claim. According to him he was the best salesman and contended that his termination was unfair because he was never given any termination notice or any termination letter stating the reason for the same and he was never paid his dues on termination. He prayed for compensation for unfair termination.

On cross-examination he confirmed that he was entitled to 2 days leave per month. He also confirmed that he was never served with any warning letter about any lost crates or at all. He denied that he was given chance to resume duty during the mediation before the labour office and declined. He further denied receiving salary for February 2013. He also denied ever misusing car fuel of going outside the route allocated by his manager. He further denied ever absconding work.

## **DEFENCE CASE**

RW1 was the depot manager for the respondent and also the supervisor over salesmen. She also collected money from the salesmen and paid them salaries. She confirmed that claimant started as loader and later became a salesman in 2010 earning between ksh.9000 and 12000 per month.

According to RW1, CW1 started well but soon thereafter he became greedy and started to swindle customers money by falsely promising them fridges. He also took empty crates from customers and failed to supply them with soda as promised. He also started to stray from his allocated route into other sales men's and small distributor's routes leading to their complaints. When the complaints swelled up, RW1 called CW1 in the evening after returning to the depot in February 2013 and send him home for suspension pending investigations into the complaints.

RW1 instructed the stock controller to take over CW1's route and when he passed through Denyenye area he met people asking to siphon fuel and reported the matter to the director who in turn notified RW1. The report meant that CW1 was selling the car fuel. RW1 used to allocate 40 litres for 2-3 days. When CW1 was called back to work he reported to the Labour officer who summoned the Director to the labour office because CW1 was demanding ksh.106,692.

RW1 denied ever dismissing the claimant and maintained that she paid him the full salary for February 2013 for which he signed his payslip for ksh.12,246. According to RW1 the respondent lost ksh.110,671.88 through fuel siphoning between April 2012 and February 2013. The said figure included shorts from sales of which the respondent was recovering through salary deductions. RW1 confirmed that by the time CW1 left work the company had recovered ksh.45000 from salary deductions.

The RW1 also confirmed that the respondent's business was closed down on 27/1/2013. on cross examination, RW1 confirmed that they had one soda distributor at Likoni and another at Ukunda over which she was in charge. She confirmed that from October 2012 to February 2013 the claimant was collecting soda from Ukunda depot because the Likoni depot had been closed. She maintained that she only suspended the claimant and never dismissed him. She further maintained that the Director wrote warning letters to the claimant after they received complaints from customers that they were swindled money. RW1 did not however produce any copies of the warning letters or any tabulation of money from the complaining customers.

She confirmed that the suspension she gave to CW1 did not state the length of the suspension paid. She also confirmed that while on suspension CW1 used to come to the depot gate but only as a tourist according to the report she received from the other workers. She admitted that the respondent never called CW1 back to work after the suspension and never gave him a report of the outcome of the investigations on his conduct after they started to receive letters from the labour office.

She referred to the payslip for October 2012 which showed deductions of ksh.5000 for loan/shortage but she stated that she is not the one who did the calculation of the shortage. As at the time of dismissal she confirmed that they had deducted ksh.45000 from CW1's salary. She alleged that she saw the dismissal letter signed by the Director which was given to the claimant in April 2013. she could not say whether the dismissal was unlawful and unfair. She did not produce the alleged dismissal letter as exhibit.

After closing the hearing both parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

The issues for determination arising from the pleadings, evidence and submissions are:

- 1. Whether the termination of the claimant was unlawful.**
- 2. Whether claimant is entitled to the reliefs sought**
- 3. whether the claimant has merits and should be granted.**

### **Whether the termination was unlawful**

The claimant contends that the termination of his services was unlawful because no notice was served upon and no letter of termination was served accusing him of any wrong doing. Instead he was told that the respondent was closing down business.

On the other hand, respondent denies that the termination was unlawful and contends that the claimant was guilty of misconduct for which he was severally warned in writing before he was eventually dismissed summarily.

Section 45 of the Employment Act bars employers from unfairly dismissing employees. The termination is rendered unfair under Section 45(2) , *supra* if the employer fails to prove that the termination was grounded on valid and fair reason and that it was done through a fair procedure. In the present suit, the respondent did not call evidence to prove that the claimant committed any misconduct as alleged. No customer was called to prove that he or she was swindled money on the promise of a fridge. No evidence was also produced to prove that fuel was siphoned from the vehicle allocated to the claimant by the company.

No evidence was also produced by the company accountant who allegedly calculated and discovered that there was a short in the claimants sales returns. Lastly, no evidence was produced by the other salesmen and small distributors who allegedly complained that the claimant had strayed from his assigned sales route into their route. The alleged misconduct, though a fair reason for dismissal in terms of the respondent's operations, the same was not valid because the respondent did not prove it as required under Section 43 and 45 of the Act.

As regards the procedural fairness, the respondent waited the claimant to handover the days sales on the fateful day and then told the claimant that he should not return to work until further notice because a new distributor was being appointed to take over the Likoni depot. He was not paid his salary for the month of February or any terminal dues. He returned to the office after 2 months only to be told that the respondent had enough drivers and as such he should seek employment from the new distributor at Likoni. Again nothing was paid to him and no certificate of service was given to him.

On the other hand RW1 contends that on the fateful day she suspended the claimant for unspecified period to pave way to investigation on the alleged misconduct reported by customers and the claimants fellow salesmen. Thereafter they called the claimant to discuss the matter but he ran to report the respondent to the labour office where the claimant was allegedly told to return to work by the director after the company was summoned to the labour officer. That when CW1 declined to return to work the respondent's Director wrote a dismissal letter to the CW1 in April 2013.

The director never testified and the alleged dismissal letter was not produced as exhibit. Likewise RW1 did not attend the labour office proceedings when her Director was summoned after a complaint was lodged by CW1. Consequently the foregoing evidence on the alleged reinstatement and the subsequent dismissal letter are either unfounded lies or unproven hearsay which must be dismissed.

The procedure for dismissal of employees for misconduct under Section 44 of the Employment Act is provided for under Section 41 of the Act. The employer is required to explain the misconduct to the employee in a language he understands, the reason for the intended dismissal and then invite the employee to defend himself. In the said hearing, the employee is entitled to bring a workmate of his choice who must also be allowed to make his representations. The employer is therefore only allowed to dismiss after considering the defence by the employee and his companion if any. That was never done in this case. The claimant was only tricked to hand over the sales proceeds and the vehicle at the end of days work and then his job was terminated on the ground that the company business was going to be given to another distributor. In the court's view, the said procedure for terminating claimants employment was unfair and unlawful. If the intention was to reduce labour, the respondent ought to have followed the procedure under Section 36 or 40 of the Employment Act which provides for normal termination by notice or declaration of redundancy respectively.

Section 45(5) provides that in deciding whether the procedure for dismissal was unfair, the court shall consider the extent to which the employer complied with Section 41 and 51 of the Act being the procedure and issuance of certificate of service respectively. The court is also to consider any previous warning letters issued. In this case no warning letter was produced and Section 41 and 51 of the Act were never complied with. Consequently for the foregoing observations and reasons the court finds that the termination of the claimant's employment by the respondent was unfair within the meaning of Section 45 of the Employment Act.

### **Reliefs to the claimant**

As earlier stated the parties recorded settlement in terms of prayer (c) ,(g), and( i). The court will therefore treat the said consent to have settled fully the prayer for underpayment of salary, accrued leave days and certificate of service. The court then further awards one month salary in lieu of notice being ksh.10,000 as prayed although this is less than ksh.19,644.30 salary as per the consent judgment. The prayer for service pay is dismissed because the claimant being a member of the NSSF, he was disqualified by Section 35(6) of the Employment Act from claiming service pay.

The claim for transport cost is also dismissed for want of particulars, basis and evidence. The salary for 7 days worked in February 2013 is awarded being ksh.3,330 although in the courts view he should have prayed for a higher sum. The prayer for leave for 5 years is deemed to have been compromised by the consent settlement under prayer (h). The prayer for loss of earnings for 12 months is dismissed for lack of basis and evidence. It is trite law that a claim for lost earnings is best suited for tortious liability where an employee's ability to continue working is compromised or diminished as a result of injuries or disease suffered while at work which is not the case herein.

In total the claimant is awarded ksh.120,018 inclusive of the consent recorded on 20/5/2014.

### **Counter-claim**

In view of the finding, above, that the respondent did not call witnesses or any competent documentary evidence to prove the alleged loss of fuel or sales shorts, the counterclaim has not been proved on a balance of probability. The accountant who allegedly calculated the said sales shorts did not testify and as such, the respondent allegation that CW1 caused loss of ksh.110,671.88 shall remain mere allegations if not hearsay. The counterclaim is therefore dismissed.

### **DISPOSITION**

For the reasons aforesaid, judgment is entered for the claimant for ksh.120,018 plus costs and interest.

**Dated, Signed and delivered this 25<sup>th</sup> July 2014**

**O. N. Makau**

**Judge**