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Case Action:	Judgment
Judge:	Onesmus Ndumbuthi Makau
Citation:	Johnson Morara Nyaega v Prime Fuels [Kenya] Ltd [2017] eKLR
Advocates:	-
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 8 OF 2016**

**JOHNSON MORARA NYAEGA .....CLAIMANT**

**VERSUS**

**PRIME FUELS [KENYA] LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for terminal damages and compensation for unfair termination of the claimant's employment contract on 3/5/2013 by the respondent. It is the claimant's case that he was dismissed for no lawful cause and without being given any hearing. He therefore prays for salary in lieu of notice, compensation for unfair termination, public holidays and rest days worked, overtime and accrued leave.

2. The respondent has admitted that she had employed the claimant since 17/8/2009 but denied ever dismissing him on 3/5/2013. It is the defence case that on the said day, the claimant abandoned the respondent truck on his way from Nakuru to DR Congo and never returned to work again. It is further defence case that it is the claimant who terminated his services without prior notice when he absconded work from 3/5/2013. She has therefore lodged a counter claim against the claimant for salary in lieu of notice and refund the money advanced to him to meet the expenses of the abandoned trip.

3. The said suit was heard on 6/10/2016 when the claimant testified as Cw1 and the respondent called Mr. Michael Oyengo Ochwayo as Rw1. Thereafter both parties filed written submissions.

**CLAIMANT'S CASE**

4. CW1 told the court that he was employed by the respondent on 15/8/2009 as a truck driver. His salary was ksh.27500 per month and his duties involved long distance truck driving from Kenya to other countries including DR Congo.

5. On 3/5/2013 he went to Eldoret to load fuel for delivery in DR Congo but before starting the journey, he was called to the Nakuru office. He handed over the lorry to another driver and went to the Nakuru office on 4/5/2013 where he met Mr. RK Birai and the transport manager Mr. Abdul Karama who accused him of diverting from the assigned route while returning from Congo on 28/4/2013. He admitted that he diverted from assigned route, namely Mau summit-Kericho-Kisumu road and used Eldoret-Kandunyi-Busia route. He explained that the reason for diverting from the assigned route was because KRA had closed the route for construction works and the respondent's Nakuru office had made a circular for the change of route. He tried to explain the said reason for the diversion of the assigned route but he was ignored and was given a dismissal letter which he refused to sign. Thereafter he was not allowed into the gate to see the respondent mangers.

6. He admitted receiving ksh.38858 plus USD467 as his subsistence allowance and other disbursements on 30/4/2013 but contended that the money was for trip of 4 days which ended before he started the other last journey on 3/5/2013. He denied ever receiving the allowances and expenses for the last journey and stated that such money were payable at the border. He maintained that he was innocent and that the termination was unfair, and prayed for the damages pleaded in the suit. He concluded by stating that he worked overtime, 192 Sundays and 28 public holidays and prayed for compensation.

#### DEFENCE CASE

7. RW1 is the respondents Road Transport Manager. As at 3/6/2013, he was the Drivers Mentor working with the transport manager in dealing with the drivers issues. He told the court that on 3/5/2013, the claimant was instructed to load a truck for transit to DR Congo and he was paid his travelling allowance and border clearance fee in US dollars. Thereafter the claimant abandoned the loaded truck in Nakuru and disappeared. The then road transport manager, Mr. Abdul Karama called the claimant several times but he never responded until the time he served the suit papers. The truck was allocated Mr. Kandie to deliver the cargo and he was also paid similar allowances and disbursements.

8. RW1 produced cash registration forms duly signed by the claimants on 30/4/2013 acknowledging receipt of ksh. 38858 and USD 467. RW1 could not however confirm whether Cw1 never refunded the money to the accounts office. He also could not confirm whether or not the claimant contacted Mr. Abdul and Mr. Birai after the alleged disappearance on 3/5/2013.

#### ANALYSIS AND DETERMINATION

9. There is no dispute that the claimant was employed by the respondent as a Truck Driver. There is also no dispute that the claimant was instructed to deliver fuel cargo to DR Congo on 3/5/2013 but he did not accomplish the task. The issues for determination are:

- a. Whether the claimant was unfairly dismissed by the respondent or he deserted employment without prior notice.
- b. If the answer to (a) above is unfair dismissal whether the claimant is entitled to the reliefs sought.
- c. If the answer to (a) above is desertion, whether the respondent is entitled to the counter claim.

#### UNFAIR DISMISSAL VS DESERTION

10. CW1 contended that he was stopped from continuing with his journey to DR Congo by the respondent managers who called him to Nakuru office. That when he went to the said office, he met Mr. Birai and the transport manager Mr. Abdul Karama who accused him of diverting from the assigned route on 28/4/2013 while returning from DR Congo. RW1 was not present at the meeting but he has admitted that as at 3/5/2013, the transport manager was indeed Mr. Abdul Karama.

11. The said Mr. Abdul Karama has not testified in this suit and as such, it is my finding that the evidence by CW1 on his meeting with Mr. Abdul Karama and Mr. Birai has not been rebutted. On a balance of probability, I find that the claimant was on 3/5/2013 stopped from driving the truck to DR Congo by the respondent and when he went to the Nakuru office on 4/5/2013 as instructed, he found Mr. Abdul Karama and Mr. Birai who dismissed him for diverting from his assigned route while returning from DR Congo on 28/4/2013. It is therefore untrue and hearsay for the RW1 to allege that the claimant disappeared from employment.

12. According to Rw1, he was the Drivers Mentor and for that reason he was kept informed about the drivers' issues. If that were true, I wonder why he did not know that the claimant had diverted from his assigned route. He also did not deny the claimants allegation that KRA had closed the assigned Kisumu-Kericho route and that the respondent's Nakuru office has made a circular advising truck drivers to use the Kandunyi-Eldoret route. Consequently, I find and hold that the testimony by RW1 has failed to prove on a balance of probability that the claimant deserted work after abandoning the loaded truck on 3/5/2013.

13. The question that arises is whether the dismissal of the claimant was unfair as alleged. Under Section 45 of the Employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Rw1 made no effort towards proving the reason for dismissing the claimant or that fair procedure was followed. Instead Rw1 accused the claimant of abandoning the truck and disappearing with the allowances paid to him.

14. Having found herein above that the claimant never deserted work but that he was dismissed by the transport manager Mr. Abdul Karama for the alleged misconduct of diverting from the assigned route, the burden has shifted from the claimant under Section 47(5) of the Act, to the respondent to justify the dismissal. That burden of proof was not discharged by the respondent and I therefore find and hold that the dismissal of the claimant was unfair within the meaning of Section 45 read with Section 41 and 43 of the Act.

15. Under Section 41 of the Act, before the employer terminates the contract of service of an employee, on ground of misconduct, physical incapacity or poor performance, he must first explain the reason to the employee in a language he understands, and in the presence of a fellow employer or shop floor union representative of his choice and thereafter accord the employee and his chosen companion a chance to air their defence for consideration before the termination is decided.

16. In this case, such fair hearing was not accorded. Although the claimant was called to the Nakuru office and met Mr. Abdul karama and Mr. Birai, that encounter did not conform with the fair hearing contemplated by Section 41 of the Act. The reason for the foregoing opinion is that the claimant was not alerted that he was attending any disciplinary proceedings and he was never given the statutory right of being accompanied by a colleague of his choice to the said meeting.

17. On the other hand, the reason for the termination according to the claimant was diversion from the assigned route. The claimant admitted the diversion but explained that the route had been closed for construction works and the respondent was aware of that fact and had indeed made a circular directing her drivers to use the Kandunyi-Eldoret route which he diverted to. The said closure and the circular by the respondent has not been denied and no evidence has been led to prove that the said diversion by the claimant was a valid and fair reason for dismissing him from service. Under Section 43 of the Act, if the employer fails to prove the reason for terminating the services of his employee in a suit like this, the termination is deemed to be unfair within the meaning of Section 45 of the Act.

18. For the reason that the respondent has failed to prove and justify the reason for dismissing the claimant and that she has also failed to prove that she followed a fair procedure before dismissing the claimant, I find and hold that the dismissal of the claimant on 4/5/2013 was unfair.

#### RELIEFS FOR THE CLAIMANT

19. Under Section 49 of the Act the claimant is entitled to one month salary in lieu of notice and

compensation for unfair termination. I award him ksh.27500 being one month salary in lieu of notice plus ksh.165000 being six months salary compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant had served for about 4 years and also the fact that he did not contribute to the termination through misconduct.

20. The claims for Sunday, overtime and public holidays worked lack particulars and evidence. They are therefore dismissed. In any case CW1 admitted in evidence that there were times when he rested and met his family while waiting for the truck to load. The claim for leave are however allowed. He was entitled to 30 leave days per year. From 17/8/2009 to 4/5/2013 is 3 years 8 months equaling to 110 leave days and which translates to ksh.100,833.35.

### COUNTERCLAIM

21. The counter claim is dismissed in view of the earlier finding above that the claimant was dismissed. In addition, the claimant's evidence that the allowances paid on 30/4/2013 was not for the aborted journey of 3/5/2013 but for a previous journey was not disproved by the defence. RW1 admitted that he was not the respondent's Accountant.

### DISPOSITION

22. For the reason that the claimant was dismissed from work unfairly, I dismiss the respondent's counter claim and enter judgment for the claimant in the sum of ksh.293,333.35 plus costs and interest.

Dated, signed and delivered this 19<sup>th</sup> May 2017.

O.N. Makau

Judge



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