



**REPUBLIC OF KENYA**  
**THE JUDICIARY**  
**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 915 OF 2012**

EDWARD MDUNGU.....

**CLAIMANT**

**VERSUS**

THIKA COFFEE MILLS.....

**RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued his former employer Thika Coffee Mills for the unlawful termination of his services. He claimed that he was dismissed on 18<sup>th</sup> January 2012 on allegation that he had siphoned diesel from the vehicle assigned to him. He thus claimed his unpaid salary from 1<sup>st</sup> January to 18<sup>th</sup> January, unpaid imprest, 227 overtime hours, unpaid medical claim, one month's salary in lieu of notice and 12 months compensation as well as leave days.
2. The Respondent denied the Claimant's claim and averred that the allegations of siphoning diesel were evident from the number of kilometres covered vis-à-vis the consumption rate of the vehicle. It was the Respondent's case that meticulous investigations were carried out leading to the making of a criminal complaint against the complainant on allegations of theft of servant.
3. The Claimant testified and stated that he initially was employed by Kenya Nut Co. Ltd. and later transferred to the Respondent on 26<sup>th</sup> September 2006. He testified that he worked diligently and honestly and that he completed the tasks assigned. He admitted receiving a warning letter which related to movement of coffee. He testified that he was aware of the allegations of theft of diesel and breaking of seals. He confirmed attending a meeting where the CEO and Management staff and the drivers discussed the issue. He denied breaking the seal on the vehicle he had being KYN 869. He stated the vehicle did not have a seal. He stated he drove the vehicle KYN 869 for 10 years. He stated he was never charged with theft and was not taken to the police station. He stated he parked the vehicle after completion of duties in the employer's yard. He testified the vehicle was in the employer's custody overnight and when the Claimant was not on assignment. He said that there was a work ticket into which drivers recorded the kilometres, the journey and the goods to be delivered. He stated it was dangerous to even go off route as the diesel was exact for the journey.
4. In cross-examination by Miss Mumo the Claimant testified that he did not know why the vehicle had no seal. He stated that the diesel from Thika to Nairobi was 20 litres and the routes were determined. He categorically denied that he had removed the seal. On petty cash, he testified that

Mr. Sitati who was Operations Manager was required to sign the copies of the request for imprest and he would tell the Claimant and other staff to take their copy and leave the other documents with him. He testified that the forms were not signed. Petty cash is not paid on the spot as it takes a while to process.

He testified that the drivers whose vehicles had broken seals were required to write a statement and he was not one of them.

5. In re-exam he testified that he got warnings in September 2008 and his termination was in 2012 and therefore the warning had expired. He stated that he did not owe the employer. The Claimant closed his case and did not call any other witness.
6. The Respondent called Josephat Maigwa an Accountant with the Respondent Thika Coffee Mills who held the position of Finance Manager. He recalled the meeting held with the CEO and drivers. He testified that the meeting was called when it was noted that the diesel consumption was higher than the work done. Work had gone down and the fuel consumption had gone higher; 2 drivers were caught red-handed siphoning fuel. He testified that all the vehicles were fitted with seals including the one driven by the Claimant and Isuzu lorry KYN 869. He testified further that the drivers who had no seals on their vehicles wrote. He testified that after clearance staff who have resigned or been dismissed received their computed dues. He stated the Claimant was entitled to 18 days leave, days worked amounting to 14,278.85 and 11,975/= respectively. The amount was 26,254.65 less statutory taxes. The amount of Ksh. 23,661.65 was therefore due to the Claimant.

Regarding the imprests, the witness testified that the head of section did not approve the imprest due. He testified receipts should have been attached.

7. The witness was cross-examined further and stated the medical cover was changed and the Respondent no longer processed refunds as the medical cover was different from the previous medical scheme. In re-exam the witness testified that the employees were duly notified of the change in the medical offered.
8. The second defence witness was Mr. Hosea Njenga Muiro a technician at the Respondent. He testified that he installed seals on 4 Renault trucks, 2 Isuzu lorries and a Hino as well as on the Isuzu D-Max's. He stated that on heavy commercial vehicles he repaired some and installed new ones while on all the light commercial vehicles he put new seals. He could not recall the vehicles.
9. The parties filed submissions. The Claimant filed submissions on 7<sup>th</sup> October 2013 and the Respondent on 14<sup>th</sup> October 2013. Each of the parties reiterated their cases and annexed authorities in support.

The issue for determination is whether the dismissal was unfair and unlawful and if so what remedies lie. Is the Claimant entitled to the sums sought?

10. The Claimant testified at length on what transpired culminating in the dismissal. The Respondent availed witnesses who also testified as to what the Respondent did. Mr. Ndungu the Claimant testified that his vehicle was not among those whose drivers were required to record a statement. He was not arrested nor was he charged in Court. Mr. Maigwa the Finance Manager testified that 2 drivers were caught red-handed. The Claimant was not one of them. Mr. Muiro who testified on the seals he placed on the vehicles could not state categorically that the vehicle KYN 869 was one of the vehicles whose seals he had to repair.
11. Having carefully evaluated the evidence on record, the testimony of witnesses and the law, I find that the Claimant's dismissal though lawful was unfair. He was not implicated directly in the siphoning of diesel. There were many hours the vehicle was not in his custody and therefore was not proved to be complicit. He was a long serving employee and came across as an honest

witness. His vehicle however was indicated as one on which a sum of Ksh. 15,000/= worth of fuel was lost. While we cannot blame the Claimant for the loss it must be borne out that he had a duty to the employer to ensure the vehicle he drove was not handled in a manner that was careless or wasteful.

He has claimed various reliefs some of which were conceded by the Respondent. He was also entitled on account of finding above to Notice. The Notice period specified in his contract was one month.

He has sought various refund but the claims for refund had no receipts. The refunds were not processed as required. Though the Claimant cited a Mr. Sitati as the Operation Manager who constantly failed to approve the sums due, no other evidence was tendered to prove the demands for the extra expenditure were well founded. In the premises he will not recover on the said expenses.

Regarding the overtime sought, the Claimant claims 227 hours or overtime but there is no approved worksheet for the time claimed. It was not therefore possible to ascertain whether the 227 hours sought were properly computed and if they were approved.

He also claims compensation. Compensation is given where the Court is of the view that the Claimant that the dismissal was unmerited. The Claimant herein was in a meeting where performance was discussed and issues of fuel siphoning also arose. He was not directly implicated but was summarily dismissed on account of the loss attributed to the vehicle he had custody and control over for much of his working life. In the circumstances the dismissal having been found to be unfair was unmerited. He will get 2 months pay as compensation.

12. In the final result I enter judgment for the Claimant against the Respondent for:

- a. Ksh. 14,278.85 for 18 days leave.
- b. Ksh. 11,975/= for days worked in January 2012.
- c. Ksh. 21,225/= one month salary in lieu of notice.
- d. Ksh. 42,450/= as compensation

**Total Kshs. 89,928/=**

The Claimant will also have costs of the suit.

It is so ordered.

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of December 2013**

**NZIOKI WA MAKAU**

**JUDGE**