**THE REPUBLIC OF UGANDA**

**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**

**LABOUR DISPUTE REFERENCE NO. 055 OF 2018**

**ARISING FROM LAB/CB/048/2017**

 **BALISIMAKI MINSAKI …………………………….. CLAIMANT**

**VERSUS**

**V.G KESHWALA &SONS LTD ………..…………. RESPONDENT**

**BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1.MS. HARRIET MUGAMBWA NGANZI**

**2.MR. FX MUBUUKE**

**3. MR. FIDEL EBYAU**

 **AWARD**

**BRIEF FACTS**

In January 2016, the Claimant was employed by the Respondent as a truck driver. On 17/02/2017, his and another driver’s truck were loaded with empty crates at the Respondent’s Hoima depot for transportation to Nile Breweries in Jinja. According to the Claimant both trucks were loaded with 1674 crates each. However, when the crates were offloaded at Jinja, it was established that his truck was 54 crates short. The Claimant was subsequently summarily dismissed for the loss of the 54 crates even though the Manager at Hoima later realised that, she had a surplus of 54 crates in stock at the Depot. He contends that his dismissal was unlawful.

**ISSUES**

1. **whether the Claimant’s termination was lawful and justified?**
2. **whether the Claimant is entitled to the remedies sought?**

**REPRESENTATION**

Ms. Kawalya Erina of Platform for labour Action was for the Claimant and Asingwire Mr. Martin of Asingwire and Partners Advocates and Legal Consultants, for the Respondent

**EVIDENCE**

The Claimant testified that, he signed a written contract but he was not issued with a copy. He was assigned a truck with a yellow head number UAS 096J and white trailer. At the time, a one Mubarak Said was the transport officer and Vito Natina was the Human Resources officer. He said that, he went to the Hoima depot where his truck was loaded with 1674 crates of various types and sizes. He said he did not participate in the loading of the truck and he only signed for what had been loaded on the truck. This was because it was not his role to verify what was loaded onto the truck, but the role of the depot manager. It was his testimony that, when the truck was opened for offloading, it was full but after offloading it, it was established that 54 crates were missing. Inquiries about this were made with Hoima depot, who sent a document marked (“D1 iii”) indicating that 54 crates remained in Hoima. After that he parked the Vehicle at Keshwala, he remained with the keys to the truck and later gave them to the labour officer after he was told, that he had been dismissed. The labour officer referred the matter back to the Respondent to subject him to a disciplinary action but this did not take place. He attributed the shortage of crates to the fact that they were of different sizes and shapes therefore, they could not be uniformly parked for one to establish the actual numbers per line.

RW1 Said Mubarak in his testimony confirmed that, the Claimant was employed by the Respondent as a driver. He said he called him, to return the truck keys which he kept for 7 days. According to him, the crates which the Claimant delivered were less by 54 crates although he was not present when the truck was being off loaded. It was his testimony that, the Claimant was not dismissed but he absconded when he kept the keys and he refused to return them. He said that, the case before the labor officer was handled by the Company lawyer who was now deceased. He insisted that, the claimant was responsible for the shortage of crates.

**SUBMISSIONS**

It was submitted for the Claimant that, he did not fundamentally breach his obligations to warrant summary termination as provided under section 69(3) of the Employment Act, 2006. According to Counsel, the Claimant cannot be faulted for failing to see that 54 crates were missing because he did not personally load the truck and it was not his key responsibility to verify what was loaded onto it. She argued that his core duties were to transport the Respondent’s property to assigned areas of operation, therefore he could not be found in breach of roles which were not his fundamental obligations.

She argued, that the Crates were in fact not stolen but misplaced as indicated in the report from the Hoima Depot that, 54 crates were found in excess of their stock. She contended that, given that the 54 crates remained at the Depot in Hoima, there was an arithmetical error made by the Hoima depot and since it was not the Claimant’s responsibility to load and verify what was loaded on to the truck, the act of summarily dismissing him before conducting an investigation and a hearing was unlawful. she cited **Ochwo John vs Appliance World LDR No.327/2015,** in support of this argument. She also cited **Florence Mufumbo vs Uganda Development Bank LDC No. 138,** for the legal proposition that, there must be justifiable reasons for terminating employee, which may not be due to the fault or misconduct of the employee. She also cited sections 66 and 68 of the Employment Act to the same effect.

She insisted that, there was no evidence to indicate that, there was an investigation and a hearing before the Claimant was dismissed, therefore the dismissal was wrongful.

In reply, Counsel for the Respondent admitted that, the Claimant was employed as a driver and he was assigned MV UAS 096J, Yellow in colour. He insisted that, the 54 crates which remained at the Hoima depot were actually meant for another truck UAV 172K and not UAS 096J as claimed. He contended that, Counsel for the Claimant misinterpreted D1(iii) because it was the Hoima depot which reported that, the yellow truck was overpacked therefore it was not the truck which was under packed, as claimed.

He refuted the Claimant’s evidence because on 16/12/2020, the claimant stated in his witness statement, that, he was orally contracted to be paid gross salary of Ugx880,000/- per month and what he actually delivered was 850 crates and 100 were missing, yet in his affidavit of 21/12/2020, he stated that, he was tasked to collect 1674 crates and 54 were missing. According to Counsel, he only came up with this claim when he learnt that, he was facing criminal charges as shown in exhibits D3 and D4. Counsel insisted that, the Claimant stole the empties and when he was reported to Police, and at mediation it became apparent that he had to face disciplinary proceedings, he run away with the Keys to the Truck.

It was further his submission that, the Respondent through DW1 only called the Claimant to return the vehicle keys and did not terminate him. He insisted that the Respondent in this case was the victim because, the Claimant ran away, and refused to account for the Respondent’s property thus posing the risk of causing loss of business and returned to claim that he was terminated. It was his submission that Court should find that, Claimant abandoned his contract.

**DECISION OF COURT**

**Whether the Claimant’s termination was lawful and justified?**

It is settled that, before terminating or dismissing an employee, the employer must give the employee reason/s for his or her termination/dismissal and the reasons must be justifiable. (See, Sections 66 and 68 of the Employment Act 2006).

It is not disputed that, the Claimant reported a complaint to the Labour officer Jinja local Government, for unfair termination. It was the Respondent’s case that he only reported the matter to the labour officer after being reported to police and after he learnt that, disciplinary proceedings against him were about to commence.

After carefully perusing the evidence on the record and adduced in Court, we established that, it was not in dispute that, the Claimant was tasked with transporting 1674 empty crates from the Respondent’s Hoima Depot to Jinja Nile Breweries. It was evident that, his role was to transport the crates and no evidence was adduced to indicate that, his roles included verifying the number of crates loaded onto or offloaded off the truck. RW1 Said Muhammed testified that, he was not sure about how many crates were loaded onto the Claimant’s truck, neither was he sure about what was offloaded because, both were done in his absence. D(iii) which the Respondent relies on to accuse the Claimant stated as follows:

 *“Re Empties from Hoima*

*Dear all thanks, we followed the advise from the drivers that there are 31 lines from front to back of the containers 9x6x31. that is how we came up with 1674. there is no way we could ascertain that after loading since it was a sealed container. However on recounting the stocks here, we found out that there was an excess of 54 crates in the yard here.*

*I strongly believe that the white truck could. have been having less 1-line 9x6=54. The second yellow truck however was over packed on the last line….”*

The statement by the Manager of Hoima Depot, that “…*we followed the advise from the drivers that there are 31 lines from front to back of the containers 9x6x31. that is how we came up with 1674…”* clearly, this email clearly shows that, she was not certain of how many crates were actually loaded. It is therefore unbelievable that she could ascertain which truck was loaded with less crates. We also established that she was not very certain about the number of crates which were loaded given her statement that, *“… I strongly believe that the white truck could. have been having less 1-line 9x6=54. The second yellow truck however was over packed on the last line….”.* Given her uncertainty, the fact that the yellow truck was over packed on the last line, in our view was not sufficient to attribute the missing crates to the white truck and not the yellow one.

In any case, there is no evidence on the record to show that an investigation was commenced to ascertain that the yellow truck was actually loaded with 1674 crates as opposed to 1620 which were delivered. Given that, both trucks had 54 cases missing each, we do not think it would be farfetched to believe that they were actually loaded with 1620 crates each and not 1674 as claimed. It seems to us that the problem was at the Hoima depot, where the staff neglected their duty to make sure that they counted what was loaded instead of making estimations based on the drivers’ advice.

The Respondent did not adduce an evidence to show that the drivers’ had a role in verifying what was being loaded on the trucks. We were not able to able to apportion any blame onto the Claimant because his terms and conditions of service were not provided by the Respondent. It was therefore not possible to determine his core duties. In the circumstances, we cannot fault him for a role that was not assigned to him in the first place.

We do not believe that the Respondent reported the matter to police because had it done so, it would have attached a Police reference number or report as proof. We also did not find any record of any disciplinary proceedings against the Claimant to justify the allegations leveled against him.

Although the Respondent insists that, the Claimant absconded from duty, it is clear from the record that, when the Claimant reported the matter to the labour officer, the labour officer referred it back to the Respondent’s to carry out a disciplinary action against him but it seems they did not do so. The Respondent’s witness Said Muhammed testified that, the labour complaint between the Claimant and themselves was handled by a company lawyer who was now deceased and he was not briefed about the case.

We have no doubt that, the Claimant took the Vehivkeys to the labour officer after he learnt that he had been dismissed because RW1 said stated that he picked the keys from the labour officer. It seems to us that, it was at that point that the Labour officer referred the matter back to the Respondent for disciplinary action to be commenced against the Claimant. However, the disciplinary action was not done because, as already stated, there is no evidence of any disciplinary proceedings on the record.

It was the responsibility of the employer to investigate and prove the allegations of theft of stolen crates against the Claimant, but even after receiving advice from the labour office, she kept silent and claimed that the Claimant absconded from duty.

In the absence of a police report and evidence that the Claimant was subjected to any disciplinary proceedings, we are of the considered view that, the Respondent’s actions amounted to constructive dismissal of the Claimant, as provided under section 65(1)(c) that:

*d) where the contract of service is ended by the employee, with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee….*

Section 66 and 68 of the Employment Act(supra) require that before

In the circumstances the dismissal was unlawful.

**2.Whether the Claimant is entitled to the remedies sought?**

Having established that the Claimant was unlawfully dismissed, he is entitled to some remedies as follows;

1. He prayed for a declaration that he was unlawfully terminated. we have already established that he was unlawfully terminated.
2. **Payment in lieu of notice.**

Although Section 58 of the Employment Act, 2006 entitles him to notice or payment in lieu of notice before termination, the quantum of payment in lieu of notice is based on the duration of employment and the salary earned per month. No contract of employment was adduced by either party. However, the salary he earned was in contention. It is the responsibility of the Respondent to provide the terms and conditions of service of her employees, however, nothing was adduced regarding the Claimant’s terms and particularly his salary. In the circumstances, we shall consider the salary of Ugx. 880,000/- per month, as stated by the Claimant, to be gross salary he earned per month and hereby, award him 1 months’ salary in lieu of notice of ugx. 880,000/-, as payment in lieu of notice.

1. **compensation for failure to hear him.**

 It is settled that this remedy can only be granted by the Labour officer as provided under section 78 of the Employment Act. The Court on the other hand has wider discretion to grant general damages as compensation for unlawful termination. We have already established that the Claimant in the instant case, was unlawfully terminated, therefore he is entitled to an award of general damages. We think an award of Ugx. 1,200,000/= is sufficient as general damages.

1. **Accrued leave.**

It is the legal position that, a claim for untaken leave can only succeed where the Claimant proves that, he or she applied for leave as provided under section 54(1)(a) of the Employment Act and leave was denied. The Claimant in this case did not adduce any evidence as proof that he applied for and was denied leave, therefore, we have no basis upon which this award can be made. It is therefore denied.

1. **Interest**

All pecuniary awards shall accrue interest of 15% per annum from the date of Judgement until payment in full.

In conclusion this claim succeeds in the above terms. No order as to costs is made.

Delivered and signed by:

**1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE …………..**

**2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ……………**

**PANELISTS**

**1.MS. HARRIET MUGAMBWA NGANZI ……………**

**2.MR. FX MUBUUKE ……………**

**3. MR. FIDEL EBYAU …………..**

**DATE 10/08/2021**