



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1614 of 2011

EVANS AGULO OVONYOLI.....CLAIMANT

VS

H. YOUNG COMPANY LTD..... RESPONDENT

Claimant in person

M/S Muriu for the Respondent

AWARD

The Claimant had since 1998 worked in various works projects contracted to the Respondent as a heavy vehicle driver. On 4th October, 2010 he was retrenched when the construction of Meru-Mikinduri Road was completed and was paid his terminal benefits.

He was rehired on 9th February, 2011 by the Respondent to drive a water truck in a project based at Mombasa, Kenya Ports Authority. His duties involved supply of water to different departments to clean equipment to avoid corrosion, for flushing toilets, drilling and construction work. He worked in that capacity until the 5th July, 2011 when he was summarily dismissed by a letter of that date. He had therefore worked continuously for a period of five (5) months from the date he was rehired.

According to his testimony before court in support of his case, the claimant was dismissed for involvement in dishonest conduct in that fuel consumption of his truck had gone up for unexplained reasons from an average of 27 – 29 litres per trip to 62 litres per trip between the 2nd – 25th June, 2011 covering 49 trips.

By a letter dated 28th June 2011, he was given 24 hours to explain the anomaly failing which ‘*stern disciplinary action*’ would be taken against him.

The Claimant wrote an explanation letter and he was asked to take 6 days leave whilst the matter was being investigated. Upon his return, on 5th July 2011, he was given a letter of summary dismissal in which he was informed that the Truck WT31, was given to another driver whilst he was away and the fuel had returned to the normal consumption of 29 litres per trip and therefore, the Respondent had concluded that the Claimant had tampered with the fuel system. The letter concluded:-

“upon careful consideration of your response we are left with no option but to summarily dismiss you from employment with effect from 4th July, 2011”.

The Claimant's explanation at the time and in court was that the fuel went up between 2nd – 25th June 2011, because the nature of work had changed in that he was now required to get water from Mazeras to the Port and then to Bamburi at the residence of a welder from Israel which distance was far from the Port. He also explained that the alleged rise of fuel consumption from 27 – 29 litres to 62 litres per trip was erroneous. He added that he went on a test trip with the operations manager, Mr. Eldon from the port to Mazeras and back and the Truck had consumed 41.50 litres. No other test trial was conducted before he was dismissed. He also explained that the trip from the port to Bamburi encountered heavy traffic jam hence it was possible that the fuel consumption for the entire trip inclusive of the port to Bamburi leg had risen to 62 litres per trip.

On 8th July 2011, the Claimant wrote a Letter of Appeal stating that the matter had not been dealt with professionally in that the fuel consumption was not gauged properly and infact a report from fuel monitoring Department had established that there was a misuse or over use of fuel by the vehicle Registration No.KBB 444X (WT31) and that it had established that the consumption was within the Company Average. He produced a letter dated 13th July, 2011 by a Mr. Omri Kohen, Logistics Department Manager titled "*Fuel Consumption WT31 REG. KBB 444X*". The letter was directed to the Site Manager, among other officers of the Respondent and it read:-

"Reference to your letter dated 11th July, 2011 requesting about fuel consumption average on the above subject..... We have investigated fuel consumption cards since it left Nairobi Industrial Plot on 21st January 2011 upto 30th June 2011 as requested. We noted that the fuel consumption was ok according to the company averages and rates. Let this information be brought to the knowledge of all concerned parties".

It is noteworthy that the period under review covered that for which the Claimant was accused of doctoring the fuel consumption leading to his dismissal.

The Claimant in his amended Statement of Claim, claims for:-

1. 2 month's salary in Lieu of Notice - Kshs.44,824
 2. Leave allowance equivalent to one month's salary - Kshs.22,412
 3. Unpaid salary for the month of July 2011 - Kshs.22,412
 4. House allowance for July in the sum of - Kshs. 4,482
 5. Overtime worked between February – July 2011
in the sum of - Kshs.86,154
- and refund of Transport of goods for him and family from
Mombasa to Western Kenya in the sum of - Kshs.19,000
- Total Claim is = Kshs.199,284

He also claims interest on the amount at court rates and costs of the suit.

Notice Pay

With regard to issue of Notice Pay, the Claimant had no Letter of Appointment so the Claim is based on the provisions of Employment Act, which entitles him to one month's notice or salary in lieu thereof if the court finds that the summary dismissal was not justified.

Overtime

The Claimant told the Court that he worked for 7 days a week from 6.00 a.m. – 7.00 p.m. or 8.00 p.m. in the evening depending on the work load. He was paid overtime depending on the number of hours worked. That 8 hours were normal working hours and the rest was overtime. He said the hours were recorded daily by the Respondent. However, the Respondent paid him for less hours than he had worked every month for the five months he had worked. He complained to the paymaster but he was not paid. He now claims payment of those hours as tabulated in the amended Statement of Claim.

Leave Allowance

He told the court that, when he was given notice to show cause he was sent on 6 days' leave but was not given leave travel allowance. This was not paid when he was dismissed from work.

Salary for July 2011

With respect to this, he told the court that working months at the Respondent's place started on 16th day of every month and ended on 15th of each month. He had worked from 15th June 2011 to 5th July 2011, he prays for the payment of 20 days worked.

House Allowance

He seeks payment of house allowance for this last month in the sum of Kshs.4,482.

The Respondent filed a Statement of Response on 5th September 2011 and also called Mr. Samuel Gathogo, the Human Resource Manager. The Respondent filed written submissions on 15th November, 2012. The witness confirmed that the period of work, the subject of this claim is from 9th February 2011 to 4th July 2011 though the Claimant had previously worked for the Respondent in various projects in respect of which he had been paid terminal benefits. He produced exhibit R1, a form that contained the terms of employment of the claimant. He added that the Respondent had a biometric clocking system which showed when each employee reported and left their work place. This record was used for purposes of paying overtime. He told the court that the Claimant was no exemption to this rule and he had therefore been paid all the overtime due to him at the time he was dismissed. He further explained that where an employee reported before the biometric system was on, the employee would be given clocking cards to fill in the hours worked. He disputed the cards produced by the Claimant in support of overtime stating that these could not provide accurate information and in any case there is no way an employee would report to work continuously at 6 o'clock without any deviation. He added that at the port, the clocking system was in use and it applied to the Claimant. Cards were an exception if the employee was not at the Station. These are filled in by the employee and countersigned by the Project Manager. At Kenya Ports Authority, normal working hours were from 6.00 a.m. to 4.00 p.m. for all workers. These fluctuated but not much. He challenged the cards produced for lack of the signature of the Project Manager.

On the issue of dismissal, the witness told the court that the Claimant was dismissed for unusually high fuel consumption of his Truck. He confirmed that he was supplying water from Mazaras to the Port and onward to Bamburi. That for each trip was calculated average consumption for each vehicle. In the case of the Claimant, the consumption doubled during the material period. He did not offer any acceptable explanation for the anomaly hence the dismissal.

He referred to Annex B1 to the Statement of Claim which data was reflecting average fuel consumption from which the Respondent concluded that the fuel consumption for the specific period, the Claimant was questioned was inordinately high.

He added that upon termination, the Respondent prepared terminal dues for the Claimant which included Salary for days worked in July; payment of 4.85 for leave days not taken; travelling allowance for days worked and overtime for 30.02 hrs at the rate of 1.5 and 9.68 hrs at the double rate. The total due was Kshs.15,261 gross and Kshs.14,642 net. The Claimant declined to receive the amount. He produced a cheque dated 4th August 2011, for this amount and tendered same for collection.

The witness told the court that the Respondent followed a proper procedure in dismissing the Claimant in that he was afforded opportunity to explain the accusation leveled against him but he failed to provide a reasonable explanation.

He was subjected to intense cross-examination and conceded that he was not employed by the Respondent at the time this matter occurred but relied on records available. He was unable to explain why the officers named in these proceedings who are still available and working for the Respondent were not called.

He agreed that the routine trip by the Claimant had changed to include Bamburi during the period under review and conceded that the Traffic Jam in this part of the trip could explain the increase in consumption of fuel during the period under review.

Upon a careful analysis of the pleadings and the annexures produced in support of the case for the Claimant and that of the Respondent, having considered the evidence adduced for the parties and the written submissions thereof, the court has come to the following conclusions of facts.

That the Claimant's Employment was terminated based on an unfounded conclusion that between the 2nd – 25th June 2011, he had tampered with the fuel system of Truck WT 31 with the result that it reflected erroneous consumption of fuel from a normal average of 27 – 29 litres to 62 litres per trip.

This conclusion by the Respondent was completely discredited by the evidence of the Claimant, especially because the officers who participated in the investigations and still worked for the Respondent were not called to testify on the matter. Instead, Mr. Samuel Gathogo, the current Human Resource Manager was called to testify and he readily conceded that he had no personal knowledge of the events leading to the termination of the Claimant. He also conceded that the test runs done for comparison purposes did not cover the entire trip the Claimant did on a regular basis from the port to Bamburi to deliver water to the home of an employee from Israel.

The Claimant had worked for the Respondent in various projects and had a good work record. He had no warning letters in his file and it is difficult to understand why he would change all of a sudden and start tampering with the fuel system of the Truck he drove.

Accordingly, I find that the Respondent has failed to satisfy the requirements of Section 43(1) as read with Section 45(2)(a) and (b)(i) by showing that the reason for termination was a valid one; was fair in that his conduct was detrimental to the operations of the Respondent and that a fair procedure was followed to terminate his services.

Indeed, after the test drive was done, the Employer did not ask the claimant to respond to the findings thereof before issuing him with a letter for summary dismissal on 5th July 2011.

The court is satisfied that the Claimant was entitled to leave allowance when he was sent on compulsory leave for six days in the sum of Kshs.22,414 and finds accordingly. He was also entitled to the salary for 20 days period between 16th June to 5th July 2011 in the sum of Kshs.14,941

The court is satisfied that the Claimant was paid for overtime worked and dismisses the claim for payment of overtime.

With regard to the issue of compensation for unlawful and unfair dismissal, the court takes into account that the Claimant had worked for the Respondent in various contracts and was regularly recalled due to his good record. This time around, he had relocated from his home in Kakamega to Mombasa only to be dismissed after a period of 5 months. He was greatly inconvenienced by the unlawful termination and his good record with the Respondent was tarnished. He also lost prospects of working till retirement in circumstances which the Court finds were most unfair to him. Accordingly, the Respondent is to pay the Claimant as follows:-

- (a) Kshs.22,412 being one month's salary in Lieu of Notice.
- (b) Leave allowance in the sum of Kshs.22,412
- (c) 20 days' salary for the period 16th June – 5th July 2011 in the sum of Kshs.14,941; and
- (d) 8 months' salary being compensation for unfair dismissal in the sum of Kshs.179,296.

TOTAL = KSHS.239,061/=

- (e) Costs of the suit

It is so ordered.

DATED and DELIVERED at Nairobi this 27th day of February, 2013.

Mathews N. Nduma
PRINCIPAL JUDGE