



IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1279 OF 2011

BETWEEN

MOSES THEURI KAINGA
CLAIMANT

VERSUS

PRIME FUELS [KENYA] LIMITED.....
RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Ndegwa instructed by Gichuki King'ara & Company Advocates for the Claimant

A.T. Oluoch & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 28th July 2011. He alleges he was employed by the Respondent Company as a Fleet Operations Assistant on 18th March 2006. He later became the Health, Safety, Security and Environment Manager, earning a gross monthly salary of Kshs. 93,999. He was summarily dismissed on 11th November 2010. The Respondent alleged that the Claimant had failed in the performance of his duties, in the following way:-

- a. Drivers diverted from their authorized routes. The Claimant was responsible for their conduct.
- b. Due to the Claimant's behaviour, the Respondent suffered tremendous loss.
- c. The Claimant failed to monitor trucks' movements and report violations for necessary actions.

The Claimant's position is that these accusations were misplaced. It was not his duty to supervise Drivers, monitor trucks or report violations. These were outside his job description. He was not given notice of termination or heard. He claims:-

- i. 3 months' salary in lieu of notice at Kshs. 281,997.
- ii. Severance pay at Kshs. 187,998.
- iii. Service pay at Kshs. 4,511,952.
- iv. Outstanding leave pay at Kshs. 375,996..
- v. Maximum compensation for wrongful termination.
- vi. Costs, Interest and any other order the Court may deem fit to grant.

2. The Respondent filed a Statement of Response on 12th August 2011. It is the position of the Respondent that the Claimant was its Employee as stated in the Claim. It is correct he was summarily dismissed by the Respondent on 11th November 2010. It was his duty to constantly monitor trucks. He neglected to do so. It was his duty to *'ensure that the security and safety of our assets and customer products is not compromised: besides constantly monitoring trucks movement and reporting violations for necessary action.'* He failed in this duty, occasioning the Respondent loss. The Respondent asks the Court to dismiss the Claim with costs to the Respondent. The Claimant gave evidence on 11th June 2013, while his sole Witness Sylvester Oduor Oyile gave evidence on 28th February 2014 when the Claimant closed his case. The Respondent did not attend Court at the hearing.

3. Mr. Kainga testified he was trained in occupational health and safety by the Kenya Shell Company. His duty at the Respondent Company was to oversee the occupational health and safety of the Employees. He was not issued any warning letter by the Respondent. There were no issues relating to his performance of duty. He was granted paternal leave of 14 days from 8th November 2010. He was recalled by the Respondent before he could exhaust his paternity leave, and issued a letter dated 11th November 2010, summarily dismissing him. He stated that the matters, over which the Respondent summarily dismissed him, were in the docket of the Road Transport Manager. He supported this position with a bundle of disciplinary letters on the subject of transit losses issued by the Respondent to various Drivers; in all cases, the Road Transport Manager, not the Claimant, was the responsible officer.

4. The Claimant was not issued any letter to show cause why disciplinary action should not issue. He was not called before any disciplinary panel, and was not heard. He was not paid terminal benefits. Other Employees, who left earlier, were paid their terminal benefits. He had taken a loan of Kshs. 200,000 from a bank, which he was repaying through salary check-off. He was summarily dismissed before he could clear the obligation. He last earned a gross monthly salary of Kshs. 93,999.

5. His Witness Mr. Oyile testified that he worked with the Claimant at Prime Fuels Company. He was the Road Transport Manager, while the Claimant was in a different area, the Occupational Health and Safety Department. Oyile oversaw transport operations. He managed the Drivers. He did the journey management and route mapping. These were not the duties performed by the Claimant. Oyile communicated to the Drivers about disciplinary issues. The letters were not copied to the Claimant because this was not his area. The Claimant's role was to advise Employees on health and safety at work. It was not the role of the Claimant to prevent diversion by the Drivers from their designated routes. The Witness testified he received a letter from the General Manager Operations, Mr. Sajid Jaffer dated 22nd November 2010, alleging that the Witness had failed in his role of Driver Management. He was asked to show cause why disciplinary action should not be taken against him for this. This was the same allegation made against the Claimant for which the Claimant had earlier on, on the 11th November 2010, been dismissed. Oyile told the Court he was present when the Claimant was dismissed. The Claimant was called from paternal leave, and summarily dismissed without the benefit of a hearing. Oyile was himself dismissed later on 15th September 2011, after he had refused to be transferred by the Respondent to the Democratic Republic of Congo.

Upon consideration of the Parties' pleadings, evidence and submissions on record the *Court Finds and Awards:-*

6. There is adequate evidence to conclude that the Claimant was employed by the Respondent as its Health, Safety, Security and Environment Manager. He worked from 18th April 2006. He was summarily

dismissed by the Respondent on 11th November 2010. His last salary was Kshs. 93,999.

7. His duties were clearly restricted to the health, safety, security matters within the Respondent's premises. The Respondent erred in finding the Claimant to have been in any way responsible for diversion by Drivers from their authorized routes, and responsible for any transit losses. These were issues that did not have anything to do with the Claimant. They were issues that fitted on all fours, in the docket of the Road Transport Manager.

8. The Road Transport Manager at the time was Mr. Oyile. He gave evidence that he was responsible for the Road Transport Department. He engaged the Drivers on disciplinary issues. He oversaw journey management and route mapping. He was called upon to answer by the Respondent, the allegation that Drivers were diverting from their scheduled routes, and occasioning transit losses to the Respondent. Having directed the query at the correct Officer, it was inappropriate for the Respondent to turn around and seek answers from the Claimant, and go on to summarily dismiss the Claimant, based on the same query.

9. There is overwhelming evidence on record, to convince the Court that the Respondent did not have fair and valid reason to justify its decision to summarily dismiss the Claimant as required under Section 43 and 45 of the Employment Act 2007. Termination was unfair for want of substantive justification.

10. The procedure adopted by the Respondent totally lacked in fairness. The Claimant was enjoying his paternity leave when he was abruptly recalled by the Respondent on 11th November 2010, and slammed with the letter of summary dismissal. He had not been warned, or called upon to explain any accusations, before he left work for paternity leave. He was not given any hearing when recalled; just a letter of summary dismissal, which raised issues which were irrelevant to his docket. There was no hearing in the manner contemplated under Section 41 and 45 of the Employment Act 2007. Termination was unfair on account of fairness of procedure.

11. The Claimant seeks maximum compensation for unfair termination. ***The Court grants to him maximum compensation at 12 months' gross salary for unfair termination, totaled at Kshs. 1,127,988.*** He prays for 3 months' salary as notice pay. The Court has found no material to support his claim on this. His contract provided for 1 month salary in lieu of notice. This clause was not varied by the Claimant's promotion from the role of Fleet Operations Assistant to that of Health, Safety and Environmental Manager. ***He is granted 1 month salary as notice pay at Kshs. 93,999.*** He prays for severance pay of Kshs. 187,998. There was no evidence or other material shown to the Court, to suggest the Claimant left employment on redundancy, so as to earn severance pay under Section 40 of the Employment Act. The claim is refused. He similarly prays for service pay at a staggering sum of Kshs. 4,511,952. He did not explain to the Court the factual or legal basis for this prayer. He was enlisted with the National Social Security Fund. He was ineligible for service pay under Section 35 [6] of the Employment Act 2007. The claim cannot be justified under the law or contract to which the employment relationship was subject to. It is declined. The contract granted the Claimant 21 days of annual leave. He states he did not take annual leave at any time. The Respondent did not avail to the Court any records on leave, and in the absence of any evidence from the Respondent, the Court allows the claim for annual leave. This amounts to 105 days or Kshs. 379,611 worth of annual leave days. ***The Claimant is granted Kshs. 379,611 as annual leave pay.*** In total, IT IS ORDERED:-

- a. **Termination of the Claimant's contract of employment was unfair.**
- b. **The Respondent shall pay to the Claimant, within 30 days of the delivery of this Award, 12 months' salary in compensation at Kshs. 1,127,988; 1 month salary in notice pay at Kshs. 93,999; Kshs. 379,611 as annual leave pay- total Kshs. 1,601,598; and**
- c. **No order on the costs and interest.**

Dated and delivered at Nairobi this 18th day of July 2014

James Rika

Judge