



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

**CAUSE NO 1384 OF 2011**

**ELISHA ODIWUOR OKIYA.....CLAIMANT**

**VS**

**NEWLINE LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim dated 27<sup>th</sup> July 2011 and amended on 26<sup>th</sup> November 2012 is for unfair termination of employment. The Respondent filed a Memorandum of Reply on 20<sup>th</sup> September 2011 and the matter was heard on 10<sup>th</sup> May 2013 and 26<sup>th</sup> June 2013.
2. The Claimant testified on his own behalf and the Respondent's Assistant Production and Workshop Manager, Wasim Mohammed Aslam and the General Manager, Burak Koc testified on behalf of the Respondent. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent in 2007 in the position of Driver at a monthly salary of Kshs.18, 611. He worked as such until 4<sup>th</sup> January 2011 when his employment was terminated. The Claimant claimed that his termination was unlawful and unfair and that he was not paid his terminal benefits.
4. He therefore claimed the following:
  - a) 12 months' salary compensation for unfair termination Kshs. 223,332
  - b) Unremitted NSSF contributions for 62 months.....24,800
  - c) One month's salary in lieu of notice.....18,611
  - d) One leave day.....716

**The Respondent's Case**

5. In its Memorandum of Reply, the Respondent stated that the Claimant's monthly salary at the time of termination of his employment was Kshs. 16,183. The Respondent further stated that the Claimant's employment was terminated for lawful cause and in full compliance with the law. The Claimant was

offered his terminal dues which he declined to receive.

## **Findings and Determination**

6. The main issue for determination in this case is whether the Respondent's action in terminating the Claimant's employment was justifiable.

7. Section 45 (2) the Employment Act, 2007 of provides that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employees conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer and that***

***(c) That the employment was terminated in accordance with fair procedure.***

8. The first question then is whether the Respondent had a valid reason to terminate the Claimant's employment. The Claimant testified that on 28<sup>th</sup> December 2010, he traveled home and was due to resume duty on 3<sup>rd</sup> January 2011. He however did not resume as scheduled because he was attending to his mother who was unwell.

9. The Claimant told the Court that he communicated with his Supervisor, Jude Siata who allowed him one day off. However, when the Claimant reported for duty on 4<sup>th</sup> January 2011, he was told by the Warehouse Manager, Yusuf Karatas to go to the Head Office where he met Burak Koc who gave him a termination letter.

10. Wasim Mohammed Aslam, the Respondent's Assistant Production and Workshop Manager testified that Jude Siata's role was limited to preparing work programs. Siata had no administrative function and was therefore not authorised to allow any employee time off. Only Aslam, who was in charge of the Muster Roll was authorised to do so.

11. Aslam further told the Court that although the Claimant's conduct was otherwise acceptable, he often absented himself from work without permission. The Respondent challenged the authenticity of a recommendation letter dated 18<sup>th</sup> April 2011 signed by its Administrator Maryanne Njenga, who according to the Respondent, was not authorised to issue recommendation letters.

12. It is not in dispute that the Claimant was absent from work on 3<sup>rd</sup> January 2011 ostensibly with the Respondent's permission, which the Respondent denied. The Claimant denied that he habitually absented himself from work without permission and challenged the Respondent's records on his attendance. However, apart from his word, the Claimant did not produce any evidence to confirm that he indeed had permission to be away on 3<sup>rd</sup> January 2011. On balance therefore, it seems to me that the Respondent had a valid reason to consider disciplinary action against the Respondent.

13. Nevertheless, the Respondent failed the fairness test because it did not offer the Claimant an opportunity to defend himself as required under Section 41 of the Employment Act, 2007. The Court was therefore left guessing whether the Respondent might not have taken a less severe disciplinary action against the Claimant if it had heard him.

14. In view of the foregoing, I find the termination of the Claimant's employment unfair for want of due process and award him the equivalent of 6 months' salary in compensation. I also award his one

month's salary in lieu of notice. The claim for pay in lieu of one day's leave was admitted by the Respondent and is therefore allowed. With regard to the claim for unremitted NSSF contributions, the Respondent submitted documents to prove that the Claimant's dues were remitted to NSSF. This claim therefore fails. In calculating the Award amount, the Court has applied the figure of Kshs. 18,611 being the Claimant's gross salary.

15. The final effect of this Award is as follows:

- a. 6 months' salary compensation for unfair termination.....Kshs.111,666
- b. One month's salary in lieu of notice.....18,611
- c. Pay in lieu of leave (1 day).....716
- d. **Total**.....**130,993**

I award the costs of this case to the Claimant.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF OCTOBER 2013**

**LINNET NDOLO**

**JUDGE**

*In the Presence of:*

.....*Claimant*

.....*Respondent*