



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 3 OF 2014**

**JOEL EMODING KHAOYA.....CLAIMANT**

**-VERSUS-**

**ELDORET PACKERS LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> October, 2014)

**JUDGMENT**

The statement of claim was filed on 03.01.2014 through Maritim, Omondi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination as carried out was unlawful and unfair *ab initio*.
- b) One month salary in lieu of notice Kshs.14, 350.00.
- c) One month salary in lieu of 2012 leave not taken Kshs.14, 350.00.
- d) Compensation of 12 months' salaries under section 49 (1) (c) of the Employment Act, 2007 Kshs. 172, 200.00.
- e) Underpayments for 7 years Kshs. 445, 642.19.
- f) Overtime worked between 30.01.2007 to 2.12.2013 Kshs.767, 088.25.
- g) Certificate of service
- h) Costs of the claim and interest on (a), (b), (c), (d) and (e) above.

The respondent's defence was filed on 27.02.2014 through Nyairo & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

It is not disputed that the claimant was employed by the respondent as a lorry driver with effect from 30.01.2007. The claimant was terminated from employment on 1.12.2013 when the respondent's transport manager asked the claimant to return the key to the lorry then assigned to the claimant to drive. Upon returning the key, the claimant testified that he saw the director one Raju Kachela who advised him to come back at 5.00pm. At 5.00pm the claimant testified that director convey to him verbally that the claimant had to leave employment due to high fuel consumption by the lorry assigned to the claimant and on the further ground that the claimant had differences with his supervisor, the transport manager. It was

the claimant's case that the fuel consumption had been high due to the absence of repair and maintenance of the lorry. In a contradictory manner, the claimant testified that on 2.12.2013 the director told him that he was terminating the claimant's employment. The claimant stated that he rejected the terminal dues of Kshs. 14, 300.00 that the director offered. During cross-examination, the claimant testified that he was at work on 1.12.2013 and further that he was a Christian and never reported at work on Sundays. 1.12.2013 was in fact a Sunday. He further stated that his last day at work was on 2.12.2013 when the director terminated his services.

The claimant testified that on 15.08.2012 he received Kshs. 195,000.00 from the respondent's client being payment for the goods sold to the client. The claimant admitted that he did not deliver the money to the respondent because he had arrived at late and thugs had attacked him at that early night while walking to deliver the money and he had remained on the ground at the place of the attack till 10.00pm. the claimant recorded a statement at the police station on 16.08.2012 and he continued in employment.

The respondent's witness (RW) was Japheth Ngusale, the personal assistant to the respondent's director. RW testified that the claimant was a very good worker and the claimant was dismissed due to reported high fuel consumption by the motor vehicle assigned to the claimant; and further due to failure to refund the respondent the Kshs.195, 000.00 the claimant testified to have been stolen. RW testified that the claimant was invited to attend the disciplinary hearing by the letter dated 16.09.2013 but the claimant refused to attend and the meeting resolved the claimant be dismissed. RW testified that the claimant was to be paid salary up to 30.11.2013. After termination, RW testified that the claimant refused to hand over the motor vehicle log showing the journeys made.

The **1st issue** for determination is whether the claimant was unfairly terminated. The court has considered the evidence. The claimant contradicted himself in his account. He alleged it was on 1.12.2013 after 5.00pm that he was verbally terminated and later said it was on 2.12.2013. The claimant further testified he did not work on Sundays but also stated that he worked on 1.12.2013 but which was a Sunday. The court holds that such contradictory evidence is unreliable and cannot be trusted. The court finds that as testified and submitted for the respondent, the claimant was invited to a disciplinary hearing, he failed to attend and he was terminated from employment. The court finds that the termination was not unfair because the claimant was accorded due process as envisaged in section 41 of the Employment Act, 2007.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court has found the termination was not unfair. The court further finds that the claimant established the basis and justification for **Kshs. 14, 350.00** in lieu of leave for 2012 as he did not take annual leave. The court finds that the claimant is entitled to the certificate of service. There was no dispute about overtime throughout the employment relationship and the claimant has not showed the basis for his claims and prayers in that regard. The claimant prayed for underpayment of **Kshs.445, 642.19** based on the relevant wage orders and the respondent did not rebut the claim. Thus, the court finds that the claimant is entitled as prayed for. The specific amount of time with respect to the overtime was not established.

In conclusion judgment is entered for the parties for:

1. The respondent to pay the claimant **Kshs. 459, 992.19** by 1.11.2014 failing interest at court rates to be payable from the date of filing the suit, 03.01.2014, till the date of full payment.
2. The respondent to deliver to the claimant the certificate of service by 1.11.2014.
3. The respondent to pay 75% of the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 17<sup>th</sup> October, 2014.**

**BYRAM ONGAYA**

**JUDGE**

