



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

**AT MOMBASA**

**CAUSE NO. 213 OF 2014**

**RAYMOND CHEROKEWA MRISHA .....CLAIMANT**

**VERSUS**

**CIVICON LIMITED .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. the claimant brought this suit on 16/4/2014 seeking Ksh. 1,716,206 as employment benefits plus compensation for unfair termination of his employment by the respondent on 4/3/2014. The grounds upon which the suit is premised is that the dismissal was summarily done without according the claimant any hearing as required under Section 41 of the Employment Act.
2. The respondent has denied liability for unfair termination and averred that the claimant was guilty of gross misconduct and as such the dismissal was substantively and procedurally fair. In addition, the respondent has averred that despite his misconduct the claimant was paid one month salary in lieu of notice, accrued leave days, plus gratuity.
3. Before the suit proceeded to hearing the parties recorded consent to the effect that the claim for salary in lieu of notice, leave earned and gratuity had been settled. The issues for trial were therefore narrowed down to the claim for compensation for unfair termination plus the disputed loan of ksh.70000 recovered by the respondent from the claimant's accrued benefits. The suit was heard on 17/9/2014 when the claimant testified as CW1 and respondent called Timothy Macharia Gathumbi as RW1.

**CLAIMANT'S CASE**

4. CW1 was employed by the responded on 1/5/2007 and was dismissed on 4/3/2014. He was earning a gross salary of ksh.83500 per month. On 9/3/2014, he was called to the transport managers office where he found the HR Manager Mr. Jarius Ochieng who told him that he (CW1) had been dismissed and that he should hand over. When CW1 enquired on the reason for his dismissal, the HR Manager told him that he was acting on instructions and was yet to know the reason for the dismissal. No dismissal letter was given to CW1 despite his request for a copy. CW1 was therefore never told the reason for the dismissal and he was never accorded any hearing to defence himself.
5. When CW1 was paid his terminal dues, ksh.70000 was deducted as a loan of which he was a stranger to. He however acknowledged that in November 2013, he was given ksh.70000 as facilitation fee for 7 trucks from Mombasa to Malaba. According to him that fee was a normal charge from clients to meet the cost of police escort, KRA and Kenya power & lighting company

- (KPLC) with respect to certain cargos.
6. CW1 prayed for 12 months salary as compensation for unfair dismissal. He confirmed that as at the day of the hearing herein, he had not secured another employment due to lack of a certificate of service. He also prayed for the payment of ksh.70000 which the respondent had deducted from the dues paid.
  7. On cross examination by the defence counsel, Cw1 confirmed that the Appointment letter entitled the respondent to dismiss him summarily for wrong doing. He further admitted that he was paid his employment dues before filing this suit. He further admitted receipt of ksh.70000 as petty cash towards facilitation money. He however contended that he accounted for the money as per his exh. 2 which shows that the ksh.70000 was divided among 7 trucks. He maintained that the ksh.70000 was deducted from his dues without any explanation and CW1 only saw it in paper.
  8. CW1 admitted that on 4/3/2014 he met the HR manager and Mr. Ian Street (the Transport Manager) and the HRM told CW1 that he was dismissed but no reason was cited. He however stated that he was dismissed for the alleged pocketing ksh.70000 for trips. He however denied pocketing any money. He clarified that the facilitation fees was to meet cost of escorting large cargo by the police and for hiring night guards when the trucks were packed for the night while on transit. He further clarified such facilitation charges were normally not signed for by the payees, a procedure which CW1 found and left going on at the respondent.

### DEFENCE CASE

9. RW1 works for the respondent in the finance department. He produced appointment letter for the CW1 to prove that the respondent had the right to summarily dismiss CW1 for dishonesty and breach of discipline. He confirmed that CW1 was dismissed for failure to account for money entrusted to him for operations of the company. According to RW1, the failure to account amounted to dishonesty and serious breach of discipline which warranted summary dismissal. According to RW1, CW1 requested for ksh.110000 for 6 abnormal loads permit, from Kenya National Highway Authority (KeNHA) on 20/11/2013. A bankers cheque of ksh.110,000 was issued in favour of KeNHA and the permit were issued. On 26/11/2013 the Transport department though CW1 requested for a further ksh.70000 for facilitation of permits which money was given to the CW1 by the cashier vide petty cash voucher (Exh.d.3).
10. On 27/11/2013, RW1 wrote an email querying the expenditure of the ksh.70000 in order for him to reimburse the same to the cashier. CW1 however did not account for the ksh.70000 by receipts, permits or any other accountability documents. The only explanation given was that the money was spent in escort yet the request was in respect of permits. Consequently, RW1 transferred the ksh.70000 as a loan to the CW1 in order for him to reimburse the petty cashier his ksh.70000. According to RW1, CW1 was given enough time to account for the ksh.70000 until 4/3/2014 when he was dismissed for failure to account for the same. He contended that CW1 was paid all his dues vide the voucher 12/3/2014 (exh.d.4).
11. On cross examination by the claimant's counsel, RW1 could not produce any request for ksh.70000 by the CW1. RW1 stated that he did not know whether the Transport manager Mr. Ian Street was required to approve payment of the ksh.70000. RW1 however confirmed that Mr. Street signed the payment voucher for the reimbursement of the ksh.70000. RW1 explained that Cw1 told him verbally that the kh.70000 was for facilitating the release of KeNHA permits for which he had paid ksh.110000. According to RW1 accounting procedure for the respondent require when an employee fails to account for money, the same is treated as a loan in the respondents books and recovered from the employee. RW1 however admitted that he did not know the circumstances under which CW1 was dismissed and further that he did not prepare the payment voucher for his dues (exh.d4)
12. After the close of the hearing both parties filed written submission of which the court has carefully considered together with the pleadings and evidence to come with this judgment.

### ANALYSIS AND DETERMINATION

13. There is no dispute that CW1 was employed by the respondent under a contract of service vide letter of appointment dated 15/4/2007. It is also common knowledge that Cw1 was dismissed on

4/3/2014 for failure to account for Ksh.70000 advanced to him for facilitation of permits or cargo escort. It is further common knowledge that CW1 was paid his accrued terminal dues save the ksh.70000 facilitation money.

14. The issues for determination are whether CW1 was unfairly dismissed and whether ksh.,70000 was lawfully deducted from his terminal dues by the respondent. Lastly the court must determine whether the reliefs sought ought to issue.

### UNFAIR TERMINATION

15. The claimant contended that his dismissal was unfair because he did not do anything wrong to warrant the dismissal and further because he was never accorded a hearing as required under Section 41 of the Employment Act. On the other hand the respondent contends that CW1 failed to account for the ksh.70000 even after being given ample time and as such the dismissal was fair.
16. Under Section 45 of the Employment Act, a dismissal is deemed fair if the employer fails to prove that it was founded on a valid and unfair reason and that it was reached after following a fair procedure. The burden of proving that there existed a valid and fair reason at the time of the dismissal is upon the employer under Section 43 of the Act. Under Section 41 of the Act, an employer is required in mandatory terms to accord an employee a fair hearing before dismissing him for misconduct or poor performance under Section 44 of the Act. The said hearing must be in a language that the employee understands and he must be accompanied by a fellow employee of his choice.
17. In the present case, the respondent never granted the claimant any oral hearing as required under Section 41 supra. He was not therefore able to defend himself. Had he been given a hearing possibly he could have explained how the money was spend because it appears to this court that the respondent had intended the ksh.70000 to be used either for clandestine purposes or for transactions which were not to be documented. The reason for the foregoing view is that according to the RW1, the money was for "facilitation of KenHA permits" in addition to the official KeNHA permits fees of ksh.110000. The official fees was by bankers cheque while the facilitation money was in cash. The facilitation cash was not an idea conceived by the CW1 but in this court's view it appears to be, a deep rooted practice or expense existing in the respondent's business policy.
18. The court could have treated the facilitation fees as lawful expense as explained by CW1 until RW1 produced exh.d.2 an email he personally wrote 27/11/2013 to Mr. Raymond Marisha and copied to CW1 among other members of the respondents staff. The said email seems to suggest that payment of facilitation fees was okay provided it was shoul not be above 50% of the permit fees. The email also suggests that, the facilitation payments was not a new phenomenon. It is therefore hypocritical for RW1 to turn round in his testimony and demand accountability of clandestine facilitation transactions in form of accounting documents. Who would sign any acknowledgement for a bribe? This court finds and holds that the respondent did not prove that CW1 breached a lawful contractual obligation to warrant summary dismissal. It was not within CW1's contractual obligation to undertake corrupt transactions on behalf of the respondent and to render accounts to the respondent. Even if that was to be the case, which was not, CW1 was entitled to fair hearing as provided for under Section 41 of the Employment Act. That was not done and the summary dismissal was rendered unfair termination within the meaning of Section 45 of the Act. It was also not justified because the reason for the dismissal was invalid and unfair.

### RELIEFS

19. Under Section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. In the present case salary in lieu of notice and employment dues have been paid except the ksh.70000 deducted as loan to recover the ksh.70000 unaccounted for by the CW1. The court therefore awards CW1 the said ksh.70000 deducted from his dues as prayed . He was never advanced any loan as alleged by the respondent. The only money advanced to him was for facilitation of permits which the respondent knew to be for an illegal transaction for which no documenttion was expected. In any case the permits were secured from KeNHA after the facilitation. The

respondent could not therefore expect to get the money back from the payees in such illegal transaction. She should not also expect accountability of money from an illegal transaction. In any case the respondent did not file any counterclaim against the claimant when the issue was brought up in this suit for the court to determine it once and for all. This court has held elsewhere that when an employee challenges a deduction from terminal dues by the employer, the employer is bound to raise a counterclaim for determination by the court and if he does not raise a counterclaim the employer is bound by the judgment to pay all the decretal sum less government taxes only.

20. In view of the finding above that the summary dismissal was unfair, the court awards CW1 6 months gross salary being ksh.501000 as compensation for unfair termination. The reason for not granting the maximum compensation is because CW1 accepted to be his employer's agent to commit an illegality.

#### DISPOSITION

For the reasons stated above, judgment is entered for the claimant for ksh.571000 plus Cost an interest.

**Dated, signed and delivered this 5<sup>th</sup> December 2014.**

**O. N. Makau**

**Judge**