



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT NAIROBI  
 CAUSE NUMBER 410 OF 2012

**BETWEEN**

JAMES ONDIBA OTIENO

..... CLAIMANT

**VERSUS**

H. YOUNG & CO. E.A.

LIMITED..... RESPONDENT

*Rika J*

CC. Elizabeth Anyango

*Mr. Rakoro instructed by Rakoro and Company Advocates for the Claimant*

*Ms. Wanjiku Muriu instructed by Wanjiku Muriu and Company Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. James Ondiba Otieno filed this Claim on 13<sup>th</sup> March 2012. The Statement of Reply was received in Court on 4<sup>th</sup> April 2012. Otieno gave his evidence and closed his case on 18<sup>th</sup> September 2012. Paul Kaberia Murungi a Fuel Attendant working for the Respondent, and Samuel Gathungu Ributhi who serves as the Respondent’s Human Resource Manager, gave evidence on 26<sup>th</sup> September 2012, bringing the proceedings to a close. The dispute was last mentioned on 14<sup>th</sup> January 2013 to confirm the filing of closing submissions. The Court advised the Parties Award would be read on notice.

2. Otieno told the Court that the Respondent is an International Construction Company. It has operations in Kenya. The Respondent employed the Claimant as a driver in October 2011, at a gross salary of Kshs. 26,300 per month. He was summarily dismissed on 24<sup>th</sup> February 2012. The reasons for dismissal were given in the letter of summary dismissal which reads:

”Dear James,

*On 13<sup>th</sup> February 2012, you left a broken down fuel tank, with fuel without informing the security team of the status of the vehicle. This resulted in loss of fuel. This amounts to neglect and carelessness in the execution of your duties. In pursuance to the Employment Act Section 44 [4] [c], we are left with no other option but to summarily dismiss you from employment effective 24<sup>th</sup> February 2012. Please avail yourself*

*immediately at the Site Agent's Office together with any other employee of your choice, or shop floor union representative and make any such representations as you might have in your defense."*

3. The Claimant disputed the correctness of the Respondent's decision. He explained that he worked well with the Fuel Attendant in January 2012, and jointly made the monthly Fuel Report. The Fuel Attendant was responsible for the Fuel Truck. In event the Truck broke down, the Attendant was to report to the Management immediately. At the end of January 2012, the Claimant received his pay slip, indicating that all his salary had been deducted. He enquired why this was so from the Site Manager, who informed Otieno that fuel, was not accounted for, necessitating the deductions. Consultations with the Earthwork Manager revealed this deduction was based on wrong information. It was agreed that there would be communication to the Head Office to correct the anomaly.

4. In February 2012 the Fuel Truck broke down, about 500 metres away from the Site. The Attendant ran back to the Workshop immediately and informed the Workshop Manager. The Workshop Manager came with a Mechanic. They found out that the Truck's fan had malfunctioned. They removed the fan and went with it to the Workshop. The Claimant and the Security Guard stayed behind. At around 5.00 p.m. 2 Security men came and instructed the Claimant to go home. On the following day, he was instructed by the Transport Manager to watch over the Truck as the Transport Manager arranged how it could safely be towed to the Workshop. It was towed at around 3.00 p.m. The Claimant then worked until 28<sup>th</sup> February 2012, when he received the dismissal letter. It was alleged that he failed to report the breaking down of the Truck to the Management.

5. The vehicle was at all material times under the control of the Fuel Attendant, who also reported the incident to the Workshop Manager. The Claimant testified that he could not have failed to report, as the Fuel Truck was used in the fueling of other working Trucks, and without it, operations would have ground to a halt. All Other Machines and Trucks were fuelled and went on with their normal duties. The reasons given in the letter of dismissal were therefore not genuine, but a witch-hunt. The Respondent did not act in accordance with justice and equity in dismissing the Claimant. The Respondent started the witch-hunt in order to avoid paying the Claimant the deduction made wrongly from his salary, in January 2012. The Claimant was victimized. The Claimant prays for:-

- a. 1 month salary in lieu of notice at Kshs. 26,300;
- b. Leave of 1 month at Kshs. 26,300;
- c. Salary for January with overtime at Kshs. 40,720;
- d. Traveling allowance from November 2011 to February 2012 at Kshs. 4,000 for each month added at Kshs. 16,000; and
- e. Transport from Kwale to Kisii at Kshs. 32,000;

Sub-total..... Kshs. 141,320

The Claimant states that he worked overtime from November 2011 to March 2012. The working of this overtime pay was not clear in the Statement of Claim, but the total is shown at Kshs. 255,102. He claims 12 months' salary in compensation at Kshs. 315,000, bringing **the total claim to Kshs. 575,807.**

6. Cross-examined, Otieno testified that he had served the Respondent earlier on, between 2007 and 2009. He has never seen the Employment Form attached to the Statement of Reply at page 7. He did not sign. He agreed the person named in the Form as Zipporah Bosibori is his wife. Kerubo Otieno is his mother. The Claimant conceded he gave these details to his employer, on 26<sup>th</sup> October 2011. It is not true that he was given a written employment contract.

7. He only experienced a problem with his employer in January 2012, when the Respondent refused to pay his salary. He did not see the warning from the Respondent to him, dated 21<sup>st</sup> December 2012. The Respondent had complained that the Claimant had used diesel beyond the allowed level of consumption. The amount of Kshs. 575,807 claimed, comprises service pay, overtime pay, underpayment of salaries and transport. The pay slips showed an entry described as overtime. Many of the excess hours were excluded from the overtime shown in the pay slips. He reported to work at 5.00 a.m. closing at 9.00 p.m.

There were about 70 vehicles in all. It took about 1 ½ hours to fuel each vehicle daily. It was not true that he lazed around after fueling, in order to earn overtime.

8. He was summoned to the office and shown the letter of summary dismissal dated 24<sup>th</sup> February 2012. He wrote an explanation of the events of 13<sup>th</sup> February 2012. He asked for traveling allowance because he was living at Ukunda and traveled to Kwale to pick the lorry, at the cost of about Kshs. 4,000 per month. He did not have receipts to support the claim for transport cost from Kwale to Kisii. He transported his household belongings and family to Kisii. During the last phase of employment, he worked for 4 months. He testified that leave would be payable at the discretion of the Court. He prays the Court to allow the claim.

9. The Respondent concedes it employed the Claimant from 26<sup>th</sup> October 2011 until 24<sup>th</sup> February 2012, when the Respondent lawfully terminated the Claimant's contract of employment. He was paid for all the excess hours worked. The Respondent displayed pay slips of the Claimant for the period worked, capturing payment of overtime. His claim for more overtime pay is wrong and grossly exaggerated. He had worked for 4 months, attracting leave entitlement of 8.68 days. He had taken 8 days by the date of termination, leaving him with 0.68 days of leave, which the Respondent duly credited to the Claimant. Otieno was not honest and forthright in the performance of his duties. He was on two occasions found to have been involved in the disappearance of petroleum products belonging to the Respondent. In December 2011, the Respondent recovered the cost of lost fuel from the Claimant, justified under Section 19 [1] [b] of the Employment Act 2007. He was issued a warning letter, which he refused to sign. On 13<sup>th</sup> February 2012, 1,467 litres of fuel were lost from his truck. He was given ten days to explain the loss, which he did not do satisfactorily. There was no witch-hunt. His claim for transport allowance of Kshs. 32,000 is extortionist and unsubstantiated. Termination was justifiable under Section 44 of the Employment Act 2007.

10. Murungi the Fuel Attendant, worked with the Claimant in the same Oil Truck. On 13<sup>th</sup> February 2012 around 10.00 a.m. the vehicle developed mechanical problems. Murungi called the Workshop Manager and the Earthwork Manager. They came within ten minutes of the breakdown. He came with a mechanic, Daniel Nyabuto. Murungi was advised to come with another lorry ferrying fuel to service other vehicles in the field, which had not yet fueled at the time of the breakdown. The stalled Truck had carried a total of 5,907 litres of fuel. 1,740 litres had been used, leaving in the immobilized Truck 4,167 litres. He left the Truck under the care of Otieno, at 2.00 p.m. loaded with this remainder of fuel.

11. When the witness took the fuel stock later, it was at 2,967 litres. Otieno had left the Truck unattended. Fuel was siphoned. It was Otieno's responsibility to ensure the safety of the broken down vehicle. Murungi called the Site Agent and told him of the incident. Murungi drafted for the Claimant a letter dated 14<sup>th</sup> February 2012. The Claimant had been summarily dismissed. The Claimant asked for the witness's assistance because he did not know how to write. The contents were from the Claimant. Paragraph 1 of the letter contains what happened in the presence of Murungi. The next paragraphs contain what the Claimant told Murungi. The loss was attributable to the Driver, not the Fuel Attendant.

12. There are different vehicles, with different fuel capacities that were being serviced. The largest would take no more than ten minutes to fuel. It cannot take one hour. There was no work done at night. On cross-examination, Murungi testified there was no clocking system in place. He had not seen the extract of overtime claim registers at page 14 of the Claim, before the date of the hearing. The letter drafted for Otieno by Murungi is dated 14<sup>th</sup> February 2012. Murungi did not recall when he wrote the letter. It was written on the date of the dismissal. His draft was handwritten. He could not say if the contents were true or not. It is true Otieno informed the Workshop Manager about the breakdown, who sent a Mechanic. The vehicle was stalled overnight. It was towed the following day. The Security Firm contracted by the Respondent carried investigations after the incident. They did not interview Murungi. Otieno told him fuel was lost, leading to his dismissal. The witness did not see the Claimant's letter of dismissal. He testified that after informing his superiors of the breakdown, the Claimant ought to have stayed behind and taken care of the vehicle. The Security Officer was responsible for provision of security. The business opened at 5.00 a.m. and closed at 4.00 to 5.00 p.m. On weekends it closed at 3.00 p.m. The witness stated

in re-examination that he drafted for the Claimant the letter dated 14<sup>th</sup> February 2012 on a date close to termination.

13. Ributhi joined the Respondent in October 2011. He never met the Claimant until the day Ributhi came to Court to testify. The witness was on duty the day Otieno was dismissed. The letter of summary dismissal was drafted by the Site Agent. Ributhi confirmed due procedure was followed. He had to ensure the highlighted issues had taken place; claimant investigated; and due procedures followed. Otieno gave an explanation in a letter dated 14<sup>th</sup> February 2012. It came before dismissal. His personal employment file had a warning letter given to him with respect to excessive fuel consumption. The cost was deducted from his salary in accordance with the Employment Act 2007.

14. The company had overtime cards, which were screened at the Site and in the Office. The pay slips showed normal overtime and public holidays overtime, were paid. The cards given by Otieno to the Court were not countersigned, and did not reflect the true position. Overtime was paid to the last day worked. He was entitled to overtime; days worked; and leave days on the date of dismissal. He was paid transport allowance of Kshs. 2,000 to get to Kisii. The Report by the Seneca Security Firm concluded that the incident was stage managed. The Workshop Manager did not engage security. He was involved in pilferage. He was discharged from employment.

15. Answering questions from the Advocate for the Claimant, Ributhi testified he could not recall the exact date the letter of summary dismissal was served on the Claimant. Ributhi was stationed at the Head Office in Nairobi, while the incident took place at the Site in Kwale. The warning letter to Otieno was served by the Site Agent. He was not served with a letter to Show Cause. He was not asked to explain the loss of fuel. His job description was given in his letter of employment. The Human Resource Policy defined the maximum hours of work. He reported to his superiors that the vehicle had broken down. It was both verbal and written. Ributhi did not know whether the Claimant was interrogated by the Security Officers. There were Security Guards, both during the day and the night. They would have been expected to be guarding the broken down vehicle. They took instructions from the Site Administration. Overtime figures were calculated from overtime cards, the same cards in the Claimant's bundles. The cards were screened. Main reason for dismissal was that the Claimant did not ensure company property was taken care of. He did not follow up to ensure fuel was safe. He communicated to the Workshop Manager. It was not his duty to draw in the Security Team. He owed the company Kshs. 13,000, which was offset from his benefits. He was paid for the whole of February 2012. Ributhi clarified on redirection that the overtime cards were filled by Site Time Keeper. Site Manager and the Head Office screened the cards. Otieno was relieved his duties because he did not go out of his way to ensure the Oil Truck was secure. He should not have left his vehicle unmanned.

The Respondent prays the Court to find summary dismissal to have been fair and justifiable and dismiss the Claim in its totality.

*The Court Finds and Awards:-*

16. H Young East Africa Limited, a construction company active in Kenya, employed James Ondiba Otieno as a driver, on 26<sup>th</sup> October 2006. He was assigned duty at a Site in Kwale in the South Coast of Kenya. He worked for four months, having been summarily dismissed on 24<sup>th</sup> February 2012. The reasons for dismissal were enumerated in the letter of summary dismissal to comprise:-

- a. On 13<sup>th</sup> February 2012, he left a broken down fuel tanker, without informing the Security Team, resulting in loss of fuel; and
- b. This amounted to neglect and carelessness in execution of his duties.

As a result, the Respondent decided to summarily dismiss Otieno, under Section 44 [4] [c] of the Employment Act 2007.

16. The Claimant did not agree with the decision and has asked the Court for assistance in terms of paragraph 5 above. He worked for a period of four months, and would not have been entitled to claim compensation for unfair termination, under Section 45 [3] of the Employment Act 2007. That law required a Claimant to have worked for a continuous qualifying period of not less than thirteen months before termination, to access the remedy of compensation for unfair termination. The High Court of Kenya has however ruled that this law is unconstitutional, and there is nothing to bar the Claimant from claiming compensation for unfair termination.

17. Was there a valid reason, or reasons for termination, and was the decision fairly carried out? The Claimant has persuaded the Court there was no valid reason or reasons shown by the Respondent to justify summary dismissal. He was a Driver, who was accompanied by a Fuel Attendant, in the course of his work. His role was to drive the Fuel Tanker, which distributed fuel to other vehicles working at the Site. The Fuel Attendant was primarily responsible for the fuel. He and not Otieno was the Fuel Accounting Officer.

18. There is common evidence that the Fuel Tanker experienced a mechanical breakdown out in the field. It had 5,907 litres of fuel when it left the Centre of Operations that morning. It had distributed 1,740 litres at the time it stalled, remaining with 4,167 litres. On breaking down, Otieno did the sensible thing by calling the Earthwork Manager and the Workshop Manager. They in turn came with a mechanic. The Tanker could not be mended in good time and had to spend the night at the place of where it was stricken.

19. The Human Resource Manager Samuel Gathungu Ributhi conceded on cross-examination and in very honest terms, that Otieno communicated the breakdown to the Workshop Manager; and it was not the Claimant's duty to call in the Security Team. It would not be logical to demand more of the Claimant. The Fuel Attendant confirmed that Otieno called the Workshop Manager. Responsibility for the security of the fuel and the vehicle should have been entrusted the Security Team. It was imprudent to expect Otieno to stay overnight watching over the vehicle, while he had communicated the breakdown to his supervisor. The Report by Seneca alleges somewhat unbelievably, that the vehicle remained grounded for three days. If this is the case, it would suggest a gradual siphoning of the fuel over three days, with the full knowledge of the Managers. It is difficult to believe that Security would not be aware of the breakdown for three days, and impossible that Otieno would have been expected to have kept watch over three days. He was not the officer directly responsible for fuel; the Fuel Attendant was. He reported the breakdown of the vehicle to the relevant Managers. Beyond this, it is difficult to see what more the Claimant ought to have done. The reasons given in substantive justification in the letter of summary dismissal were not valid reasons.

20. Was the procedure in conformity to the minimum statutory termination procedure? The summary dismissal letter is dated 24<sup>th</sup> February 2012. It communicates the message to the Claimant that "*..... we are left with no other option but to summarily dismiss you.*" It then continues, "*please avail yourself immediately at the Site Agent's Office together with any other employee of your choice, or shop floor union representative, and make such representations as you might have in your defense.*" This latter statement does not make any sense, considering the first statement. The Claimant had already been dismissed. What would be the purpose of hearing him at the Site Agent's Office? The Respondent realized belatedly, that it had not granted the Claimant a hearing, and made desperate attempts to remedy the problem, offering a hearing after the decision. In the evidence of all the witnesses, there was nothing to suggest that a disciplinary panel was convened, and the Claimant heard in the procedure prescribed under Section 41 of the Employment Act. Termination was procedurally unfair.

21. Having worked for a total of 4 months, it would be way out of proportion to grant Otieno his prayer of 12 months' salary in compensation. **The Claimant is granted 1 month salary at Kshs. 26,300 as compensation for unfair termination. He is granted a similar amount as notice pay.** He claims transport allowance of Kshs. 4,000 per month from November 2011 to February 2012. This he explained, relates to transport costs he incurred in commuting between Ukunda where he resided, and Kwale, where the Site was. There was not sufficient material availed to the Court to conclude that this claim is merited. This claim is disallowed. He claims for transport costs from Kwale to his ancestral Kisii, which he incurred after summary dismissal. He had to move his bag, baggage and family. He claims passage and

luggage costs. The Respondent paid him Kshs. 2,000 under this head, but he claims Kshs. 32,000. The question is not whether it was payable, but whether adequate sum was paid. In the view of the Court, Kshs. 2,000 was inadequate to enable Otieno relocate to Kisii. It is doubtful it would suffice even for his individual one way ticket, let alone for his family, bag and baggage. **The Court grants him Kshs. 20,000 under this head.** The Court is persuaded he is not owed any leave days. He does not merit leave of one month as claimed, after working for only four months. Section 28 of the Employment Act would require him to work for twelve consecutive months, to become eligible to at least twenty days of leave with full pay. The proportionate leave computation done by the Respondent was satisfactory, and the claim for leave is rejected. His claim for overtime was unpersuasive. The pay slips reflect overtime time payments made. The Respondent was able to show that by the number of vehicle in the field and their fuel capacities, the Claimant would not be justified in claiming excessive hours of overtime. It would not require the many hours claimed, to fuel the vehicles in the field. The Claimant would not be entitled to overtime for hours spent whiling away in the field, after fueling had been done. The claim for overtime is declined. The Respondent with-held the Claimant's whole salary for January 2012, justifying this under Section 19 of the Employment Act. It was alleged Otieno had not accounted for fuel consumption for the period. He testified that the Managers at the site had realized the deduction was based on misinformation, and undertook to reverse the deduction. There was no reversal, but instead, the Respondent's Managers started to witch-hunt the Claimant to silence him over his demands. This culminated in the adverse decision taken against the Claimant on 24<sup>th</sup> February 2012. The Court has no reason to disbelieve the evidence of the Claimant on this. He was not charged with any employment offence in January 2012. An employer has no right to deduct an employee's entire salary, without hearing out the employee. Section 19(3) of the Employment Act requires that deductions made at any one time, shall not exceed two thirds of the employee's monthly salary. There can be no justification in with-holding of the entire salary. In this case, there was no justification in with-holding even a portion of Otieno's salary without having given him the benefit of a hearing. **He is granted Kshs.26,300 being his salary for January 2012. In sum-:**

***[a] Termination was unfair;***

***[b] The Respondent shall pay to the Claimant compensation of 1 month salary at Kshs. 26, 300; notice pay of Kshs. 26,300; Kshs. 26,300 being January 2012 salary; and passage and baggage cost of Kshs. 20,000- total Kshs. 98,900, to be paid within 30 days of the delivery of this Award; and***

***[c] No order on the costs.***

*Dated and delivered at Nairobi this 19<sup>th</sup> day of June 2013*

***James Rika***

***Judge***