



**Mutinda v Dakawou Transport Limited (Cause E024 of 2022)
[2023] KEELRC 1667 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1667 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E024 OF 2022**

**M MBARŪ, J
JULY 6, 2023**

BETWEEN

STEPHEN MUTINDA CLAIMANT

AND

DAKAWOU TRANSPORT LIMITED RESPONDENT

JUDGMENT

1. The respondent employed the claimant as a heavy commercial driver on 4 April 2013 earning a wage of Ksh.23,994 per month. The main duty was to drive the heavy and large trucks until 12 April 2021 when the respondent conducted a routine blood pressure check-up on all drivers and upon realising that the claimant's blood sugar had increased, he was advised to go for more check-up. These routine medical check-ups were essential to ensure the drivers were in good health before commencement of nay long distance journeys.
2. On 26 April 2021 and 10 May 2021 the claimant went for further medical check-up and the doctors advised that he should take lifestyle measures that would assist in lowering his blood pressure to enable him resume his duties at work. On 10 May 2021 the claimant received a call from his immediate supervisor with information that he was unfit for employment due to increase in his blood pressure. The claimant took all the necessary precaution and another review on 22 May 2021 confirmed that he was fit to resume his duties.
3. The claim is that all these processes were undertaken without formal communication. Despite the doctors advising that his blood pressure had stabilised, the respondent refused to allocate him duties. He became distressed and frantic but the respondent did not oblige which resulted in unfair termination of employment on discriminatory grounds contrary to Section 5 of the [Employment Act](#) and despite diligent serving last earning Ksh.23,999 which was an underpayment instead of what he was entitled to at Ksh.30,627.45 he was not accorded justice.



4. The claim is that there was discrimination on the grounds that there was no notice issued and the respondent had no valid reasons leading to termination of employment or payment of terminal dues. The claimant is seeking the following terminal dues;
- a. One month notice pay Ksh.23,999;
 - b. House allowance for 96 months at 15% Ksh.346,600;
 - c. Unpaid leave days 21 x 800 x 8 years Ksh.134,400;
 - d. Compensation for unfair termination of employment Ksh.287,988;
 - e. Unpaid NSSF Ksh.500 x 96 months Ksh.48,000
 - f. Unpaid salaries due to underpayments Ksh.6,628 x 12 x 8 years ksh.636,288;
 - g. General damages for discrimination; and
 - h. Costs of the suit.
5. The claimant testified in support of his case he worked diligently for the respondent until routine medical check-up found his blood pressure high upon which he was directed to change lifestyle and resume duty but on 10 May 2021 his supervisor called him with instructions that due to his increased blood pressure, he was unfit for employment. This was unfair, discriminatory and without due process. Despite being cleared as fit to work, the respondent declined to allocate him duties leading to the claimant being distressed and without income to take care of himself or his family which depended on him and the claims made should be allowed with costs.
6. The claimant testified that in the year 2013 he signed a contract of employment with the respondent and there was no indication of any house allowance to be paid. In the year 2016 his gross wage was Ksh.25,000. While in employment he had time to check up on his family. In the year 2017 he had time to visit his ailing brother and he took a day off. He was not required to sign any leave form or application. Whenever he was sick, he resumed work with a sick off sheet but the last routine check-up on his blood pressure was used to terminate his employment unfairly.
7. In response, the respondent has made mere denials that the claimant commenced employment in May 2014 as a driver. The claimant was absent from work without informing the respondent on his whereabouts or giving notice which amounted to gross misconduct and subject to summary dismissal.
8. Without being at work, the respondent could not allocate the claimant work and hence he breached the employment contract and was paid for work done. The claimant failed to notify the respondent of his illness or any medical reasons necessitating his absence from duty and the claims made are without merit and should be dismissed with costs.
9. In evidence, the respondent called Patrick Kinyanjui the transport officer who testified that the claimant was employed as a driver from April 2013 earning a wage of Ksh.17,000 inclusive of house allowance. On 26 June 2015 wage was increased due to good work performance to Ksh.20,000 per month and in July 2016 the wage was increased to Ksh.25,000.
10. The claimant was entitled to 21 leave days which he enjoyed annually and would be allowed sick off especially in august 2018.



11. Mr Kinyanjui testified that due to the nature of the respondent's business, it facilitated routine medical check-ups for all drivers to ensure that they were safe while on duty. The medical examinations collected the driver's health history while testing vision, hearing, blood pressure and laboratory tests.
12. On 12 April 2021 the claimant underwent his routine check up where the doctor found him to have abnormal high blood pressure and he was required by company policy to get respite so as to lower his blood pressure to normal level before he could resume duty but the claimant absconded duty and failed to return after being granted time off to regulate his blood pressure and he gave no feedback and could not be allocated work. This led to his termination of employment as no notice issued.
13. At the close of the hearing, both parties filed written submissions which the court has taken into account and the issues for determination are whether there was discrimination against the claimant; whether there was unfair termination of employment; and whether the reliefs sought should issue.
14. On the one hand, the claimant is asserting that the respondent failed to allocate him work after his routine check and being found to have high blood pressure and despite being cleared, no work was allocated leading to termination of employment.
15. On the one hand, the respondent's asserts that the claimant deserted duty after being given time to regain his blood pressure to normal level and hence he effectively terminated own employment.
16. The respondent's witness Mr Kinyanjui gave a very detail chronology of events and the work history of the claimant. He had been a good employee, he performed his duties well and earned accolades and salary increments. This was until 12 April 2021 when the claimant underwent routine medical check-up which found his blood pressure high and was required to regularise it back to normal.
17. All these directions and requirements of the claimant with regard to his medical check-up and what he needed to do seem to have been verbal. The respondent as the employer did not produce any record of allowing the claimant to rest and to take care of his high blood pressure and how and when he was to resume duty or the circumstances under which he was to resume duty.
18. It is human to get sick, unwell, ill or sick. This is contemplated under Section 30 and 34 of the Employment Act, 2007 (the Act). That where an employee is unwell or sick, the employer is legally bound to allow the employee time off to recuperate and secure treatment so that he can get well and back to work.
19. Where the employee is unable to resume duty, or the employee remains absent from work without due cause, recourse is not non-payment of wages. Section 44(4)(a) of the Act allow the employer to initiate disciplinary action against the employee who remains absent from work without good cause. Notice should issue and the employee allowed time to respond and make his representation in terms of Section 41(2) of the Act that;
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
20. Even in a serious case of gross misconduct or breach of contract, the employee is entitled to notice and a hearing at the shop floor.
21. The employer cannot be found to cite abandonment of employment without demonstrating what due process was undertaken to ensure the subject employee had notice and a hearing before being deemed



to have abandoned employment. In *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR that;

The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant's absenteeism the Respondent cannot lawfully plead abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them.

22. The employer has a duty to terminate employment procedurally where the employee is deemed to have abandoned work. An employee cannot be presumed to have terminated his employment.
23. Leaving the claimant at large, if at all, such resulted in the respondent failing in its duty leading to unfair termination of employment. Such is contrary to Section 41, 43 and 45 of the Act which requires notice and hearing, having valid reasons or grounds and a fair process. Employment terminated unfairly.
24. With regard to alleged discrimination against the claimant, the facts of the case addressed above, discrimination cannot accrue where the claimant was deemed to have abandoned work and hence inaction on the part of the respondent as the employer is addressed.
25. The claimant testified that he was allowed time to regularise his blood pressure and that he visited the doctors severally and was confirmed to have his blood pressure back to normal. Being away from work for medical reasons required the claimant as the employee to submit a medical certificate from an authorised medical practitioner and the record submitted in support of his claim are not what is envisaged under Section 30 and 34 of the Act. see *Dorothy Ndung'u versus Machakos University* [2015] eKLR.
26. On the claim for notice pay, on the finding above this is due, the respondent as the employer failed to take the claimant through the due process. Notice is due.
27. The respondent's witness Mr Kinyanjui testified that the last wage paid to the claimant from the year 2016 was ksh.25,000. The claimant is seeking payment of notice at ksh.23,999 and the record of the employer is deemed as the true record in this regard.
28. On the claim for house allowances for 96 months, the respondent filed an employment contract dated 3 April 2014 noting employment took effect from 5 April 2014. The wage paid was ksh.17,000 inclusive of house allowance.
The claimant is defined as a Driver.
29. On 26 June 2015 the wage was increased with effect from 1st June 2015. On 18 July 2016 the wage was increased with effect from 1st July 2016 to Ksh.25,000 being all inclusive.
30. As of 12 April 2021, a driver of a light vehicle under the Wage orders was earning ksh.17,561, a light van driver was earning ksh.18,319, a truck driver earning ksh.23,039 and a heavy commercial driver earning ksh.30,629.40.
31. Under his contract, the claimant is defined as a driver without specifications. A wage of Ksh.25,000 is hereby found appropriate all inclusive.
32. On the claim for unpaid leave for 8 years, the respondent as the custodian of work records in terms of Section 10(6) and (7) of the Act produced two leave application forms for 3 to 6 February 2017 being 2 days out of 21 available days.
33. On 11 March to 4 April 2019 the claimant took 21 leave days out of total due and a balance of zero days.



34. From April 2019 until April 2021 there is no record filed. It is imperative that once a claim such as herein filed by the claimant is served, the respondent as the employer had a legal duty to file all work records. Without proof that in the year 2020 and 2021 the claimant enjoyed his annual leave in terms of Section 28 of the act, pay is due based on the last wage paid at basic but he was earning an all inclusive wage of ksh.25,000 which is hence due for 2 years all at ksh.50,000 in lieu of taking annual leave.
35. With regard to the claimant for general damages, such is addressed above and not due.
36. On the finding there was unfair termination of employment, compensation is due.
37. The claimant worked diligently for 8 years and had a clear record. He is entitled to 8 months compensation at his last wage of ksh25,000 all at Ksh.200,000.
38. On the claim for unpaid NHIF, such monies are due to the statutory body and not to the employee.
39. On the claim for underpayments for 8 years, as analysed above, such does not arise.
On the findings above, the claimant is entitled to his costs.
40. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. a declaration that employment terminated unfairly;
 - b. compensation Ksh.200,000;
 - c. notice pay Ksh.25,000;
 - d. leave pay Ksh.50,000;
 - e. costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

