



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1649 OF 2013**

**DANIEL MBUTHI.....CLAIMANT**

**VS**

**EXPRESS AUTOMATION LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim dated 11th October and filed in Court on 14th October 2013 seeks compensation for unfair termination of employment. The Respondent filed a Statement of Defence on 15th November 2013 to which the Claimant filed a Reply on 2nd December 2013. The Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Sheena Khimasia. Both parties then filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on a two year contract beginning on 2nd January 2013 in the position of Driver at a gross monthly salary of Kshs.16,000 as at the time of leaving employment.

3. On 22nd July 2013 the Claimant was issued with a warning letter for failure to wear proper uniform and on 12th August 2013, he was issued with a second warning letter for absenting himself from work on 10th August 2013 without permission.

4. On 17th August 2013 he was terminated verbally and on 30th August 2013 he was issued with a termination letter citing failure to meet company expectations as the reason for the termination. The Claimant states that the Respondent's allegations against him were without basis and that he was not given any notice nor was he paid his terminal dues.

5. The Claimant therefore claims the following:

- a) Unpaid salary for August 2013.....Kshs. 8,000
- b) Compensation for loss of employment.....192,000
- c) Salary for remainder of contract (16 months).....256,000
- d) Notice pay.....16,000

- e) Leave allowance for 2 years.....32,000
- f) Costs and interest
- g) Any other relief the Court may deem just to grant

### **The Respondent's Case**

6. In its Statement of Defence the Respondent admits having employed the Claimant but denies terminating his employment illegally. According to the Respondent the Claimant absconded duty without any explanation, a matter that was reported to the Police. The Claimant had also been issued with previous warning letters. The Respondent further states that the Claimant was paid all his dues.

### **Findings and Determination**

7. The issues for determination in this case are as follows:
- a) Whether the termination of the Claimant's employment was lawful
  - b) Whether the Claimant is entitled to the reliefs sought.

### **The Termination**

8. The Claimant's termination letter states in part:

***“This is to inform you that you are being relieved of your duties with immediate effect. This is due to your performance not meeting company expectations.***

***You are required to surrender all company items issued to you and your August 2013 salary will be paid upon receiving confirmation from your department head, that all company items have been surrendered back to the company.***

**NAUSHAD LUHAR**

***DIRECTOR”***

9. According to this letter, the termination of the Claimant's employment was informed by his poor performance.

10. Section 41 of the Employment Act 2007, establishes the procedure for handling cases of misconduct, poor performance and physical incapacity as follows:

- (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.

11. On the issue of poor performance, the Court in the case of ***Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*** stated thus:

***“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”***

12. It is therefore not enough for an employer to simply state that the performance of an employee does not meet company expectations. The employer must point out the specific areas in which the employee's performance is wanting and go further to support the employee to improve. Performance is not to be confused with misconduct which requires a separate handling procedure. From the evidence on record, the Respondent did not follow the procedure set out in Section 41 of the Employment Act, 2007 and the employment was therefore unfair for want of due process.

### **Reliefs**

13. The Respondent submits that the Claimant is not entitled to the reliefs sought since at the time he left employment, his probation had been extended. The Respondent adds that the letter of appointment signed by the Director, Archith Rao and accepted by the Claimant on 16th July 2013 did not emanate from the Respondent's Human Resource Department and was not therefore properly issued.

14. The Respondent's Human Resource Manager, Sheena Khimasia told the Court that the letter, though signed by the Director, was not released to the Claimant because a decision had been taken to extend his probation. Khimasia however could not tell how the letter had come into the Claimant's possession.

15. Further, there was no proof of forgery of Rao's signature and Rao himself was not called to explain the circumstances under which he had signed the letter. Moreover, there was no evidence that the decision to extend the Claimant's probation was ever made known to him. From the foregoing the Court finds that the Claimant was confirmed in his appointment by the letter signed by Rao and accepted by the Claimant on 16th July 2013.

16. That settled, I now proceed to consider the remedies sought by the Claimant. In view of my finding that the Respondent failed to follow the proper procedure in terminating the Claimant's employment I award him two months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as his employment record. I also award him one month's salary in lieu of notice. The Claimant is also entitled to prorata leave.

17. The claimant told the Court that he worked for 17 days in August 2013 and that he had taken an advance which was recovered from his salary for the same month. The claim for unpaid salary is therefore without basis and is dismissed. The claim for salary for remainder of the contract is within the province of an order for specific performance which is to be granted in very exceptional circumstances which have not been established in this case.

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

- a) 2 month's salary in compensation for unfair termination Kshs. ....32,000
- b) 1 month's salary in lieu of notice.....16,000
- b) Prorata leave (16,000/30x1.75x8).....747
- Total.....48,747

19. The Respondent will meet 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 SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF  
OCTOBER 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ilako for the Claimant

Mr. Njuguna for the Respondent