



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

**CAUSE NO. 273 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2014)**

**BARRACK MUSUMBA ..... CLAIMANT**

**-VERSUS-**

**NYANZA SUGAR & PRODUCE LTD ..... RESPONDENTS**

**JUDGMENT**

The claimant Barrack Musumba filed his memo of claim on 8.10.2013 through the firm of P. D. Onyango & Co. Advocates. The issue in dispute is the alleged unlawful termination of the claimant's employment, severance pay, underpayment, allowances and damages for breach of contract. The claimant's case is that he was employed by the respondents as a driver in March 1988 to September 2009 earning a salary of Ksh 9,000/= which was later increased to Ksh 14,000/= per month. He contends that on 13th September 2009, the respondents wrongfully, unlawfully and without just cause summarily terminated his services. The claimant contends that he was sacked verbally and contends that he was not being paid house allowance or leave allowance. He stated that he used to drive trucks to different towns in Kenya – Kakamega, Mombasa, Kisii etc and would transport cement 20 tons. He stated that he was being paid less than the minimum wage which he puts at Ksh 18,000/= per month. He denies he lost any vehicle and states he was never charged in court. He swore that a vehicle got lost and it is the turn boy who was arrested and charged in court. He also admits that he was paid Ksh 100,000/= by the respondents as his terminal benefits.

In cross-examination he told court that he gave notice to stop working and left in 2010 due to old age. He said that he was still working when the vehicle got lost. He also told court that he was a NSSF contributor. The turn boy was the one charged when the vehicle was stolen and it was a robbery. The vehicle was a Mitsubishi and it was not heavy commercial. It was carrying 10 tons then. He claims Ksh 322,000/= less Ksh 100,000/= already paid leaving the balance to Ksh 222,000/=.

The respondents on the other hand filed their memo of defence on 17.12.2013 through the Federation of Kenya Employers (FKE). The respondents called one witness the claimant's employer. He told court that the claimant was his employee since September 1989 and used to drive a medium sized vehicle – canter 5 tons. His last salary was Ksh 14,000/=, inclusive of house allowance.

On 8.8.2009, he was assigned to collect sugar from Mumias Sugar Company which the respondents had purchased to deliver to the respondents shop in Kisumu. The claimant went and loaded the sugar but he never came back. It was a weekend on 9.8.2009 and he reappeared on Monday. Before then, the respondents had received a call from Mbale Police Station informing him that the vehicle had been stolen and the driver was a suspect. The driver himself reported the theft. When the claimant appeared, he was sent on 1 month leave to necessitate the investigations. He was then charged at Butere Law Courts with

the offence of stealing the lorry. The respondents then declared him redundant and they paid him Ksh 100,000/= which he has admitted. They declared him redundant because the vehicle he was driving was stolen and he had nothing to drive. It is the respondents case that they were paying the claimant more than the minimum wage as for heavy commercial, the minimum wage was Ksh 13,833 and yet he was being paid Ksh 14,000/=. The respondents also aver that since they were remitting NSSF contributions for the claimant, gratuity is not payable.

In cross-examination, the respondents said that they were paying claimant Ksh 14,000/= inclusive of house allowance.

Upon hearing the evidence of both parties, the issues for determination by this court are:-

1. **Whether the claimant was dismissed, or he resigned.**
2. **Whether the claimant is entitled to prayers he has sought.**

The claimant told court that he gave notice to retire from service of the respondents due to old age in September 2010. However, before he left, the vehicle he was driving for respondents got lost in a robbery. The turn boy was arrested and charged. It was after this that the respondents dismissed him without any notice. Initially the claimant had denied that he lost any vehicle but evidence adduced shows that the vehicle he was driving got lost and he reported the loss to the police at Mbale Police Station. The respondents version is that since the vehicle he had been driving was lost, there was no work for the claimant to do hence the decision to treat him as redundant.

The claimant may have given notice to retire from the service but before the expiry of the notice the vehicle was stolen. The respondents decided to terminate his services after this treating him as redundant as there was no vehicle for him to drive after this. The dispute was reported to the labour office and after discussions, the respondents paid the claimant Ksh 100,000/= as his benefits. The claimant was still working when the respondents decided to relieve him of his duties hence this was a dismissal.

Was the respondents justified in dismissing the claimant? In the circumstances, yes. The claimant had been assigned a vehicle to transport sugar from Mumias Sugar Company Limited and he went and loaded the sugar but never delivered it to the respondents. The vehicle and the sugar never reached the respondents. The claimant has not told court the circumstances under which the lorry and the sugar went missing. He only told court that the turn boy was arrested and charged following the disappearance of the lorry and the sugar. S. 44(g) of the Employment Act 2007 states that an employer can summarily terminate services of an employee if:-

**“An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.”**

In this case, the employer suffered substantial loss of a lorry and sugar which the claimant was driving and the claimant has not explained to court circumstances under which the lorry and its contents disappeared. It was therefore in order in the circumstances for the respondents to terminate the claimant's services. The respondents has already been kind enough to give him Ksh 100,000/= which he has already acknowledged receiving and I find he is not entitled to any other prayer. The claimant's case is therefore dismissed accordingly with no order as to costs. Those are the orders of this court.

**HELLEN S. WASILWA**

**JUDGE**

**17/9/2014**

**Appearances:-**

P. D. Onyango for claimant present

Muthaiga for respondents present

CC. Wamache