



REPUBLIC OF KENYA



KENYA LAW
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**Mwakoi v Kaylift Services Limited (Cause 787 of 2015)
[2023] KEELRC 2071 (KLR) (22 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2071 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 787 OF 2015**

J RIKA, J

AUGUST 22, 2023

BETWEEN

ANTHONY KIWOI MWAKOI CLAIMANT

AND

KAYLIFT SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on 11th May 2015. He states that he was employed by the Respondent as a forklift driver, from 4th December 2009 to October 2013. His last salary was Kshs. 11,739 monthly.
2. On 23rd October 2013, he was assigned duty at Kenya Airports Authority godown, to offload a lift. On his way back to the Respondent's premises at Lunga Lunga Road, Nairobi, he was called by a colleague whose forklift had developed mechanical problems, to offer assistance.
3. After mechanics arrived at the stricken forklift, the Claimant proceeded to Lunga Lunga. On the way, one of the mechanics called the Claimant asking to be assisted with a cylinder. The Claimant stopped and waited by the roadside for the mechanic to come for the cylinder.
4. The mechanic arrived and took the cylinder. The Claimant proceeded with his return journey. On the way, some street boys jumped onto the back of the forklift. The Claimant managed to stop and chase them away.
5. On arrival at Lunga Lunga, the Respondent's Managing Director summoned the Claimant, alleging that he ferried passengers illegally, in the forklift. The Managing Director, Thuo, did not listen to the Claimant's explanation, that the alleged passengers were street boys, who had jumped onto the forklift, and that the Claimant chased them away after a brief tussle.



6. The Director advised the Claimant that he would deduct some amount of money from the Claimant's salary, a decision the Claimant objected to. The Claimant was subsequently asked to leave the premises.
7. Summary dismissal was not based on valid reason; no charge was served upon the Claimant; he had served for 4 years; and the decision was harsh. He prays for:
 - a. Declaration that termination was unfair and unlawful.
 - b. Salary for the month of October 2013 at Kshs. 11,739.
 - c. 1-month salary in lieu of notice at Kshs 11,739.
 - d. Accrued annual leave 2009-2013 at Kshs. 49,956.
 - e. 12 months' salary in compensation for unfair termination at Kshs. 140,868.
Total...Kshs. 214,402.
 - f. Costs and interest.
8. The Respondent filed a Statement of Response on 3rd July 2015. It is conceded that the Respondent employed the Claimant from 4th December 2009 to 28th September 2013 [not October] as a forklift driver.
9. He was assigned duty at Kenya Airports Authority go-down as pleaded. He was instructed on the specific route to use, to and from the godown.
10. He completed his work, then went on a frolic of his own. He was caught by the Respondent's Managing Director, at Donholm/Savannah estates, in Nairobi, away from his designated route. He was there on private business. He was carrying unauthorized passengers, completely against the instructions given by the Respondent.
11. He was summarily dismissed for gross misconduct, having failed to follow instructions given by his superiors; unauthorised use of the Respondent's asset for personal gain; and carrying unauthorized passengers on a public road.
12. He was paid through his bank account, September 2013 salary on 1st October 2013, and pending leave at Kshs. 3,937, on 7th October 2013.
13. The Respondent does not owe him anything. The Respondent prays the Court to dismiss the Claim with costs.
14. The Claimant was heard and closed his case on 4th November 2022. The Respondent's Director, Paul Kihoro, gave evidence for the Respondent on 28th March 2023, closing the hearing. The Claim was last mentioned on 28th July 2023 when Parties confirmed filing and exchange of their Submissions.
15. The Claimant adopted his witness statement and 5 documents on record, in his evidence- in chief. He restated how he was assigned work at Kenya Airports Authority godown; how he encountered a colleague whose forklift had broken down on his way back, requiring the Claimant to stop, and assist; how farther down the road he was confronted by street boys who boarded his forklift uninvited; how he ejected the street boys from the forklift; and how upon arriving at Lunga Lunga, he was confronted by the Managing Director Thuo, with the allegation that he had detoured and ferried unauthorized passengers. He was summarily dismissed.



16. On cross-examination, the Claimant told the Court that he had not been instructed on specific route to follow between Lunga Lunga, and the godown. He used Lunga Lunga road on the whole journey. He did not call the Director, to report that his colleague's forklift had broken down. His colleague had called the Director. If the Director wanted to send the Claimant elsewhere, he could have called the Claimant.
17. The Respondent has its own mechanics. The Claimant did not know, if it had a motor vehicle yard. He was not permitted to carry passengers in the forklift. The Director alleged that the Claimant ferried passengers. The Claimant did not write explaining to the Director, that he did not carry passengers. He was not aware of terminal benefits paid, beyond his monthly salary. The Respondent was in the business of hiring out forklifts. It was paid per forklift, per hour. Each forklift operated separately. He did not recall money being deposited by the Respondent to his bank account, by way of terminal benefits.
18. There was 1 year left, to the end of his contract. Paul Thuo explained to the Claimant orally, the charges against him. The Claimant agreed that charges could be written or oral.
19. Redirected, the Claimant told the Court that his contract was for 2 years, ending in December 2013. It was terminated before the due date. He did not call the Director when his colleague's forklift was broken down, because it was not his own forklift, which was stricken. Street boys mounted his forklift briefly. He ejected them. He was not issued a letter to show cause, or disciplinary charges. The Respondent just made allegations. He could not recall if termination benefits, were deposited in his bank account.
20. Paul Kihoro adopted his witness statement and documents on record. He confirmed that the Claimant was employed by the Respondent as a forklift driver. He served his first contract in full, and was paid all benefits.
21. The contract was renewed for 2 years, 3rd December 2011 to December 2013. Renewal was on similar terms, as the first contract. His contract was terminated on 29th September 2013, for reasons given in his evidence. He detoured and ferried unauthorized passengers. Thuo found the Claimant at Donholm estate, at 5.30 p.m. carrying 5 unauthorized passengers. The Donholm route has many garages, who ask for services from forklift drivers, without paying.
22. He was paid salary for September 2013. He was paid through Equity Bank Enterprise Road, as had been the case over the past 4 years. He was paid pending leave through the same account. The bank statements showing these payments are exhibited. He amended the date of termination to indicate September, not October 2013 as the date of termination. There were 2 months left to the end of his contract
23. Cross-examined, Thuo told the Court that there was another forklift, which had developed mechanical problems. The Claimant was not allowed to tow this forklift. Its mechanics had been sent to Jomo Kenyatta International Airport [JKIA].
24. Thuo did not issue the Claimant a warning letter or letter to show cause. It was a summary dismissal. Thuo stopped the Claimant's forklift while it was ferrying passengers and ordered them out. They were not street boys, but mechanics. The Claimant was engaged in his own business. Thuo caught him red-handed. He dismissed the Claimant the morning after.
25. The Claimant was paid pending leave. Gratuity had been settled. Notice was not due, because the Claimant was involved in an act of gross misconduct. Money was transferred to his Equity Bank account 0880194784977. His prayers have no merit.



26. Redirected, Thuo told the Court that the other forklift developed mechanical problems at JKIA. Mechanics were sent there and restored the forklift, and drove it to Lunga Lunga. The Claimant deviated from the given route. Thuo found him leaving a garage in Donholm, in the company of 5 mechanics. He had gone missing for 2 hours. The Claimant was paid gratuity for the first contract as shown in the pay slip of May 2012. Salary for September 2013 was paid on 7th October 2013. Bank statements show payments made. Even if he was not found to have engaged in gross misconduct, there were only 2 months left to his contract.
27. The issues are whether the Claimant was dismissed by the Respondent for valid reason; whether fair procedure was adopted; and whether he merits the prayers sought.

The Court Finds: -

28. Documents on record show that the Claimant was employed by the Respondent as a forklift driver, through a contract dated 4th December 2009.
29. The contract was to last 2 years, ending 3rd December 2011.
30. The Claimant served to the end of the period. Renewal was granted for another 2 years, ending 3rd December 2013.
31. He was dismissed on 28th September 2013, as shown in his letter of termination, 2 months before the expiry of his second contract.
32. Validity of reason. The Court is, on the balance of probability, persuaded that the Claimant was found at Donholm, carrying 5 unauthorized passengers, in the Respondent's forklift. His explanation that the passengers were street boys, who had imposed themselves on his forklift, is not persuasive. He was captured live by his Director Thuo, carrying 5 mechanics in the forklift, way out of his designated route. It was the Director who ordered the mechanics out of the forklift. The explanation about street boys jumping onto the forklift, was a cock and bull story, told by the Claimant after he was caught red-handed, utilizing his Employer's forklift for private business, at the garages in Donholm. He had been at it for 2 hours. It is not believable that he had stopped over at the request of a fellow forklift driver whose forklift was stricken. The other forklift was at JKIA, not Donholm. The Respondent sent its mechanics to JKIA, who attended the forklift and returned it to JKIA. The Claimant did not at the very least, call this other forklift driver who called for his assistance, as his witness, to give some degree of credence to his explanation.
33. The Claimant was unmindful of the potential loss he would occasion to the Respondent, by conducting his own business using the Respondent's forklift, and by depriving the Respondent of user, while he knew well that the forklift was for hire, on an hourly rate. There was a valid reason under Section 43 to justify early termination of the Claimant's contract.
34. Procedure. The Director Thuo, dismissed the Claimant the following day, after finding the Claimant at Donholm at 5.30 p.m. There was no time given to the Claimant to explain his detour, however feeble that explanation be. There was no letter to show cause, and there was no disciplinary hearing in any form. The Claimant was denied his procedural right, under Section 41 of the [Employment Act](#).
35. Remedies. Termination was on 28th September 2013. There is no basis for the prayer for salary for the month of October 2013. Prayer 9[i] is declined.
36. The Claimant was involved in an act of gross misconduct and was summarily dismissed. His prayer 9[ii], for notice pay has no foundation and is declined.



37. He was paid his annual leave under the first contract as shown in the pay slip dated 29th May 2013. Pending leave under the second contract was paid at Kshs. 3,937.
38. He was less than candid in his evidence, that he was not aware that terminal benefits had been deposited by the Respondent, in his bank account at Equity Bank Enterprise Road. His bank statements have been availed to the Court. Prayer 9[iii] seeking annual leave pay is declined.
39. He had worked cumulatively for 4 years. He expected to go on working for 2 months at the time his contract was terminated. Termination was on 28th September 2013, while the contract was to expire on 3rd December 2013.
40. To redress procedural infirmities, he is granted equivalent of 2 months' salary in compensation for unfair termination at Kshs. 23,478.
41. No order on the costs.
42. Interest allowed at court rate, from the date of Judgment, till payment is made in full.
43. In Sum, It Is Ordered: -
 - a. Termination was on valid reason, but flawed procedure.
 - b. The Respondent shall pay to the Claimant equivalent of 2 months' salary in compensation for unfair termination at Kshs. 23,478.
 - c. No order on the costs.
 - d. Interest allowed at court rate, with effect from the date of Judgment.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 22ND DAY OF AUGUST 2023.

JAMES RIKA

JUDGE

