



REPUBLIC OF KENYA



KENYA LAW
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**Cupstone Travels Limited (CT) v Tindi (Appeal E023 of 2023)
[2024] KEELRC 383 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 383 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E023 OF 2023
M MBARŪ, J
FEBRUARY 15, 2024**

BETWEEN

CUPSTONE TRAVELS LIMITED (CT) APPELLANT

AND

GIDEON MKANDO TINDI RESPONDENT

*(Being an appeal from the judgment of Hon. R. M. Amwayi (PM)
delivered on 20 September 2023 in Kaloleni ELRC No. E007 of 2023)*

JUDGMENT

1. The appeal herein arises from the judgment in Kaloleni ELRC No. E007 of 2023 delivered on 20 September 2023.
2. The background of this appeal is a claim filed by the respondent against the appellant on the grounds that he was employed by the appellant as a driver on 2 April 2012 with duties to transport Rabai Power Plant staff to and from work. He was assigned various motor vehicles and was lastly driving KCV 926K. the respondent was also assigned duties of transporting customers to various destinations within Kilifi, Kwale and Mombasa. The monthly wage paid was Kshs. 18,300. He claimed that the wage was an underpayment.
3. The respondent claimed that he worked until 27 January 2023 when the appellant's director one Mr. Kizito terminated his employment without the due process or payment of his terminal dues. he claimed the following;
 - a. Notice pay Kshs. 18,300;
 - b. 27 day worked in January 2023 Kshs. 16,470;
 - c. House allowance for 129 months Kshs. 354,105;



- d. 21 leave days for 10 years Kshs. 128,100;
 - e. Unremitted NHIF for 129 months Kshs. 64,500;
 - f. 12 months' compensation Kshs. 219,600;
 - g. Service pay for 10 years Kshs. 91,500;
 - h. Costs.
4. The appellant filed a reply and admitted that the respondent was employed as a driver at a wage of Kshs. 17,800 per month. his duties included driving Rabai Power Plant workers to and from work and was expected to be diligent in his duties. In November 2022, the appellant received complaints that the respondent was reckless and driving dangerously forcing the appellant to transfer him to day staff transport on probation basis. The respondent was made aware of complaints made by the client, Rabai Power Plant with regard to poor performance of his duties. In January 2023, similar complaints were made of reckless and dangerous driving. On 24 January 2023 the director called the respondent to a disciplinary hearing through letter dated 17 January 2023 and through notice dated 26 January 2023 he was dismissed after failing to attend or respond to the matters raised. termination of employment was justified, there was notice issued and the respondent is not entitled to the claims made.
 5. The learned magistrate heard the parties and in the judgment made a finding that there was unfair termination of employment and awarded the respondent as pleaded in the Memorandum of Claim.
 6. Aggrieved by the judgment, the appellant filed this appeal on grounds that the award of notice pay was in error as this was included in the final payment to the respondent including pay for January 2023 total being Kshs. 35,600. The award of underpayments was in error as these related to a period that was time barred as well as house allowances and leave arrears. Despite following the due process in terminating employment, the learned magistrate awarded 9 months' compensation which was excessive in the circumstances and the judgment should be reviewed and or set aside and the claim dismissed and the appeal allowed with costs.
 7. Both parties attended court on 19 December 2023 and agreed to address the appeal by way of written submissions.
 8. The appellant submitted that upon termination of employment, the respondent was paid for 27 days and notice pay all at Kshs. 35,600 and there was evidence submitted in this regard. Such should be taken into account to avoid double payment.
 9. The appellant submitted that the claim for underpayments was not specifically pleaded as required by law. this was only raised during written submissions and hence denied the appellant a fair chance to respond. The minimum wage for a driver of a light vehicle as of 1st July 2022 was Kshs. 15,652.30 per month and the appellant paid above the minimum wage.
 10. The award of 9 months in compensation was excessive and failed to factor in the conduct of the respondent as required under Section 45 of the *Employment Act*. This resulted in a very high award that is not justified taking into account the respondent was of gross misconduct and had several complaints against him.
 11. The respondent submitted and reiterated his case and that under the law, the employer has the duty to ensure the due process before termination of employment as held in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR and *Walter Ogal Anuro v Teachers Service*



Commission [2013] eKLR. the judgment of the trial court should be confirmed and the appeal dismissed with costs.

12. This being a first appeal, the court is required to re-evaluate the entire record and make its own conclusion, however, the court should take into account that the trial court had the opportunity to hear the witnesses and ask questions where necessary.
13. On whether notice pay and pay for days worked was properly allocated, the duty to confirm work records and what an employee has been paid rests on the employer pursuant to Section 10(6) and (7) of the Employment Act, 2007 (the Act). In the letter dated 26 January 2023 terminating the respondent in his employment with the appellant, he was offered one month notice pay. The transaction advice attached at page 31 of the Record of Appeal is not challenged by the respondent. The payment is for Kshs. 35,600.
14. The respondent was earning Kshs. 18,300 per month. a payment of Kshs. 35,600 is more than double his wage taking into account employment terminated on 26 January 2023. He was well compensated in lieu of notice and for his wages for January 2023. An award for the same in the judgment of the lower court is not justified.
15. On the matter that the awards for underpayment, house allowances and leave pay were time barred, this matter is not gone into in the written submissions. A claim is time barred under the provisions of Section 90 of the Act. Such must relate to when the cause of action arose and the nature of employment.
16. In response to the claim, the appellant admitted that the respondent was employed as a driver in April 2012 until 26 January 2023. Employment was therefore continuous and without stoppage. At the end of employment, the appellant was justified to make any lawful and due claim within 3 years as required under Section 90 of the Act read together with Section 35(4) of the Act that;
 - (4) Nothing in this section affects the right—
 - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.
17. The respondent filed his claim within time and also allowed to claim terminal dues for the entire duration of his employment.
18. With regard to assessing the claims for underpayments, the appellant's case in response was that the respondent was earning Kshs. 17,800 per month while the payment statement issued to the respondent and attached at page 15 of the Record of Appeal indicate the wage was Kshs. 18,300 per month. Such rate applied in the assessment of the terminal dues.
19. However, a driver working in Mombasa as at January 2023 had a minimum wage of Kshs. 20,517.80 plus a 15% house allowance all at Kshs. 3,077.67 total due Kshs. 23,595.47. The underpayment is Kshs. 5,295.47.
20. From May 2022 to January 2023, for 9 months, the respondent had an underpayment of Kshs. 47,659.23.



21. The minimum wage each year from 2012 to 2022 was different. The respondent ought to have pleaded and outlined the wage paid less what was set as minimum wage and claim the underpayment. A general claim in underpayment does not apply.
22. On the claim for 10 years leave days, Section 28(2) of the Act only allow an employee to accumulate annual leave days for up to 18 months unless there is proof that he applied to leave and this was declined by the employer or that he was allowed to carry over his accrued leave days to the next year. Such approval should be in writing. On the wage paid, the accrued leave days should be awarded based on the payable basic wage at Kshs. 20,517.80. For 33 days, the respondent is entitled to Kshs. 22,569.58.
23. The claim for NHIF dues is not to the employee. Such remittance should be to the statutory body.
24. Service pay is due where the employer fails to remit statutory dues. In the payment statement at page 15 of the Record of Appeal, the respondent was registered with NSSF and NHIF and pursuant to Section 35(5) and (6) of the Act, service pay is not due.
25. On the award of 9 months' compensation upon the finding that there was unfair termination of employment, such award is discretionary, save such discretion on the learned magistrate should be applied judicially. Reasons must be given as to the allocation of the given number of months starting with appreciation of the provisions of Section 45(5) of the Act.
26. The learned magistrate took into account that the respondent had worked for the appellant for over 10 years and there were no valid reasons leading to termination of employment. Such reasoning is not faulted save that the work record of the respondent was not put into account. Such record is necessary when assessing compensation.
27. The respondent does not deny that he was issued with notices of careless and reckless driving. This resulted in termination of his employment. Save for want of due process, he does not fault the substantive issue at hand. Such record of reckless and dangerous driving by a driver go to the core of his role. For lapse in due process, an award of 3 months appropriately compensates him. The due gross wage was Kshs. 23,595.47 total due is Kshs. 70,786.41.
28. On costs, these are discretionary and the learned magistrate exercised his mind properly and made an award of costs and interests. For this appeal, each party shall bear own costs.
29. Accordingly, the appeal partially succeeds and judgment in Kaloleni ELRC No. E007 of 2023 is hereby reviewed in the following terms;
 - a. Compensation at 3 months Kshs. 70,786.41;
 - b. Underpayment Kshs. 5,295.47;
 - c. Leave pay Kshs. 22,569.58;
 - d. Costs for the lower court as awarded and in this appeal, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 15 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

