



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 736 OF 2017

BETWEEN

PETER MUTUA NZEKI.....CLAIMANT

VERSUS

S.A.A. INTERSTATE TRADERS [K] LIMITED.....RESPONDENT

Court Assistant: Benjamin Kombe

C.O. Tolo & Company Advocates for the Claimant

Ngonze & Ngonze Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 11th September 2017. He avers, he was employed by the Respondent as a Turn Boy in 1983. He became a Long Distance Truck Driver in 1989. His contract was terminated by the Respondent on 22nd May 2017. By this time his salary was Kshs. 25,000 monthly.

2. He was instructed by Respondent's Director Shariff Ali, to transport goods from Mombasa Port, to Kisangani in the Democratic Republic of Congo [DRC], in September 2016. There arose a debt dispute between Ali and the Consignee, once the Claimant arrived in Kisangani, leading to the impounding of the Truck the Claimant was driving. The Truck was detained by Congolese Police. The Claimant stayed in DRC from September 2016 to May 2017, waiting for the Truck to be released.

3. The Respondent abandoned the Claimant during this period. The Claimant did not receive any salary over the period. On 22nd May 2017, the Claimant returned to Mombasa to seek the instructions of Ali. Ali told the Claimant to leave the workplace and never return. The Claimant avers, termination was without notice or just cause.

4. He prays for Judgment against the Respondent for:-

[a] 1 month salary in lieu of notice at Kshs. 25,000.

[b] Arrears of salary from September 2016 to April 2017 at Kshs. 200,000.

[c] Salary for 22 days worked in May 2017 at Kshs. 21,153.

[d] House allowance from 1989 to May 2017 at Kshs. 1,237,500.

[e] Public holidays over the same period at Kshs. 519,210.

[f] 12 months' salary in compensation for unfair termination at Kshs. 300,000.

Total Kshs. 2,302,863.

[g] Declaration that termination was unfair.

[h] Certificate of Service to issue.

[i] Costs.

[j] Interest,

[k] Any other suitable relief.

5. The Respondent filed its Statement of Response on 18th October 2017. Its position is that it was incorporated in 2004. It employed the Claimant as a Truck Driver in 2006. He worked until January 2017 when he absconded. He has been absent since, with all attempts by the Respondent to communicate with the Claimant, bearing no fruit. His last salary was Kshs. 25,000 monthly, inclusive of relevant allowances.

6. The Respondent concedes that its Trucks, 5 in all, were impounded in the DRC on account of a commercial dispute. The Respondent was in communication with all the Drivers while they remained in DRC. They were paid their salaries through m-pesa. The Claimant was paid his salary up to January 2017 when he abandoned his Truck in the DRC. The Respondent was compelled to engage another Truck Driver to replace the Claimant. The Trucks were due to be released and driven back to Kenya, at the time the Statement of Response was filed. The Respondent did not terminate Claimant's contract. He was paid all public holidays and rest days worked. His salary included house allowance. He is not entitled to the reliefs sought. He owes the Respondent 1 month salary in lieu of notice at Kshs. 25,000, which the Respondent counterclaims. The Respondent prays the Court to dismiss the Claim.

7. The Claimant gave evidence on 23rd October 2018 and 12th February 2019 when he closed his case. The Respondent's Director Omar Shariff Abdallah gave evidence on 12th June 2019 when the hearing closed. The dispute was last mentioned on 26th September 2019 when Parties confirmed filing of their Closing Arguments.

8. The Claimant adopted as his oral evidence, the contents of his Pleadings and Witness Statement. He adopted Documents contained in his List of Documents on record, as his exhibits. He restated his employment history with the Respondent, his terms and conditions of employment, and his journey to and detention in the DRC.

9. Respondent's Truck Drivers sought the assistance of Ambassador Amina Mohammed, then Kenya's Foreign Secretary. She advised this was a private dispute, and the State would not help the Drivers in extricating themselves from the shackles of the authorities in the DRC. The Drivers were stuck in DRC from September 2016 to April 2017.

10. On 22nd May 2017, the Claimant went to see his boss at Mombasa, accompanied by the Boss's Son. The Boss declined to see the Claimant. The Claimant was not given any opportunity to explain himself. The Claimant did not leave employment of his own volition. It is not true that the Claimant was employed in 2006. The N.S.S.F Statement shows the date of employment. It is not true that the Respondent was incorporated in 2004. N.S.S.F contributions were made from the year 1989. The Claimant was not called for any disciplinary hearing. The Claimant was not cross-examined as the Advocate for the Respondent was absent, at the time the Claimant gave his evidence on 12th February 2019.

11. Omar Shariff Abdallah adopted his Witness Statement, Pleadings and Documents filed by the Respondent, in his evidence. He reiterated that the Respondent did not terminate Claimant's contract. The Respondent's Trucks were stuck in the DRC for a whole year. Someone intended to steal the Trucks. The Claimant was paid his salary while in DRC. His accommodation and food was financed by the Respondent. His salary was paid to him through m-pesa, or through his Wife Elizabeth Mulei, on authority of the Claimant. M-pesa records show payment was made. He is not owed any salary.

12. The Claimant abandoned his post in January 2017. He disappeared with Respondent's car keys. His document saying he worked from 1988 is not genuine. The author of the letter alleging the Claimant was employed in 1988 swore an Affidavit, disclosing he did not have authority to issue the letter. The Respondent was registered in 2004. House allowance was an approximate sum of Kshs. 3,000. It was provided for as shown in the pay slips.

13. Cross-examined, Abdallah told the Court that the N.S.S.F Statement indicates the Claimant was employed by the Respondent on 1st July 1988. The Trucks were stuck in DRC for 1 year. The Claimant was paid basic salary of Kshs. 22,000 monthly. Pay slips do not show how much was paid as house allowance. The Claimant left work of his own volition. The Operations Manager Ambani, wrote a letter indicating that the Claimant worked as a Driver from 1988 to January 2017. Ambani has since resigned. He did not have authority to issue the letter. Redirected, Abdallah told the Court that N.S.S.F Statements do not normally list all Employers who employed a particular Employee, within the period shown. Where house allowance was not shown in the pay slips, it was probably because of faulty accounting.

The Court Finds:-

14. The Claimant was employed by the Respondent initially as a Turn Boy, then a Long Distance Truck Driver. There is dispute over his period of employment. The Claimant states he was initially employed as a Turn Boy in 1983. He was made a Truck Driver in 1989. He was dismissed on 22nd May 2017.

15. The Respondent states it employed the Claimant as a Truck Driver in the year 2006. The Respondent was incorporated in 2004. The Claimant deserted in January 2017.

16. There are 2 documents which give other dates of employment. The Certificate of Service issued by the Respondent, signed by the Operations Manager Ambani, indicates the Claimant was employed in 1988 and left in January 2017. The N.S.S.F Provisional Member

Statement of Account, specifically gives 1st July 1988 as the date the Claimant was employed by the Respondent.

17. The Certificate of Service, issued by Respondent's Operations Manager is conclusive proof of the date of employment. There is no reason for the Court to accept the Affidavit sworn by Ambani, alleging he did not have authority to issue the Certificate of Service. The date the Claimant is alleged to have left employment in the Pleadings of the Respondent, and in the evidence of Abdallah is January 2017. It is the same date shown in the Certificate of Service. The date of employment is corroborated by the N.S.S.F Statement. There is no reason why the date of employment should be any other date, other than stated in the Certificate of Service. The Respondent does not give any plausible explanation why in any event, it would present an Affidavit allegedly sworn by Ambani, to discredit the Certificate of Service, instead of bringing Ambani to Court to explain his position orally.

18. The Court does also not think it is material to the Cause, that the Respondent was registered as a Company in 2004. It was still a transportation business in 1988, capable of employing and registering Employees with the N.S.S.F. The Certificate of Service definitely shows the Respondent was in business in 1988, in whatever business form. That business employed the Claimant.

19. The period before 1988 is irrelevant. There is no prayer relating to the period, when the Claimant alleges he worked as a Turn Boy.

20. Was Claimant's contract terminated by the Respondent at all, or unfairly?

21. The Claimant drove to DRC to deliver some consignment. He was in the company of about 5 other Truck Drivers in the employ of the Respondent. While in DRC, there arose a dispute between the Respondent and the Consignee, resulting in the detention of the Trucks and their Drivers. The detention went on from September 2016. Release was under process, at the time the Respondent filed its Statement of Response, on 16th October 2017. The Claimant states he left DRC and the Truck behind and returned to Kenya in April 2017. He saw his boss on 22nd May 2017, who declined to see the Claimant. He was dismissed.

22. The Respondent, while agreeing that the Claimant and other Drivers were detained in the DRC from September 2016, states that the Claimant deserted in January 2017.

23. Again relying on the Certificate of Service issued by the Respondent, the Court would agree that the Claimant left employment in January 2017. He did not tell the Court where he was for the period between January 2017 and 22nd May 2017 when he alleges to have been summarily dismissed. Even if he arrived in Kenya in April 2017 as alleged in sections of his Pleadings, why, did he have to wait to see Ali, until 22nd May 2017?

24. In the view of the Court, the Claimant most likely returned to Kenya in January 2017. He was tired of the long detention in the DRC. Rather than resign and look for alternatives upon return to Kenya, he obtained his Certificate of Service and left.

25. He was not summarily dismissed by the Respondent. He does not merit notice pay and compensation. There is evidence that he was paid salary for the period he was in the DRC through m-pesa. There are m-pesa records showing money sent to and received by the Claimant while he was in the DRC. His Certificate of Service shows he was in employment up to January 2017. Why seek salary up to May 2017? His prayer for arrears of salary has no foundation and is declined.

26. The Claimant was a Truck Driver. The nature of his work is that it does not require driving throughout the day, week and month. There are breaks, with assignments given intermittently. He was for example assigned a journey to DRC, which ended up in impounding of his Truck for 1 year. He was not driving during that 1 year. He was idle in the DRC from day to day. He continued to receive his salary. The time spent in DRC is sufficient to cover any claims for annual leave and holiday pay. On other days, outside the DRC incident, the Claimant as a Truck Driver would be expected to have flexible working hours. He was not engaged in driving throughout, in continuity, from 1988. The prayers for annual leave and public holidays are rejected.

27. The Claimant seeks house allowance in arrears from the date he was employed as a Driver. He did not supply the Court with any pay slips or other documents which would enable the Court to say what he received as salary and the nature of that salary. There are no documents from either Party, particularly over the period 1988 to 2007, suggesting what the Claimant received as salary, and whether it was basic, consolidated or gross salary. Some of the salary vouchers exhibited by the Respondent, from 2007 to 2017, indicate the Claimant received what was described as gross or consolidated pay. From September 2016 to the time the Claimant left employment, the pay advice shows a specific sum of Kshs. 3,261 in house allowance. There is no justification in seeking house allowance in arrears of Kshs. 1.2 million.

28. The Respondent prays for notice pay, by way of Counterclaim. The Court does not think this is merited. Although the Claimant deserted, the Respondent was aware that its Drivers were detained in the DRC, for 1 year and there was a possibility they would give up on the employment relationship. Detention in the DRC may well have amounted to an act of *force majeure* relieving the Parties from the obligation to issue written notice of termination, or pay in lieu of notice. The Counterclaim is rejected.

29. Certificate of Service has already issued in form of the letter authored by the Operations Manager Ambani.

IT IS ORDERED:-

a. The Claim is declined.

b. The Counterclaim is declined.

c. No order on the costs.

Dated and delivered at Mombasa this 13th day of December 2019.

James Rika

Judge