



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

**AT NAIROBI**

**CAUSE NO. 1085 OF 2012**

**NICHOLAS KILONZO LUMUMBA.....CLAIMANT**

**VS**

**KAPA OIL REFINERIES LTD.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's Claim brought by way of Memorandum of Claimant dated 22nd June 2012 and filed in Court on even date seeks compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Defence on 28th August 2013 and the matter proceeded on 19th May 2014. The Claimant testified on his own behalf and the Respondent called its Transport Manager, Rizwan Hassan and Anthony Nzioka, a Time Officer within the Human Resource Department.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a Driver effective 27th November 1995. On 23rd December 2011, he received a show cause letter and a summary dismissal letter both dated the same day. In the said letters the Claimant was accused of loss of 116 litres of diesel from the Respondent's motor vehicle registration number KAS 003K.

3. The Claimant denies any involvement in the alleged loss and states that at the time the loss was reported to have occurred, he was on duty with another motor vehicle. He claims that prior to his dismissal, he was not given an opportunity to be heard.

4. The Claimant's claim is as follows:

- a. A declaration that his dismissal was illegal and unlawful
- b. One month's salary in lieu of notice.....Kshs. 45,375
- c. 12 months' salary in compensation for unfair termination.....544,500

**The Respondent's Case**

5. In its Memorandum of Defence the Respondent admits having employed the Claimant on 28th September 1995 in the position of Driver. On 20th and 21st December 2011, the tracking device of motor vehicle number KAS 003K which was assigned to the Claimant indicated that diesel had gone missing from the motor vehicle in unexplained circumstances. Specifically, on 20th December 2011 the volume of

fuel fell from 86 to 25 litres yet the odometer reading remained at 210813. Similarly on 21st December 2011, the fuel fell from 73 to 18 litres while the odometer reading remained at 211012.

6. On 23rd December 2011, the Claimant was issued with a notice to show cause why he should not be summarily dismissed for gross misconduct. He was required to respond to the show cause letter by 10.00 am on 27th December 2011. After receiving the notice to show cause, the Claimant failed to return to work leading the Respondent to summarily dismiss him. The Respondent states that the date of 23rd December 2011 on the letter of summary dismissal 2011 is an error as the Claimant was actually dismissed on 27th December 2011.

7. The Claimant was required to clear and vacate the company house he was occupying by 27th December 2011. The letter of summary dismissal was delivered to the Claimant's house and on 2nd February 2012, the Respondent wrote to the Claimant notifying him that his personal belongings had been removed from the company house to the store room pending collection. The Respondent later learnt that the Claimant had attempted to secure a job with Wells Fargo Limited using a forged certificate of service ostensibly issued by the Respondent.

### **Findings and Determination**

8. The issues for determination by the Court are as follows:

- a. Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b. Whether in effecting the termination, the Respondent followed due process;
- c. Whether the Claimant is entitled to the reliefs sought.

### **Reason for Termination**

9. On 23rd December 2011, the Respondent wrote to the Claimant as follows:

*“ Reference is made to a discussion this morning between yourself and the Personnel Manager on two incidents of unexplained disappearance of diesel on Company vehicle Registration Number KAS 003K.*

*As indicated, on 20th December 2011 and 21st December 2011 while you were allocated the said motor vehicle for routine company work, it was discovered from the vehicle's tracking device report that diesel had gone missing in unexplained circumstances.*

*According to the report retrieved from the tracking device;*

*1. On 20th December 2011, while you were out on duty in the Company vehicle, 61 litres of diesel disappeared from the vehicle. The volume fell from 86 Litres to 25 Litres but the Odometer reading remained 210813.*

*2. On 21st December 2011, 55 Litres of diesel disappeared from the vehicle. The volume fell from 73 Litres to 18 Litres but the Odometer reading remained at 211012.*

*The report shows that on both occasions the vehicle was stationary at the same point for sometime.*

*The Management has concluded that you are guilty of gross misconduct for the loss of the fuel in the company vehicle and hereby intends to summarily dismiss you from its employment unless you give an acceptable explanation on the foregoing.*

*Accordingly, you are hereby required to give an acceptable explanation in writing **TO SHOW***

**CAUSE** why you should not be summarily dismissed from employment for the loss of 116 Litres of diesel failure to which you shall be summarily dismissed.

Please note that your written explanation should be received by Human Resource office by latest **10.00 am on 27th December 2011.**

Also note that you are entitled to bring a representative of your choice along should you wish to. Kindly append your signature and name on a copy of this letter to acknowledge receipt and for our records.

Yours Faithfully

KAPA OIL REFINERIES LTD

(J.M. OGOODE)

MRS MALIKA SOOD ARVIND

HUMAN RESOURCES CONSULTANT

PERSONNEL MANAGER

10. A summary dismissal letter dated the same day reads as follows:

*“Reference is made to the Management's letter dated 23rd December 2011 that required you to give an explanation on the loss of 116 Litres of diesel in Company vehicle registration Number KAS 003K while in your control.*

*You have not given the said explanation and the management has decided that you shall be **SUMMARILY DISMISSED** from employment for gross misconduct (i.e loss of the fuel) with immediate effect. Your last working day shall be 23rd December 2011.*

*You are required to clear with the company and vacate the company house immediately but not later than 27th December 2011 by 4.00 pm.*

*Please note that your terminal dues may only be released to you upon completion of the Company clearance procedures.*

Yours Faithfully

KAPA OIL REFINERIES LTD

(J.M. OGOODE)

MRS MALIKA SOOD ARVIND

HUMAN RESOURCES CONSULTANT

PERSONNEL MANAGER

11. According to these letters the termination of the Claimant's employment had to do with loss of fuel from motor vehicle registration number KAS 003K on 20th and 21st December 2011.

12. Section 43 (1) of the Employment Act, 2007 provides as follows:

- 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

13. In my view, an employer is deemed to have discharged its obligation under Section 43(1) once a reason that would move a reasonable employer to terminate the employment of an employee is established.

14. The Respondent's Transport Manager, Rizwan Hassan testified that investigations into the loss of fuel

from motor vehicle registration number KAS 003K was triggered by a report made by some unnamed person to the Human Resource Department to the effect that the Claimant had siphoned fuel from the motor vehicle. Hassan further told the Court that the tracking device from which a report was extracted had been fitted in the first week of December 2011 and there were no comparative figures on fuel consumption of the motor vehicle.

15. Motor vehicle registration number KAS 003K was a staff bus driven by the Claimant between 5.00-7.30 am in the morning and again between 4.40-7.00 pm in the evening. In between these periods, the Claimant was assigned another motor vehicle which he used to run errands.

16. At the time the fuel was said to have been siphoned, motor vehicle registration number KAS 003K was parked at the Respondent's yard and according to the work schedule provided by the Respondent's witness, the Claimant would have been away on other duties. The Court was therefore unable to understand how the Respondent arrived at the conclusion that it was indeed the Claimant who had siphoned the fuel. The Respondent chose not to avail the source of its information regarding the Claimant's culpability and the Court does not engage in speculation. Consequently, I find that the Respondent did not have a valid reason for dismissing the Claimant and the dismissal was therefore unfair for want of substantive justification.

### **Termination Procedure**

17. Section 41 of the Employment Act, 2007 sets out the following procedure for handling cases of misconduct, poor performance or physical incapacity:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

18. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

19. It was the Claimant's evidence that he was served with a notice to show cause and a summary dismissal letter on the same day. In denying this assertion, the Respondent states that the date of 23rd December 2011 on the dismissal letter is an error and that the summary dismissal letter was in fact issued on 27th December 2011 after the Claimant had failed to respond to the show cause letter dated 23rd December 2011.

20. The Court was not persuaded by the Respondent's averment in this respect. First, the authors of the letter, J.M Ogode and Mrs. Malika Sood Arvind were not called to confirm that they had indeed made a mistake. Second, in the Respondent's subsequent letter to the Claimant dated 2nd February 2012 notifying him that his personal effects had been moved to the company's storeroom, reference is made to letter of termination dated 23rd December 2011.

21. The Respondent submitted that because the Claimant had not signed notice to show cause but not the letter of dismissal, then he could not have received the dismissal letter on 23rd December 2011. An examination of the show cause letter however indicates that the Claimant was specifically required to append his signature as an acknowledgement of receipt. The fact that he did not sign the letter of summary dismissal is therefore of no evidential value. That said, the Court finds that the Claimant was not taken through any disciplinary process and his dismissal was procedurally unfair.

### **Reliefs**

22. Having found the termination of the Claimant's employment by way of summary dismissal unfair for want of substantive justification and procedural fairness, I award him six months' salary in compensation for unfair termination of employment. I also award him one month's salary in lieu of notice.

23. In making this award, I have taken into account the Claimant's length of service and the Respondent's failure to fully investigate the issue at hand and afford the Claimant an opportunity to defend himself. As against the Claimant, the Court took into account his failure to respond to the allegations of forgery of certificate of service dated 12th March 2012 made by the Respondent.

24. Ultimately, I make an award in favour of the Claimant in the following terms:

- a. 6 months' salary in compensation for unfair termination.....Kshs. 115,362
- b. 1 month's salary in lieu of notice.....19,227

**Total.....134,589**

25. I further award the Claimant the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2014**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2014**

**MAUREEN ONYANGO**

**JUDGE**

**Appearance:**

Mr. Namada for the Claimant

Miss Oyombe for the Respondent