



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA**

**CAUSE 356 OF 2012**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....CLAIMANT**

**VS**

**RICHLANDS INSURANCE.....RESPONDENT**

Mr. John Owiyo for the Claimant

Mr. Thande for the Respondent

**AWARD**

This matter was brought by the Claimant Union on behalf of the grievant Harun Kegondi.

It is common cause that the grievant was employed by the Respondent on 1<sup>st</sup> July 2006 and worked continuously until 4<sup>th</sup> January 2011 when his employment was terminated for poor work performance and misconduct.

It is also not in dispute that he was initially employed as a filing clerk and was later trained to ride a motorbike and started doing delivery service. On 24<sup>th</sup> August, 2009 he had a road accident which led to serious injuries necessitating long treatment and physiotherapy. All the payments for treatment were met by the Respondent and he was later compensated to the tune of Kshs.120,615.40 under the Work Injury Benefits Act, 2007.

Upon return to work he was given light duties as he continued to recover from the injuries while under observation and treatment.

It is the Respondent's case that the Claimant was a very good employee initially but had completely changed after he received compensation for the injuries received. He started flouting the Respondent's rules and instructions and would often come late or not at all whenever he was sent on simple errands such as to deliver mail or when he went for check-up at the various clinics. He was given several warnings including a last and final warning and when he failed to reform, his employment was terminated on 4<sup>th</sup> January, 2011.

At the time of termination he earned Kshs.10,000 per month subject to statutory deductions. That

he was a member of the Respondent's Pension Scheme and was paid Kshs.40,000 being 75% of the pension payable and the balance of 25% is due upon attainment of 50 years. He was also registered with NSSF and the employer remitted all statutory deductions accordingly.

The Respondent further offered the grievant one month's salary in lieu of notice though the grievant has not collected it to date.

The grievant had in his testimony refuted that he had changed upon receipt of statutory compensation under Work Injury Benefits Act and also denied that he failed to honour instructions and regularly absented himself from work. He stated that he was being discriminated upon because of the injuries he had received which had slowed him down. He added that he would often get delayed at the various hospitals he attended and did not fail to return to work or deliberately absented himself from the work place.

The version by the grievant vis a vis that presented by the Respondent on the circumstances leading to his termination are mutually destructive.

However, the Respondent bears the burden to show on a balance of probabilities that he had a valid reason to terminate the employment of the grievant and that the termination was done following a fair procedure. These are the dictates of Section 43(1) as read with Section 45(2)(a) and (c) of the Employment Act No.11 of 2007.

Mr. Durgesh Shah, the Chief Executive Officer of the Respondent gave a candid account of the history of the grievant from the time he employed him till the date of termination. He said that he had 17 employees and had employed a Human Resource Officer to handle their welfare. That he had fostered at the workplace a very conducive environment for his employees by way of giving them competitive salary; registering them and remitting all statutory dues including NSSF and NHIF and in addition had put in place a contributory pension scheme for them. He told the court that he had taken care of the grievant very well after the accident but the grievant had gotten out of hand even after receiving a written warning and several verbal warnings. He had admonished him to change in vain until he was left with no alternative but to terminate his services by a letter dated 4<sup>th</sup> January, 2011 produced and marked R 1. He added that he had not been brought to court by any of his employees for 30 years and had no reason to victimise the grievant.

Having carefully considered the version by the grievant vis a vis that given by Mr. Durgesh Shah, the court finds that the evidence by the Respondent is more credible and the court does believe him. Accordingly the Court finds that the Respondent has satisfied the requirements of Section 43 as read with Section 45(2)(a) and (c) earlier referred to and therefore had proven on a balance of probabilities that it dismissed the grievant for a valid reason and in accordance with a fair procedure.

The Claim for compensation for unlawful and unfair termination is dismissed. The grievant is also not entitled to any severance pay because he was paid pension from the employer's pension scheme and was also covered by NSSF to which the Respondent had fully contributed during the grievant's period of employment.

The Respondent tendered one month's salary in lieu of notice in the sum of Kshs.10,000 to the grievant and the court orders the Respondent to pay the amount to the grievant and/or tender the same to court for the grievant to collect.

There will be no order as to costs.

**It is so ordered.**

**DATED and DELIVERED** at Nairobi this 5<sup>th</sup> day of January, 2013.

Mathews N. Nduma

**PRINCIPAL JUDGE**