

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

(Before Hon. Justice Ocharo Kebira)

AMOS MUNYOKI.....CLAIMANT

VERSUS

HAKIKA TRANSPORT SERVICES LIMITED

.....RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times, he was an employee of the Respondent, whose employment they terminated unfairly, the Claimant sued the Respondent, seeking various compensatory reliefs.

2. The Respondent opposed the Claimant's claim by filing a Response to the Memorandum of Claim, denying the Claimant's cause of action and the reliefs sought. The Respondent also counterclaimed against the Claimant. Pursuant to this court's Procedure Rules, the Claimant filed a reply to the Respondent's Response, reiterating the averments of his Statement of Claim and denying the Counterclaim.

The Claimant's Case

3. The Claimant's case was that he initially joined the Respondent in July 2004 as a turn boy. He was later promoted to the positions of storekeeper and driver.
4. He contended that during the course of his employment, he was assigned to drive motor vehicles KUT 217 and KRA 512 at different times. On 28th July 2015, he was sent to the Kenya Ports

Authority to collect his port pass. As he was returning to his station, he was involved in a road traffic accident at Mikindani stage along the Mombasa-Nairobi road.

5. Consequently, he sustained serious **injuries** and was admitted to Coast General Hospital, where he remained until October 18, 2015. Subsequently, he was transferred for additional treatment to A.I.G Kijabe and Makindu hospitals. He was later discharged and deemed fit to resume his duties. However, upon his return, the Respondent unlawfully terminated his employment, issued a certificate of service, and declined to provide his terminal benefits.
6. The termination was malicious, ill- spurred, and without a justifiable reason. The termination was not preceded by any notice. He was not afforded an

opportunity to be heard before the Respondent verbally terminated his employment.

7. He further stated that throughout the period he served the Respondent, the Respondent never allowed him to take his annual leave, or to compensate him in lieu.

8. He asserted that in the premises, he is entitled to:

a) Notice in lieu of termination.....KShs.18,000.00

b) 12 months' pay for unfair termination
.....KShs.216,000.00

c) 14 months' unpaid salaries from July 2015 to 19th
September 2016.....KShs.252,000.00

d) Underpayment, i.e., labour day 2015,
(20,528 - 18000) x 7.....KShs.195,472.00

e) Gratuity.....KShs.108,000.00

Total.....KShs.789 472.00

9. The Respondent issued him a certificate of service dated 19th September 2016. This certificate incorrectly states that he served the Respondent from January 2015 to July 2015.
10. He further stated that the Respondent was remitting National Social Security Fund contributions for him,
11. Contrary to the Respondent's assertion, he didn't abscond from duty at any time.
12. In his evidence under cross-examination, the Claimant stated that he was initially employed as a workshop cleaner. He subsequently applied for a driver role by letter dated 3rd June, 2014. On 1st January, 2015, the Respondent employed him in the role.
13. He further testified that his guarantors upon his employment as a driver were Simon Rono and Nyamu Wakiro. Whenever he reported for duty, he

could sign the attendance register. His remuneration was fixed at KShs. 610 per day, whether or not he made a trip to the port. However, for every additional trip, he was paid KShs. 150. The number of additional trips depended on the volume of work at the port. His remuneration was paid mid-month and at the end of the month.

14. He testified that the last day he was at the Respondent's premises was on 29th July, 2015, as that is the day when he got involved in an accident while in the course of his duty.
15. Shown the employee record filed by the Respondent, he acknowledged that it reflects his last entry as 25th July, 2015. He was paid KShs. 610. On 23rd July, 2015, he had been paid KShs. 1,980 and on 21st July 2015, KShs. 1,760. The record did not contain entries for 26th, 27th, 28th, and 29th July, 2015.

16. He admitted that in evidence, he had not presented any document to demonstrate that he informed the Respondent that he had been injured. This is because, following the injuries, he was admitted to the Intensive Care Unit, and as such, was not aware of what was happening around him.
17. The NSSF statement demonstrates that the Respondent made contributions to his account up to the month of August 2015.
18. The motor vehicle involved in the accident belonged to a company called Dockwide, not the Respondent.
19. In his evidence under re-examination, the Claimant testified that the record presented by the Respondent is not signed at all, and shows not who printed it.
20. He also stated that he never received any letter from the Respondent requesting an explanation for his

absence. Additionally, the Respondent did not provide the attendance register, which employees sign when reporting for duty, as evidence. The work schedule provided that, if he worked today, his alternate driver would take his shift the following day; accordingly, he wouldn't report to work.

21. He clarified that he was not given any formal letter of appointment to the role of a driver. Too, he was not given letters of appointment for the other positions mentioned in his evidence in chief.
22. The Respondent's records indicate that his NHIF contributions were paid up to September 2015. During that period, he was hospitalised and unable to work for about a year. In 2016, he received a hospital report confirming he was fit to return to work. Throughout this time, he did not work or self-employ,

and his relatives assisted him in maintaining his NHIF payments contributions.

The Respondent's Case

23. The Respondent presented 5 witnesses to testify in support of their case. The first witness was Corporal Noah Chirchir [RW1]. The witness testified that he had records and a police abstract concerning a road accident that occurred on 28th July, 2015. The accident involved the Claimant as a pedestrian and a motor tractor, registration number KTCB 291/Z568Q, owned by Dockwide Business Centre Kenya Limited. The accident did not involve any motor vehicle belonging to the Respondent. The accident occurred along the Mombasa-Nairobi road.

24. During cross-examination by Counsel for the Claimant, the witness testified that he was not the investigating officer in the matter. The P3 form in the

record shows that the accident occurred on 29th July 2005. However, the police abstract shows the date of the accident as 28th May, 2015.

25. RW2, Jimmy Mwadime Msagha, testified that he is an employee of the Respondent as a General Supervisor. In this role, he assigns vehicles to drivers and generally oversees day-to-day operations. The Claimant was allocated a tractor, registration KTCB 786k. The tractor had alternate drivers who worked in shifts with him.
26. The witness testified that on or about 27th July 2015 and 28th July 2015, the Claimant did not report to work nor did he communicate his absence. Later, on 29th July 2015, the Respondent received information that he had been involved in a road traffic accident after he tried to steal a ride on a moving tractor

belonging to Dockwide Business Centre [K] Limited and fell off the tractor.

27. On this day, he was not on duty. He had not been allocated any work. His allegation that he had been sent to pick up his port pass was false, as the Respondent had a designated Port Clerk responsible for applying for and collecting Port user movement passes for all employees.
28. Cross -examined by Counsel for the Claimant, the witness testified on 27th July, 2015, that he recorded 5 tractors. He had no duty/work attendance register or any document to demonstrate that, on the dates in issue, the tractor was being driven by his alternate driver.
29. In its pleadings, the Respondent has admitted that the Claimant reported back to work, but had severe

injuries. It is true, he reported to work after the accident.

30. When he did not report to work, he [the witness] tried to call the Claimant on the phone but did not manage to reach him. However, did not have anything to show that he made the attempt.

31. RW3, Anderson Charo Tsuma, testified that at all material times he was employed by the Respondent Company as a clerk. In that role, he would take application forms to the port and subsequently collect the gate passes for the Respondent's employees. The Claimant's port was renewed on 1st July 2015, but not on 29th July 2015. A gate pass would be renewed every two years. As such, the Claimant's claim was to expire on 1st July 2017.

32. In his evidence during cross-examination, the witness testified that on 1st July 2015, he processed port

passes for the Claimant and other employees of the Respondent. The pass is a property of KPA and may be signed only by KPA.

33. RW4, Rajab Yeri Kombe, the Respondent's Human Resources Manager, stated that the Claimant was first employed by the Respondent on 6th August 2009, as a cleaner at the Workshop Department, earning a daily wage of KShs. 325. At his request, he was appointed to the position of Tyreman on 13th October 2011, at a salary of KShs. 495 per day.
34. After serving as a Tyreman for a period of three years, he was appointed a tractor driver, following his employment. His salary was enhanced to KShs. 610. This salary was in conformity with the Legislative Supplement No. 38, Legal Notice No. 116 of the 26th June 2015, which stipulated the minimum

wage for a tractor driver as KShs. 6,891.00, thus 292.70 per day.

35. While working as a tractor driver, the Claimant was assigned to tractor Registration No. KTCB 786k. On 8th April 2015, the Claimant alleged that, while driving from the Respondent's Jomvu Depot to Global Yard, he was suddenly hit by a stone thrown by an unknown person. The Respondent completed a Dosh form for him; however, the Claimant failed to complete the form and return it.
36. On or about 27th July 2015, the Claimant did not report to work, nor communicate the reason for his absence from work. Later, on 29 July 2015, the Respondent received information that he had been involved in a road traffic accident involving him and a tractor belonging to another company. The accident occurred as he tried to steal a ride on the tractor.

37. The Claimant was not on duty when he was injured. Furthermore, the allegations that he was sent to collect his port user movement control pass are false, as the Respondent had a designated Port Clerk responsible for processing, collecting, and distributing the passes.
38. Contrary to his assertion that he was employed in 2004, his employment record shows that he was first employed in 2009 as a cleaner, in 2011 as a Tyreman, and finally in 2015 as a tractor driver.
39. During his employment, the Claimant utilised his off-duty time, free time and leave days to work with other transport companies. The documents he supplied to the Respondent in connection with his application for the position of tractor driver are evidence of this.

40. Throughout his employment, the Claimant enjoyed all the statutory and contractual benefits due to him. The Respondent remitted all statutory deductions payable on his behalf to NSSF and NHIF.
41. Cross-examined, the witness stated that the Claimant remained an employee of the Respondent up to the time he got involved in an accident. The Respondent hasn't alleged that the Claimant's employment was terminated because of desertion. Further, the Claimant was not issued a show-cause letter at any time.
42. He was not subjected to any disciplinary hearing on the grounds that he had deserted his duty. She issued him a certificate of service. He requested the certificate and was not ready to resume duty.

Analysis and Determination

43. I have carefully considered the pleadings and evidence by the parties on their respective cases, and the submissions by their Counsel, and the following issues emerge for determination;

- a) Whether the Claimant's employment was unfairly terminated;
- b) Whether the Claimant is entitled to the reliefs sought;
- c) Whether the Respondent's Counterclaim is merited.

Whether the Claimant's employment was unfairly terminated.

44. It is not in dispute that, at all material times, an employer-employee relationship existed between the parties herein. This Court is now called upon to determine whether the termination of the Claimant's employment was unfair.

45. Before I delve any further into the issue, I find it imperative to comment on the burden of proof in a matter like this. For some time, the waters did not settle over this legal issue in Kenya. There was confusion and uncertainty over the true import of Section 47[5] of the Employment Act. However, through a line of judicial precedent, it is now trite that the provision places two distinct legal burdens on the employee and the employer. The employee bears the initial burden, while the employer bears a shifted one. Therefore, where the employee fails to discharge his or her burden, the employee's case fails. Consequently, the employer won't have any burden to discharge. The employee bears the burden of establishing, prima facie, that a termination occurred and that it was unfair or, in cases of summary dismissal, wrongful. It is after the

establishment that the burden shifts to the employer to prove that the termination was justified.

46. In **Muthaiga Country Club v Kedheiha Workers [2017] eKLR**, elaborating on the provision, the Court of Appeal stated;

“The grievant, having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47[5] of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Sections 43[1] and 47[5] of the Act, which place the burden on the appellant to prove the alleged reasons for the termination of the grievants’ employment and to justify the grounds for termination.”

47. I have carefully considered the material placed before this Court. Prima facie, the Claimant

demonstrated that the termination of his employment was not procedurally valid and fair. His evidence on these two aspects was not rebutted. He thus discharged his burden under the provision, and the burden of proof shifted to the Respondent to demonstrate the reasons for the termination [section 43 of the Employment Act], that they were valid and fair [section 45], and that the dictates of procedural fairness were adhered to [section 41].

48. When addressing the presence of fairness in the termination of an employee's employment or the summary dismissal of an employee, a court must consider two statutory aspects, substantive justification and procedural fairness. Together, they form the unit of fairness. The absence of either shall render the termination or summary dismissal unfair.

49. Section 43 of the Employment Act requires an employer in a dispute, such as the instant one, to prove the reason[s] for the termination; otherwise, the termination or summary dismissal will be deemed unfair by dint of the provisions of Section 45 of the Act. It is imperative to state, however, that it is not enough for the employer to prove the reason[s]; the employer must further demonstrate that the reason[s] were fair and valid, as required by the provisions of Section 45[2] of the Employment Act.

50. Time and again, this Court has held that the burden of proof imposed on a party is discharged by that party proffering sufficient evidence on matters that he or she has to prove, unless there is an admission or the court takes judicial notice thereof.

51. In their pleadings, the Respondent averred thus;

“ 3. Save that the Claimant was in the employment of the Respondent from January 1, 2015, as a tractor driver until on or about July 2015, when he proceeded on sick off never to return to work, all the other claims, innuendos and or averments contained at paragraph 3,4, and 5 of the Memorandum of Claim are denied and the Claimant put to strict proof.

4. Further and in addition to the foregoing, the Respondent avers that sometime on or about July 29, 2015, the Claimant having been involved in a road traffic accident where he sustained injuries and was allowed some days off to seek medical attention and was only to return to work after he had fully recovered. The Respondent further avers that sometime in August 2015, when the Claimant came back to resume duties,

he was asked to provide a letter from the doctor indicating that he was fit to work since the injuries he had sustained were severe, but the Claimant never came back to the Respondent with medical records until sometime on or about September 19, 2016 when the Claimant came to request for his certificate of service which was issued to him. In the circumstances, the Claimant absconded from duties without proper reason or permission from the Respondent, which act was in breach of the Employment Act, to the extent that the Claimant did not give the Respondent sufficient, adequate and or statutory notice period and the Respondent counterclaims against the Claimant for a sum of KShs. 18,000 being one month's salary in lieu of one month's notice.....”

52. Having pleaded desertion as the reason for the separation, the Respondent was under a duty to first demonstrate that the reason existed and secondly that it was a legitimate reason to be a basis for the termination of the employment relationship between the Respondent and the Claimant.
53. This Court hasn't lost sight of the fact that during cross-examination, RW4, the Respondent's Human Resources Manager, testified that the Respondent had not made an assertion that the Claimant absconded, effectively diverging from the averments in the Respondent's pleading. As such, her evidence was not helpful in establishing the alleged desertion.
54. It was generally accepted that the Claimant was involved in a road traffic accident resulting in serious injuries. Evidence from the Respondent's witnesses and pleadings showed that the Claimant was off duty

for a legitimate reason, and the Respondent was aware of and approved this. The Respondent stated that the Claimant returned to work in August 2015 but would not be allowed to resume duties until he provided a medical clearance. However, the exact date in August 2015 when he reported back remains unclear. Additionally, it is unclear who directed him to get a medical clearance. Therefore, this Court considers the Respondent's statement to be just an assertion.

55. It was alleged that the Claimant, after being instructed to obtain the clearance, did not return to work until 19th September 2015, when he appeared and requested a certificate of service. Reasonably, from whatever angle it is looked at, this cannot be deemed as constituting desertion. At best, it would

constitute constructive resignation, which was not pleaded and proved.

56. It is now well-established that an employer claiming desertion must show that, after deciding the employee had absconded, they attempted to trace the employee, determined why he was not reporting for duty, and, convinced that the absence lacked a justifiable cause, initiated disciplinary action. Undoubtedly, the Respondent failed to demonstrate that it approached the matter in this manner.
57. Critically, this Court notes the Claimant's evidence that after the accident, he did not return to work until around 29th August 2016, after obtaining clearance from his doctor. His evidence on this, including documentary evidence, was not challenged by any of the Respondent's witnesses who testified.

58. In sum, I am unpersuaded that the Claimant deserted duty as alleged by the Respondent. I am, however, persuaded that the Claimant's employment was terminated as explained by the Claimant. As such, the Respondent has failed to convince this Court that the termination of the Claimant's employment was substantively justified.

59. Undoubtedly, the dictates of procedural fairness were not observed in the termination of the Claimant's employment.

Whether the Claimant is entitled to the reliefs sought

60. Section 49[1][c] of the Employment Act confers on the Courts the authority to grant compensatory relief in favour of an employee who has successfully challenged their employer's decision to terminate their employment as unfair. However, it is critical to

note that this authority is discretionary and exercised on a case-by-case basis. I have carefully considered the circumstances surrounding the termination of the Claimant's employment, which, in my view, were inhumane; the fact that the Respondent did not comply with the requirements of the law in terminating the employment; the length of the Claimant's service; and the fact that he did not, in any proven manner, influence the decision, and conclude that he is entitled to the compensatory award, to the extent of seven months' gross salary.

61. The Claimant sought "Underpayment, i.e., labour day 2015, Kshs.195,472.00. It is my firm view that a prayer that is merely set out in the reliefs section of a party's pleading, with factual or legal support [where applicable], not set out within the body of the pleading, cannot be available to the party. For this

reason, this Court declines to grant the relief. Furthermore, the Claimant did not tender any evidence to support the grant of the award.

62. Time without number, this Court has consistently held that gratuity is not a statutory benefit but a contractual benefit. It can only be successfully claimed by an employee, if their employment contract or Collective Bargaining Agreement, executed between their trade union and their employer, where applicable, explicitly provides for it.
63. In the case of **H. Young & Company EA Limited v Javan Were Mbago [2016] eKLR**, the Court of Appeal aptly stated;

*“This Court in the **Central Bank of Kenya v Davis Kivieko Muteti [2009] eKLR** emphasized that there is a difference between severance pay and gratuity. Gratuity, as correctly enunciated by this*

Court in Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR, denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement. Severance pay, on the other hand, is only payable under Section 40[g] of the Employment Act, where an employee is terminated on account of redundancy.”

64. Having consideration of the foregoing, I am not persuaded to grant the relief sought, as the Claimant did not elucidate that the basis for the claim was either a contractual stipulation or a term within a Collective Bargaining Agreement.

65. Undoubtedly, the Claimant’s employment was terminable by notice under section 35 of the

Employment Act. No notice was issued to the Claimant. He is entitled to notice pay under section 36 of the Act.

66. Having found as I have hereinabove, that the Claimant's employment was terminated on 19th September 2016, and considering the Respondent's admission that he was last paid a salary for July 2015, I find no difficulty in awarding compensation for the unpaid salary for the period July 2015 to 19th September 2016 [13.5 months].

67. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

a) A declaration that the termination of the Claimant's employment was at the initiative of the Respondent and that it was unfair.

b) Compensation for unfair termination of employment pursuant to the provisions of

section 49[1][c] of the Employment Act,
Kshs.126,000.

- c) One month's salary in lieu of notice,
KShs.18,000.
- d) Compensation for the unpaid salary for 13.5
months, KShs.186,472.
- e) Interest at court rates on the awarded sum, from
the date of this Judgment till full payment.
- f) Costs of the suit.

**READ, SIGNED AND DELIVERED THIS 29TH DAY OF
JANUARY 2026**

**OCHARO KEBIRA
JUDGE**

In the presence of:

Claimant:

Respondent: