



**Muambi v Unik Car Hire & Safaries Limited (Petition E002 of 2022)  
[2023] KEELRC 2479 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2479 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E002 OF 2022  
M MBARÚ, J  
OCTOBER 4, 2023**

**BETWEEN**

**MUENDO MUAMBI ..... PETITIONER**

**AND**

**UNIK CAR HIRE & SAFARIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner is a male adult. The respondent is a limited liability company, a tour operating company.
2. The petition is that the respondent employed the petitioner as a driver from 15 July 1999 with duties of picking and dropping tourists to and from the airports, hotels and game parks as and when assigned such duties. The petitioner was earning Kshs. 27,000 per month as basic salary without provision of housing allowance.
3. On 4 January 2019 the petitioner reported on duty and was given tasks of picking up tourists and guests from the airport at 3AM the following morning but as he was preparing for his duties, he experienced visibility problems and could not see. The petitioner informed the respondent's director Mr Ashraf immediately and another driver was designated to do the duties.
4. The petitioner sought medical treatment but his condition deteriorated, he was subjected to various eye tests and reviews in different hospitals without improvement.
5. In February 2019 the petitioner reported back to work to update the respondent on his health condition and reduced eye sight but he was directed to resign so that his terminal dues could be processed. He declined to resign since he was still undergoing treatment and the respondent had other roles he could be assigned to undertake but at the end of February 2019, no salary was paid.
6. The petition is that the petitioner's medical condition was aggravated by the nature of his working conditions where he was required to be at work during the wee hours of the night to pick up guests



at the airport, hotels and game parks. Despite working for the respondent for over 20 years, there was no compassion to his condition or reasonable support to accommodate his challenges as he was on treatment. That the actions of the respondent were unlawful and unconstitutional.

The petitioner is seeking for orders that;

- a. Payment of notice pay in accordance with Section 35 of the [Employment Act](#) at 31,050;
  - b. Payment of house allowances at 15% of the basic wage 145,800;
  - c. Compensation for unlawful termination of employment at Kshs. 372,600;
  - d. Compensation for constitutional violations Kshs. 5,000,000; and
  - e. Costs of the petition.
7. The petition is supported by the Affidavit of the petitioner and he gave oral evidence in court that he was employed as a driver by the respondent but in mid-February 2019 he woke up with sight problems and informed the respondent. He sought medical attention at various health facilities and hospitals without his sight improving. He reported back to work but the respondent asked him to resign so that his terminal dues could be processed but he declined since, there were other duties that he could undertake instead of terminating his employment.
  8. The petitioner testified that it was a term of his employment contract not to use alcohol while at work. He only consumed alcohol after work hours.
  9. The petitioner admitted that on a few occasions, consumption of alcohol interfered with his duties and the respondent's property was stolen while in his possession.
  10. The petitioner admitted that he wrote over 10 letters to the respondent seeking pardon and an apology over use of alcohol and cigarettes while at work. That he was unable to control alcohol use and this interfered with his driving duties and on 24 July 1999 he had an accident while driving the respondent's motor vehicle. He had been allocated to drive motor vehicle registration number KAG 736K but he drove this vehicle while drunk and caused an accident. He later wrote an apology over the matter and the respondent allowed him to continue working.
  11. The petitioner testified that while driving in Tsavo National Park, a park ranger stopped him, he was found drunk and smoking which was prohibited within parts of the park and for this reason he was banned from accessing the parks. He wrote an apology to the respondent over the matter.
  12. Further, the petitioner admitted that after getting eye problems, he is not able to drive. He has attended various hospitals with the assistance of the respondent and got an assessment. The medical reports indicate that he had an eye injury as a minor and subsequently had glaucoma and over the years, due to cigarette smoking, eye sight deteriorated. In the year 2019 he fainted while at work, the respondent took him to hospital to find out what the matter was, it was discovered that he had childhood eye trauma. He has submitted all the medical reports to the respondent.
  13. Since the eye problem started, the claimant did not report to work until mid-February 2019 and the respondent paid all salaries until end of February 2019. At the time, the petitioner was aged 55 years and was willing to work and to be assigned other duties which do not require use of eyesight. He could no longer do his duties as a driver. The respondent had capacity to allocate alternative employment. The option of early retirement was offered but he declined.
  14. In reply to the petition, the respondent filed the Replying Affidavit of Sharaff Gulamabbas and who also testified in court that he is a director of the respondent and employed the petitioner as a driver



from 15 July 1999. The petitioner was not dismissed from his employment as alleged because on 4 January 2019 he called the office and requested that another driver be allocated his duties after he had experienced serious eye problems. He gave the petitioner days off to attend hospital and he went to Coast General Hospital and later he talked to a friend who referred him to Lions Eye Clinic under his personal billing to assist the petitioner address his eye problems as this could affect his employment.

15. Mr. Sharaff testified that the petitioner called and informed him that his eye condition had not improved, and as the director, he advised him to seek early retirement in writing after which the company would pay him his dues but instead, the petitioner left and filed the instant petition and has never resumed duty since 4 January 2019.
16. On 6 September 2019 he called the petitioner to resume work despite being away for over 9 months but he failed to oblige.
17. For the entire period of his employment, the petitioner had many cases of gross misconduct, each time he was called to respond, he offered an apology. On 5 October 2010 the petitioner was blocked from accessing Tsavo East Game Reserve due to misconduct prohibited by the game rangers. His conduct had severe consequences for the respondent since being denied access to the park meant that guests and tourists could not be taken there and hence this affected its core business. The petitioner had an accident due to being drunk and his health and eye condition has deteriorated due to heavy smoking and drinking alcohol. At one point the petitioner fainted while at Salt Link on safari while driving tourists when he was found drunk and could not drive, he was ferried out to hospital and another driver sent to take over his duties at great costs.
18. Over the years the petitioner had not disclosed that he had suffered eye trauma in childhood a condition which was detected upon a medical examination. Despite the poor eye sight, the respondent did not treat the petitioner differently as alleged and the claims made are without merit and should be dismissed with costs.
19. The petitioner had a consolidated wage inclusive of a house allowance. The respondent has a lean staff and main focus is the drivers out in the field and there are no other duties he can be allocated.

At the close of the hearing, parties filed written submissions.

#### Determination

20. Before addressing the matters addressed in the petition, the petitioner opted to file a petition instead of Memorandum of Claim. Such matter is addressed at length by this court and the Court of Appeal in various rulings and judgments. Unless a party is seeking for orders that a given law is unconstitutional, a Memorandum of Claim should suffice in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 that;
  - (3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.
21. The petition herein is seeking to enforce rights which are secured under the [Employment Act](#), 2007 with regard to employment. There is no matter that there is a provision thereof that is unconstitutional and should be declared so.
22. A Memorandum of Claim ought to have been filed to allow the respondent a fair chance to file the necessary responses. On this lapse, no order of costs shall issue.



23. On the petition, the petitioner's case is that on 4 January 2019 he woke up and experienced eye problems. He called the respondent to allocate his duties of a driver to another employee since he required to seek medical attention.
24. At the time of giving evidence, the petitioner's eye sight had not improved despite seeking various reviews and treatment at clinics and hospitals. He submitted his medical assessment and reports to the court and the Doctors who assessed him noted that he had suffered eye injury in childhood causing trauma and that such condition had deteriorated over time due to heavy smoking and consumption of alcohol.
25. Upon return to the office in mid- February 2019, the respondent's director Mr Sharaff testified that the petitioner's eye sight had not improved and as a caring employer and taking into account his circumstances asked him to retire so that his terminal dues could be processed and paid but the petitioner refused to do so in writing and has since not been at work. The petitioner, as a driver had been of gross misconduct and engaged in matters detrimental to his health by causing accidents, being banned from accessing Tsavo East park, being found drunk and smoking at work, all which he filed various written apologies and offered to change.
26. As a driver, the claimant admitted that he cannot undertake such duties. He has not worked as driver since the incident in January 2019.
27. Section 41 of the *Employment Act*, 2007 (the Act) allow an employer, faced with incapacity of the employee with regard to the performance of his duties to issue notice and to allow the employee to attend to make his representations. Even though being of ill health is not similar to incapacity, an employee whose eye sight is necessary for his duties as a driver cannot undertake such duties if a medical assessment indicates that the eye sight is not improving. Incapacity to undertake the driver duties kicks in, as the employee cannot be assigned the duties for which he was employed to do.
28. However, the basic requirements under the law is to issue the employee with notice to allow him urge his case and where there are alternative duties, to negotiate what is available and possible. If not, the modalities of termination of employment due to such incapacity.
29. In this case, the respondent left the petitioner at large after stopping payment of his wages in February 2019. The notice recalling him back to work on 6 September 2019 is not the notice anticipated under Section 41 of the Act. As much as goodwill to do the right thing existed, the legal duty required notice be issued to the petitioner to attend and address his incapacity to work at the shop floor.
30. An employee who remains absent from work for no good cause should be issued with a notice to show cause to attend and state why they have failed to report to work, even where such employee is suffering eye sight problems. As the employer, the duty is vested upon the respondent to issue such notice. Leaving the petitioner at large does not aid the respondent's case.
31. Whether the respondent allowed the petitioner to be away for medical attention, such matter should and ought to have regularised by written notice allowing him time off and when to resume his duties. With various reviews from various hospitals, to get reports and updates instead of allowing him time off without keeping track.
32. Ultimately, the petitioner filed this petition and is seeking notice pay, which is due in a case where the respondent as the employer failed to regularise work absence.

The petitioner was earning Kshs. 27,000 per month.



33. A driver working in Mombasa in the year 2019 was entitled to a basic pay of Kshs. 17,561. On the paid wages, the petitioner had over and above the minimum and cannot justify a claim for more in house allowances. Kshs. 27,000 is hereby awarded in notice pay.

The claim for payment of house allowances is not justified.

34. Following termination of employment without notice or the due process of the law, pursuant to Section 45 of the Act, such resulted in unfair termination of employment. However, Section 45 (5) of the Act read together with Section 74(1)(l) of the Act directs the court in assessing the compensation due to the employee, to put into account his work record and any cases of misconduct;

(l) of a record of warning letters or other evidence of misconduct of an employee; and ...

35. The petitioner admitted to the litany of gross misconduct during his entire duration of employment. He wrote various apology letters due to his gross misconduct and every time, the respondent allowed him back to work. Leading to his eye sight problems, the medical report observes that the petitioner had been a heavy smoker and was drinking alcohol. The respondent as the employer allowed him time to seek medical attention and even offered specialised treatment at Lions Eye Hospital at the director's costs.

36. Therefore, in assessing the compensation due, all these matters put into account, a one-month compensation is hereby found appropriate all at Kshs. 27,000.

37. This not being a proper constitutional petition, no damages or costs are due.

38. Accordingly, judgment is hereby entered for the petitioner against the respondent in the following terms;

- a. Notice pay Kshs. 27,000;
- b. Compensation Kshs. 27,000;
- c. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF OCTOBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

