



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO.79 OF 2012**

NAHASHON WACHIRA..... CLAIMANT

**-VERSUS-**

UNITED MILLERS ..... RESPONDENT

**JUDGEMENT**

The case herein was commenced by the Claimant **MR. NAHASHON WACHIRA** through a Memorandum of Claim dated 19<sup>th</sup> January 2012 and filed in Court on 26<sup>th</sup> January 2012.

In the Memorandum of Claim the Claimant alleges unfair termination and seeks the following orders:-

1. Notice.
2. Compensation.
3. Severance pay.

The Respondent filed their reply to the Memorandum of Claim on 14<sup>th</sup> December 2012.

The case was first mentioned before Hon. Justice Isaac E.K. Mukunya (as he then was) on 5<sup>th</sup> March 2012 when the Claimant was present in person and Mr. Mburugu appeared for the Respondent. The Court fixed the case for hearing on 8<sup>th</sup> June 2012. The case was mentioned before Hon. Justice Paul K. Kosgei on 8<sup>th</sup> June 2012 and hearing was rescheduled to 27<sup>th</sup> November 2012 when the parties appeared before me and hearing proceeded. Mr. Makhoha was present for the Claimant and Mr. Mburugu for the Respondent. The Claimant testified on his behalf. The Respondent called 4 witnesses.

## **CLAIMANT'S CASE**

The Claimant testified that he was employed on 15<sup>th</sup> October 2007 as a Shortening Operator. His job involved loading and packing of fats and oils. He referred to his employment contract (Appendix 2). On 4<sup>th</sup> September 2011 he arrived at work at around 8 a.m. as usual and switched on his machine. He later received a call that he was required home urgently. He testified that he sought permission from his supervisor and left. When he reported back the following day he was told there was excess loading. He was asked to write a statement about what happened the day before. He said he knew nothing as he was away but was told to write whatever he knew. The following day he was told to go home.

On 13<sup>th</sup> September he was called to go back to the office and was given a hearing notice informing him of a hearing on 14<sup>th</sup> September 2011(Appendix iii). That on 14<sup>th</sup> September he was told to go back home and come back on 15<sup>th</sup> September for the hearing. When he went to the office on 15<sup>th</sup> September 2011 he found a committee composed of the General Manager Mr. Keith Cannon, Logistics Manager Mr. Deepak Pankaj, Production Manager Mr. Daniel Kanyango, Administrator Mr. Daniel Arasa, Refinery Operator Mr. Elijah Obiawa and the Accountant. He was asked if he knew what was in the hearing notice and replied he did not know the charges against him and cannot respond. He was given a suspension letter and told to go back on 21<sup>st</sup> September 2011. When he went back on 21<sup>st</sup> September 2011 he met Mr. Arasa and another officer whom he was told was Duncan.

He was questioned about what transpired on 4<sup>th</sup> September 2011. That he was later told he had been dismissed. He reported to the Labour Officer who recommended that he be paid 12 months compensation.

He prayed for notice or re-instatement and other prayers as per Memorandum of Claim. He testified that his last salary was Shs.27,824 and he also earned over time, and that he was paid Shs.43,200 through the Labour Office.

## **RESPONDENT'S CASE**

The Respondent called 4 witnesses RW1 testified that he is the Logistics Manager of the Respondent, that on 4<sup>th</sup> September 2011 he reached the office around 11.15 and found that Motor Vehicle KAT 022U had been loaded with vegetable cooking fat, that it is part of his duty to check weigh bridge ticket. When he checked the net weight of the vehicle he noticed it was different from the weight of the same vehicle on 1<sup>st</sup> September 2011. There was a difference of 1 tonne. He asked the supervisor Mr. Razak to check the stock but it was not possible to check the physical stock. He asked Mr. Girish who was to report later to come 30 minutes early so that they could count the products on the floor which was found to be ok. He

then directed Girish to break the seal of the vehicle and confirm the products in the vehicle. They discovered excess load of 100 cartons of royale 1x10 cooking fat. They offloaded the excess stock and resealed the vehicle. The excess product was dated 4<sup>th</sup> September 2011. The vehicle was released after he got authority of the General Manager. That the person responsible for loading was Razak.

He testified that he was aware there was a hearing on 21<sup>st</sup> September 2011 for 4 people. That Mr. Gilbert was given benefit of doubt, and Mr. Arasa was no longer in employment of the Respondent. That Mr. Razak did not come back to work after that day. He testified that he was aware the Claimant worked as Shortening Operator and reported to work on 4<sup>th</sup> September in the morning but left with permission of the supervisor, that he was not involved in loading.

RW2 a driver with the Respondent testified that the Claimant left the work premises at 10.18 a.m. as RW2 was given a lift with the Claimant in a company vehicle which left at that time.

RW3 testified that he is a Soap Operator with the Respondent, that in 2011 he was working as a helper on the soap machine. That 4<sup>th</sup> September 2011 was a Sunday and Soap Section does not work on Sunday so all the soap section staff including himself were at the refinery. On that day he was painting stickers between loading and shortening Sections. That both loading and shortening were going on and Mr. Razak and the Claimant were standing at loading section.

The Claimant did not go to his Section which is shortening. That he saw the shortening driver bring a load from shortening directly to loading, that this was unusual as loading is done from stores. He told his colleague that something unusual was going on. He decided to find out the quantity that was to be loaded and the quantity actually loaded. He realized that there was an excess of 100 cartons. That Mr. Razak asked him what he was doing, then took him to the toilet and asked him to tell Razak what he had seen. That while in the toilet Razak told him that Razak had left the Claimant to oversee the loading. That later the Claimant and Razak approached his colleagues to tell him to disclose what he had done. Razak promised Shs.5,000 to all members of the committee. That on 6<sup>th</sup> September 2011 the Claimant threatened him and he reported to Arasa and to Police. That on the same day the Claimant asked Kombo and Momanyi to talk to him.

RW4 testified that he was a Shortening Assistant Operator and at the material time he was a Machine Attendant at Shortening Section. That he worked night shift and left on Sunday 4<sup>th</sup> September 2011. Before he left he was asked by Gilbert to arrange 50 people from machine to store, which took about 30 minutes. As he was leaving he found the Claimant sitting at the loading section with Razak the supervisor. When they saw him they looked scared. That he greeted them then passed on. That after a few meters the Claimant called him back and asked if he knew what was going on inside the company and he replied that he didn't. The Claimant then told him that there was theft at the weigh bridge. That on 5<sup>th</sup> September the Claimant asked RW4 to help him with blending. The Claimant again asked him if he knew anything about the theft. That after talking to Razak the Claimant told him the Claimant had been named in the theft, and that if RW4 and the Committee helped they will each be paid Shs.5,000. That he informed David Ochieng, Peter Kegode and Daniel Okusimba, the other committee members. The committee members asked him to take them to the Claimant but they found that the Claimant had already left. They instead talked to Razak who promised them each Shs.5,000 if they helped him so that the case does not succeed.

I have carefully considered the pleadings, the evidence and the submissions.

I will adopt the issues as framed by the Claimant as follows:-

1. Whether the dismissal of the Claimant by the Respondent was justifiable.
2. Whether fair procedure was applied.
3. Is the Claimant entitled to the prayers sought?

### **Whether the dismissal of the Claimant by the Respondent was justifiable**

It is not in dispute that there was attempted theft by loading of excess goods in the lorry No.KAT 022U by 100 cartons. It is also not in dispute that the Claimant was at the work premises at the time the lorry was being loaded or for part of the time when the lorry was being loaded. The only issue is whether he colluded with the employees who organized the loading. I have noted from the proceedings of the hearing that apart from the Claimant, the other employees who were also called for disciplinary hearing were Gilbert Arasi, Enock Wamalwa, Razak Jaffer Ahmed and the driver and turn boy of the lorry whose names are not disclosed in the report.

RW3 and RW4 both testified about the suspicious behavior of the Claimant and that the Claimant and Razak promised them and the other members of the committee Shs.5,000 each if they helped to ensure the case did not succeed.

The Claimant was unable to explain why he came to work on a Sunday morning only to ask for permission which he could have done on telephone, why he stated that he left the work premises at 9.00 a.m. when the record at the gate for the vehicle he used when leaving showed that he left after 10.00 a.m. He also did not explain why he did not leave immediately after securing permission at 8.00 a.m.

The proceedings of the disciplinary hearing dealt with the case in detail and I agree with the findings in respect of the Claimant to the effect that he was part of the team that colluded to load extra cooking oil in Motor Vehicle Registration No.KAT 022U and that there was reasonable and sufficient grounds for which the Respondent could dismiss the Claimant.

I also find that the disciplinary procedure adopted by the Respondent in respect of the Claimant met the requirements of Section 41, 43 and 45 of the Employment Act and that the Claimants termination was fair and justified.

Now I turn to the specific prayers.

## **NOTICE**

Since the Claimant was dismissed he is not entitled to notice. I however find that dismissal was too harsh and that no goods were lost. Termination would have sufficed. I therefore reduce the summary dismissal to normal termination and award the Claimant 1 (one) month's salary in lieu of notice.

## **COMPENSATION**

I have found that the Claimant did not suffer unfair dismissal. He is therefore not entitled to compensation. The claim is dismissed.

## **SEVERANCE PAY**

The Claimant was not declared redundant and is therefore not entitled to severance pay. The claim is dismissed.

In conclusion I award the Claimant 1 months salary in lieu of notice in the sum of Shs.27,824.00.

Each party bears its costs.

Orders accordingly.

Read in open Court and signed on this **10<sup>th</sup>** day of **May** 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**Ms. Akhaabi holding brief for Namada**

In the presence of:- \_\_\_\_\_ for Claimant

\_\_\_\_\_ **Mr. Mburugu**  
for Respondent