



**Muema v Two Ways Logistics Services Limited & another (Employment and Labour Relations Cause 1553 of 2015) [2023] KEELRC 3188 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3188 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1553 OF 2015  
MA ONYANGO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**THOMAS MWANIKI MUEMA ..... CLAIMANT**

**AND**

**TWO WAYS LOGISTICS SERVICES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SENDIT AFRICA LOGISTICS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim dated 5<sup>th</sup> August, 2015 and filed on 3<sup>rd</sup> September, 2015 the Claimant avers that he was employed as a turn boy by the 1<sup>st</sup> Respondent on 14<sup>th</sup> February, 2011. That the 1<sup>st</sup> Respondent was later acquired by the 2<sup>nd</sup> Respondent and he continued working for the 2<sup>nd</sup> Respondent until 7<sup>th</sup> May, 2015.
2. The Claimant states that his starting salary was Ksh. 8,000 per month. That in April, 2014 he was promoted to the position of driver and assigned motor vehicle registration No. KBP 220A Make FH Truck which was used to deliver parcels countrywide. His salary was increased to Ksh. 15,000 upon promotion.
3. It is the averment of the Claimant that the salary was paid in cash or by cheque. That between January, and April, 2015 he was not paid any salary. That on 7<sup>th</sup> May, 2015 upon inquiring from Mr. Fernandes Johnson Muiga, the Respondent's Managing Director, about his delayed salary, he was instructed to pack up, leave and to never report back to work.
4. The Claimant avers that the termination of his employment was without a hearing, illegal and unfair. He seeks the following remedies.



- a. A declaration that the Respondents dismissal of the Claimant's employment was illegal, unlawful, unfair and harsh and that the Claimant is entitled to payment of his due terminal benefits and damages.
  - b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
  - c. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totaling to Ksh.396,150/=.
  - d. Interest on the award from the date of filing suit till payment in full.
  - e. An order for the Respondents to pay the Claimants' costs of this suit plus interest thereon.
5. The sum of Ksh. 396,150 is particularised at paragraph 11 of the Memorandum of Claim as follows:
- i. One months salary in lieu of notice being ....Ksh15,000/=
  - ii. Payment of salary for the period between January 2015 to April 2015 being Ksh. 15,000/= x 4 .....Ksh.60,000/=
  - iii. Payment of salary for the 7 days worked in the month of May, 2015 being 7/30 days x Ksh15,000/= .....3,450/=
  - iv. Payment for off days not taken (worked) for the entire period of Service  
being 4/30 days x 12 months x 3 years x Ksh.15,000/= x 2 (at double rate).....Ksh.11,700/=
  - v. Payment in lieu of untaken & unpaid leave for the entire period of service being Ksh15,000/  
= x 3 years..... Ksh45,000/=
  - vi. House allowance for the entire period of service being 15/100 x 15,000/= x 12 months x 3  
..... Ksh81,000/=
6. The Respondents filed a Memorandum of Reply dated 15<sup>th</sup> September, 2015 in which they admitted that the Claimant was an employee of the Respondents as pleaded at paragraph 4 of the Memorandum of Claim.
7. The Respondents denied all other averments in the Memorandum of Claim and stated that the Claimant absconded duty from 8<sup>th</sup> May, 2015.
8. The suit was heard on 29<sup>th</sup> October, 2019 when the Claimant testified as CW1 and was cross examined by the Respondent's counsel and closed his case. The case was then adjourned to 3<sup>rd</sup> February, 2020 for hearing of Respondent's case.
9. On 3<sup>rd</sup> February, 2020 the case could not be reached and was taken out and fixed for hearing on 3<sup>rd</sup> June, 2020.
10. Thereafter the case was fixed for hearing on several occasions when the Respondents counsel failed to appear. On 13<sup>th</sup> July 2022 the court closed the Respondent's case after the Respondents counsel yet again failed to appear in court after being properly served with hearing notice. The parties thereafter filed written submissions.
11. It is noteworthy that the Respondent did not file any list of witnesses or witness statements.



12. At the hearing the Claimant reiterated the averments in his Memorandum of Claim. He added that he worked 7 days a week without off-days. That he was not paid in lieu of off-days. He further testified that he never took any leave and was never paid in lieu thereof.
13. The Claimant further testified that he was never paid house allowance and was not provided with housing.
14. Under cross-examination the Claimant testified that he started working for the Respondents in 2011 and was never issued with a letter of appointment. He testified that Mr. Fernandes sometimes paid him in cash and other times in his bank account. That sometimes the salary was paid regularly and other times he was paid late when Mr. Fernandes financial had problems.
15. The Claimant testified that when he was employed as a driver in 2014 he travelled all over the country and operated the vehicle as both driver and turn boy.
16. He testified that he was paid all salary except for salary from January to 7<sup>th</sup> May 2015 which he claims at Ksh.75,000.
17. The Claimant testified that there is no time he absconded duty. That after his employment was terminated he was called by Kenneth Mula the Respondent's Operations Manager who requested him to deliver some goods to Malindi but he declined as he did not want to increase the debt owed to him by the Respondent.
18. He denied that he was asked to drive the vehicle to Western Kenya and in return be paid all salary arrears but refused.
19. He testified that he severally requested for off days but was denied. That he never asked for leave as the Respondents did not allow any employee to take leave.

### **Analysis and determination**

20. I have considered the pleadings the evidence adduced in court and submissions filed by both the Claimant and the Respondents.
21. The Respondents having admitted that the Claimant was in their employment, the only issues for determination are whether the Claimant's employment was unfairly terminated and if he is entitled to the prayers sought.
22. Although the Respondents filed a defence to the Memorandum of Claim and averred that the Claimant absconded duty, no evidence was adduced to prove the same as the Respondents did not call any witness or file any documents in support of their averments made in the defence and written submissions. The evidence of the Claimant therefore remains uncontroverted.
23. As provided in section 10(6) and (7) and 43 of the *Employment Act*, it is the duty of the employer to keep and produce records and also the burden of the employer to prove reasons for termination.
24. This court has severally held that where an employer alleges that an employee absconded duty, the employer must prove the steps it took to find the employee. In the case of *Felistas Acheha Ikutwa v Charles Peter Otieno* (2018) eKLR it was held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At



the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

Similarly, in the case of *Judith Atieno Owuor v Sameer agriculture and Livestock Limited* [2020] eKLR it was held that:

There being no evidence of either desertion of duty or fair termination by the Respondent, I thus return a finding that the termination of the Claimant’s employment was unfair both substantively and procedurally.”

25. In this case there is no evidence that the Claimant absconded duty. There is further no evidence that the Claimant was subjected to any due process before his employment was terminated. There is no evidence that the Claimant absconded duty as alleged by the Respondents. There is further no rebuttal of the Claimant’s evidence that his employment was terminated verbally and without notice or due process when he went to ask for his salary which had not been paid from January to 7<sup>th</sup> May 2015.
26. It is therefore my finding that the Respondents terminated the employment of the Claimant unfairly.

### **Remedies**

27. The Claimant prayed for one months’ salary in lieu of notice which he is entitled to in view of the fact that his employment was terminated unfairly. I award him Kshs. 15,000.
28. The Claimant further prayed for salary for January to April 2015 and for 7 days worked in May 2015 which the Respondent has neither controverted nor proved that it paid. I award the Claimant the same at Ksh.63,450 as prayed.
29. The Claimant prayed for off days of 4 days every month for the period worked. The Respondents did not controvert his evidence that he was never allowed to take any days off for the period he worked. I award him the same as prayed in the sum of Ksh.71,700.
30. The Respondent did not prove that the Claimant was given any annual leave for the period he worked for then from 14<sup>th</sup> February, 2011 to 7<sup>th</sup> May, 2015. He is therefore entitled to annual leave at 21 days per year worked or 1.75 days per month worked. He is thus entitled to 66.5 days for the period worked. This amounts to Ksh  $(15000 \div 26 \times 66.5)$  Ksh.38,365.40. The salary is divided by 26 in view of the fact that the leave is based on working days which excludes one rest day every week. On average there are 4 Sundays in a month hence exclusion of the 4 Sundays from a regular month of 30 days to leave a balance of 26 working days.
31. The Regulation of Wages (General) Order which was applicable at the time the Claimant’s employment was terminated provided for the basic minimum wage for a driver, medium sized vehicle at Ksh.16,602.85. The Claimant whose salary was Ksh.15,000 was therefore not in receipt of house allowance of 15%.
32. In view of the fact that the general order for 2013 was operations from 1<sup>st</sup> May, 2013, I award the Claimant house allowance from May, 2013 to April 2015 at 15% of the statutory minimum wage  $(16,602.85 + 15\%)$  being Ksh.2,490.45 for 24 months being Ksh.59,770.80.
33. Having found that the Claimant’s employment was unfairly terminated, I award him compensation equivalent to 6 months salary. Taking into account all circumstances of his case and the relevant factors set out in section 49 (4) of the *Employment Act* I award him compensation equivalent to 6 months’ salary in the sum of Ksh.90,000.
34. The total amount awarded to the Claimant is therefore:



- a. One months' salary in lieu of notice Kshs. 15,000
  - b. Salary arrears Kshs. 63,450
  - c. off days Kshs. 71,700
  - d. Annual leave Kshs. 38,365.40
  - e. House allowance Kshs. 59,770.80
  - f. Compensation Kshs. 90,000
- Total Kshs. 338,286.20

35. The Respondent shall pay the Claimant's costs of the suit and interest shall accrue from the date of Judgment at court rates.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

