



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 385 OF 2013

SAMUEL OCHIENG ATINDA

CLAIMANT

v

NAKURU EXPRESS SUPPLIES & SERVICES LTD

RESPONDENT

JUDGMENT

1. Samuel Ochieng Atinda (Claimant) was employed by Nakuru Express Supplies & Services Ltd (Respondent) from 1 January 2004 as a Low Loader Attendant.
2. The Claimant commenced legal action against the Respondent on 7 November 2013 alleging that around 19 December 2011, the Respondent's Director instructed him to go home and wait to be called but he was never called.
3. The Claimant therefore alleges unfair termination of employment and seeks underpayments and other reliefs accruing from the operation of the contract and statute.
4. The Respondent filed a Response on 18 March 2014 denying the Claimant's pleas and the Cause was heard on 4 February 2015 and 26 March 2015. The Claimant filed his submissions on 10 April 2015 while the Respondent was expected to file its submissions by 30 April 2015 but the same were filed on 13 May 2015 and brought to the attention of the Court only on 2 June 2015.
5. The Court has considered the pleadings, evidence and submissions on record and identified the issues for determination as, *whether the Claimant's remuneration was inclusive of house allowance, whether the Claimant was dismissed or absconded from work, if dismissal, whether the dismissal was unfair, whether the Claimant was underpaid, whether Claimant has outstanding leave and appropriate remedies.*

Whether remuneration was inclusive of house allowance

6. The Claimant was issued with an offer letter dated 1 January 2004. The clause on salary and other allowances provided that

The Company has awarded you basic salary of Kshs 4,000.00 per month but to be reviewed after every 1 (one) year when performance assessments has been carried out.

You entitled to an allowance @ Ksh. 500.00 per day but only when you are outside your workstation on official duties, this will be reviewed after every 6 months.

7. That was the only clause on emoluments.

8. Section 9 of the Employment Act, cap. 226 (repealed in 2008) provided that the employer would provide housing accommodation to the employees or pay in lieu thereof a sufficient amount as rent in addition to the wages/salary.

9. The same proviso has been maintained in the Employment Act, 2007 at section 28. Provision of housing accommodation or payment of house allowance is a basic minimum right of an employee under the previous and current statutory framework.

10. The offer letter issued to the Claimant was specific that the salary was a basic salary.

11. The Respondent's first witness Andrew Waititu however testified that the Claimant was on a gross wage.

12. By no stretch of the imagination can the Respondent contend that the wage was inclusive of house allowance considering the clear words of the contract.

13. The Respondent did not suggest that it provided the Claimant with housing and the Court finds that the salary did not include an element to pay for rent.

Whether Claimant was dismissed or he absconded

14. The Claimant's pleaded case was that he was told to go home on or around 19 December 2011 and wait to be called.

15. The Respondent's pleaded case on the other hand was that the Claimant abandoned his work station and never reported back, and therefore he lost his job because of absconding from work.

16. The Claimant stated in his testimony that he worked until 15 December 2011, when an Assistant Director Mr. Waithaka called him and instructed him to report to the Respondent's Nakuru office.

17. On 17 December 2011, he found the said Mr. Waithaka and the Director Moses Kiragu and they told him to go home and wait to be called.

18. There was no call and on 15 January 2012, he wrote to the Respondent (exh. 2) but there was no response. The Claimant went on to add that in February 2012 he went to enquire about his status but the two gentlemen again instructed him to return home and wait. He wrote another letter on 15 June 2012, (exh. 3) but again the Respondent did not respond. He stated that he delivered the 2 letters to a secretary called Wangari.

19. The Claimant denied receiving a dismissal letter dated 30 January 2012 which was in the Respondent's bundle of documents.

20. The Respondent's first witness was Andrew Waititu. He stated that the Claimant was sent away for 3 months because he had been rude to the Respondent's director. Further, he stated that towards the end of 2011, the Claimant was summoned back to work in a project in Baringo but was involved in siphoning of fuel and was therefore instructed by the Director to go home and was given a dismissal letter dated 30 January 2012.

21. The witness stated that the Claimant was given a dismissal letter by a secretary.

22. The Respondent's second witness was its Managing Director, Moses Kiragu. He stated that he terminated the Claimant's employment in December 2011, and gave him a letter of dismissal on 1 January 2012, (though he paid him wages until May 2012) because he was rude to him and the supervisors in the field.

23. On the genesis of the dismissal of the Claimant, the Director stated that the Claimant did not perform well on a project along Nairobi/Thika highway and he therefore redeployed him to the Nakuru office. While in Nakuru, he instructed the Administration Manager to lay off the Claimant but after following due process.

24. From the pleadings, three different reasons have been advanced by the Respondent for terminating the employment relationship. These are rudeness, siphoning of fuel and desertion/absence.

25. The Respondent's pleadings and its witnesses' testimonies are so irreconcilable that the same defy common sense and logic. The witnesses were categorical that the Claimant was dismissed for being rude while the defence advanced was that the Claimant was dismissed for not reporting to work.

26. The Court out rightly rejects the defence that the Claimant absconded from work and finds as a fact that he was dismissed.

Whether the dismissal was unfair

27. The Respondent did not suggest that it informed the Claimant of the allegations against him and which led to his dismissal. The Court was not informed when a hearing was held and who was present or chaired it.

28. Sections 41 and 45(2)(b)(c) of the Employment Act, 2007 has made procedural fairness an essential requirement in employment where the employer is contemplating terminating the employment of an employee.

29. The Court finds that the summary dismissal of the Claimant was procedurally unfair.

30. It is therefore not necessary to examine whether the Respondent has proved the reasons for dismissal (section 43 of the Employment Act, 2007) or that the reasons were valid and fair section 45 of the Act).

Whether Claimant was underpaid

31. The Claimant's appointment letter gave his occupation as a Low loader Attendant. This is not a category or occupation listed in the schedules to any of the Regulation of Wages Orders the Court has looked at.

32. In terms of duties, the letter did not set out the Claimant's day to day duties.

33. But in testimony, the Claimant stated that from 2006, he started driving a trailer and that he got his driving license in 2002 though it had got lost (police abstract was shown).

34. The Respondent's first witness stated that initially the Claimant was assisting a truck driver but at the same time stated that in 2010, the Claimant was given a 7 tonne truck to ferry materials to various points.

35. The Respondent's Managing Director on his part stated that the Claimant was carrying on the duties of a turn boy but in the same breathe he narrated how the Claimant was not making the required 7 trips but was managing only 4 trips ferrying/collecting red soil using a 7 tonner. Later on, he stated the Claimant became a driver in 2011.

36. It cannot be disputed that in the course of his employment, the Claimant moved from being a low loader to a truck driver. It is the time which is in dispute. According to the Claimant, he started driving trucks in 2006. But according to the Respondent this was in 2011.

37. It is the word of one against the 2 others. But a resolution of this issue is a straight jacket.

38. At least from the commencement of the Employment Act, 2007, an employer was under an obligation

to indicate the job description of an employee. That is a requirement under section 10(2) of the Act.

39. And by dint of section 13 of the Act, an employer should issue a statement of particulars of the job description not later than one month after any change in particulars of employment.

40. The Respondent did not issue any statement detailing the Claimant's new responsibilities as a truck driver.

41. And where the word of the employee runs counter to that of the employer, section 10(7) of the Employment Act, 2007 kicks in.

42. The Court relying on the statutory provisions finds that the Claimant became a truck driver in 2006, and his wages should have been in conformity with the prescribed minimum wages.

43. The Claimant's testimony was that in 2006 and 2007, he was earning a salary of Kshs 6,000/-. In 2008, the wage was increased to Kshs 7,500/- and to Kshs 10,000/- from July 2008 upto time of dismissal.

44. According to the Respondent's exh. 3, the Claimant was earning Kshs 9,700/- in January 2011 and about Kshs 9,700/- in February, March, April, May 2012.

45. The prescribed minimum wage for a driver (heavy commercial vehicle) in 2009 according to Legal Notice No. 70 of 2009 was Kshs 13,017/-. In 2010, the minimum wage was Kshs 14,319/- (Legal Notice No.98 of 2010).

46. In 2011, the minimum wage was Kshs 16,109/- (Legal Notice No. 64 of 2011).

47. The Claimant pleaded and made reference to these Legal Notices.

48. The Court finds that the Claimant was underpaid with effect from 2006 but will deal shortly with the question whether the same is statute barred (limitation) by virtue of section 90 of the Employment Act, 2007.

Whether Claimant has outstanding leave

49. The Claimant pleaded that he never went on leave for the 8 years he served. He stated as much in testimony.

50. He also denied applying for leave when shown leave application schedule in the Respondent's bundle.

51. The Respondent's first witness stated that the Claimant applied for and went on leave for 21 days in 2011.

52. The Respondent's Managing Director on the other hand stated that the Claimant was not entitled to leave because he would stay at home and report to work only when required.

53. The Court finds that the Claimant went on leave in 2011, but not the other years. This finding is because of the application of section 10(3) and 74 of the Employment Act, 2007. An employer has a responsibility to keep records.

54. But because the Employment Act, 2007 commenced in 2008, the Court holds that the Claimant would be entitled to leave encashment for 2008, 2009 and 2010 based on the prescribed minimum wages for these years.

55. The Respondent, in its submissions also urged that this head of claim is statute barred by virtue of section 90 of the Employment Act, 2007.

Limitation

56. The Respondent submitted that some of the entitlements by the Claimant were brought outside the applicable limitation period. The Court will therefore address the limitation question on these entitlements.

57. In the view of the Court, each underpayment constitutes a distinct cause of action and because the underpayments were continuous, a claim for the same should have been commenced within 1 year of the underpayments ceasing.

58. The last underpayments sought by the Claimant are for 2011 and the claim should have been brought latest by end of 2012. The Memorandum of Claim herein was filed on 7 November 2013 and the same is therefore statute barred by section 90 of the Employment Act, 2007.

59. Similarly, in my view the failure to grant leave and pay house allowance were continuing injuries and should have been claimed within 1 year of cessation.

60. The claim in respect of these entitlements should therefore have been made by February 2013, but were only brought on 7 November 2013. I find them statute barred.

Appropriate remedies

3 Months pay in lieu of notice

61. The Claimant did not deny that he was paid wages for January to March 2012. The Respondent stated this was pay in lieu of notice.

62. The Court declines to award this head of claim.

Underpayments

63. Because of the operation of section 90 of the Employment Act, 2007 this head of relief does not lie.

Annual leave

64. For similar reasons as those in the previous paragraph, this head of claim is declined.

House allowance

65. Similarly this claim is statute barred.

Compensation

66. The Court has found the summary dismissal of the Claimant procedurally unfair. He served the Respondent for about 8 years. Considering the length of service, the Court would award him the equivalent of 7 months gross wages (gross minimum wage of Kshs 18,525/-) assessed as Kshs 129,675/-.

Conclusion and Orders

67. The Court finds and holds that the Claimant did not abscond duty but was summarily dismissed unfairly and awards him and orders the Respondent to pay him

7 months wages compensation Kshs 129,675/-.

68. The heads of claim for underpayments, leave, house allowance and notice pay are dismissed.

69. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 5th day of June 2015.

Radido Stephen

Judge

Appearances

For Claimant	Mrs. Ndeda instructed by Ndeda & Associates
For Respondent	Mr. Githui instructed by Githui & Co. Advocates
Court Assistant	Nixon