



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mnoi v Hakika Transport Services Limited (Cause 916 of 2015)
[2023] KEELRC 3450 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 916 OF 2015
M MBARÚ, J
NOVEMBER 23, 2023**

BETWEEN

PRESTONE MNOI CLAIMANT

AND

HAKIKA TRANSPORT SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimant's case is that he was employed by the respondent as a truck driver in the year 1998 and worked until September 2015 when a decision was taken to transfer him from Magongo to Mazeras. He complained of the two days given to transfer owing to his family circumstances but the respondent refused to stop the transfer. The management refused him to sign the attendance register and then cited his for absenteeism.
2. The claim is that there was unfair termination of employment. There was no notice or hearing contrary to Section 41 and 43 of the *Employment Act*.
3. There were 3 hours overtime worked without compensation.
4. The claimant is seeking the following terminal dues;
 - a. 12 months' compensation Kshs. 288,000;
 - b. Notice pay sh.24,000;
 - c. Unpaid leave Kshs. 58,000;
 - d. Unpaid off days Kshs. 707,200;
 - e. Public holidays Kshs. 81,600;
 - f. Overtime of 3 hours per days Kshs. 1,861,500; and



g. Costs.

- 5 The claimant testified that he worked as a truck driver for 7 days each week continuously from 1998 to September 2015 when he was transferred. It was sudden and without notice to allow him time to organise his family and school going children from Mombasa to Mazeras. He had two days to move and had no chance to get a new house and move his family.
6. The claimant testified that on 8 October 2015 he was served with notice dated 7 October 2015 on the basis that he had absented himself from work leading to dismissal. Through the union, he lodged a complaint. On 12 October 2015 he was issued with notice to show cause over alleged absenteeism and to appear before the disciplinary committee on 22 October 2015 upon which notice terminating employment issued on 26 October 2015. He was paid Kshs. 24,800 for the month of October, 2015.
7. The claimant testified that he did not know the manager at Mazeras the new station he was required to report to. The respondent allegations that there was a bus transporting employees from Mombasa to Mazeras is not correct since he had two other colleagues he knew and were not provided with such service. Mazeras is in Kwale County and different from Mombasa and he needed time to organise his family and move. There was no response to his request to move.
8. Part of his duties as a truck driver were that every day there was a general wage of ksh.500. For every trip taken to collect goods at KPA, the first trip one was paid Ksh.600. For every other trip, one was paid ksh.600. The wages would be paid after every two weeks the day one was not at work there was no payment.
9. When the claimant was issued with show cause notice, he did not reply, the union replied and then attended disciplinary hearing. Karisa Kitsao was present as his employee representative.
10. On the wages paid, every day had a different pay. Upon work attendance, one was paid ksh.600 plus a bonus for each trip taken.
11. In response, the respondent denied the claims by the claimant and that there was unlawful termination of his employment and the claim with regard to notice pay, leave pay, severance pay, pay for public holidays and overtime claims are without merit. The claimant was a heavy commercial vehicle driver, having been internally transferred from one department to another did not report to his work station in October 2015 and hence absconded his work and did not return to the employment of the respondent.
12. The internal transfer of the claimant did not affect the claimant's terms of service and when he claimant absented from his station of work, the respondent constituted a disciplinary panel which invited the claimant and held disciplinary proceedings against the claimant and resulted into the regular and lawful termination of the claimant's services, the panel having found that the claimant had no sufficient grounds to exonerate his conduct.
13. The response is also that there is another claim ELRC Claim No.758 of 2015 – Boniface Olienge & 67 Others v Hakika Transport Services Limited arising out of the same circumstances of this case and the respondent shall seek this case be stayed pending the determination of the first sit.
14. The claimant was paid his terminal dues at the end of his employment and his case should be dismissed with costs.
15. In evidence, the respondent called Rajab Kombe who testified that the claimant left his employment after refusing to go on transfer. His transfer was to take effect on 15 September 2015. He asked for time to prepare. The respondent asked him to be specific in his request and was given 7 days to report to the new station. On 7 October 2015 he was given more time to report to the new station. When he was



- given notice, he refused to accept it. The claimant reported the matter to the union which made a reply on his behalf. The respondent had not written to the union and the claim that there was no notice is not correct since the union responded on behalf of the claimant. He still declined to take the transfer.
16. Mr Kombe testified that on 22 October 2015 the claimant was called for a meeting. He was served with a notice to show cause dated 17 October 2015 which he declined to sign but he attended the meeting. The meeting and notice related to the claimant's absenteeism from work. The biometric system shows the claimant was not reporting at work. His assertion that he continued reporting to Changamwe site is not correct as this was not his station. From 16 September 2015, the claimant was not at work. His wages were paid at Kshs. 19,400 comprising the allocated daily wage of Ksh.600 and for every trip he made to the port, the first had a bonus of Ksh.500 and every other trip had a bonus of Ksh. 600 which was paid. This was a system developed by the drivers to ensure work was done effectively and the respondent adopted the system.
 17. The claimant took his annual leave and public holidays. He would work for 7 days and then take a break. This is noted in the biometric system. He took several off days per month. while on off, the day was not paid for. Work depended on ships docking at KPA yard and the claimant would remain on stand by for allocation of work. The transfer to Mazeras was where work was available but he declined the transfer on the basis that he would incur family relocation costs but the respondent had a staff bus from Changamwe to Mazeras every morning and evening. The manager was based at Changamwe and would be picked in the staff bus daily which could have applied to the claimant. Failure to report to his station resulted in absenteeism leading to summary dismissal.
 18. At the close of the hearing, parties filed written submissions.
 19. The claimant submitted that he was a truck driver from 1st May 1998 but his employment was unfairly terminated on 26 October 2015. Due to the nature of his duties of transporting cargo from the KPA Port to the yard, he was residing at Mombasa with his family. On 16 September 2015 he was assigned duties outside Mombasa to Mazeras which required him to prepare his family and hence applied to be allowed time but there was no response. Through his union, Kenya Long Distance Truck Drivers and Allied Workers Union, a response dated 9 October 2015 was written and the claimant was reporting at the Jomvu station but was not allowed to sign-in or allocated with any work. He was then compelled to attend disciplinary hearing without notice of any matters. The subsequent summary dismissal was without appreciating the improper transfer to a new station and the failure by the respondent to respond on his request.
 20. In the case of Ronald Odeke v Fidelity Security Limited [2011] eKLR the court held that it does not matter the offence the employee is accused of, if there is no hearing, termination of employment is unfair. In Josephine Akinyi v Farhiyo Mohamed [2012] eKLR the court held that it is the duty of the employee challenging the termination of employment to establish that a termination took place and why it was unfair. The employer on the other hand is required to justify the reasons for termination of employment. In Francis Maina Kamau v Lee Construction [2014] eKLR the court held that without evidence of the employer complying with the law, termination of employment was unfair.
 21. The respondent submitted that the claimant failed to discharge the burden of proof with regard to his claim of unfair termination of employment as held in George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR. The respondent had valid reasons leading to the termination of employment after the claimant refused to go on transfer and absented himself from duty. The claimant admitted that he received directions to go on transfer but he declined to report to his new station and this justified summary dismissal under Section 44(4) of the Employment Act as held in CFC Stanbic Bank Ltd v Danson Mwashako Mwakuona [2015] eKLR. The respondent took the claimant through a



disciplinary process and he was represented by his representative but failed to give satisfactory responses as to his conduct and hence justified termination of his employment.

Determination

22. The claimant's case is that he was an employee of the respondent from the year 1998 until October 2015 when the respondent unfairly dismissed him from his employment. The respondent asserted that the claimant was a casual truck driver and would be paid a daily wage and bonuses for work done and that he was transferred to a new station but declined to do so leading to absence from work and this justified summary dismissal.
23. The employment of the claimant by the respondent was continuous and regulated. He remained under the control and guidance of the respondent. He was allocated work on a daily basis and hence expected to take a transfer as directed on 16 September 2015.
24. On this basis, there was an employment relationship. Without any written contract with terms and conditions of service thereof. Based on the continuous service of the claimant for duties that were not expected to end within casual employment, his employment became protected under the provisions of Section 37 of the *Employment Act*, 2007 (the Act).
25. On 16 September 2015 the respondent directed the claimant to report to a new station, Mombasa to Mazeras. On 18 September 2015 the claimant responded in writing stating that he had a family and school going children in Mombasa and Mazeras was 30 kilometres away and hence he needed time to consult with his family. He also noted that he had requested for a loan facility to facilitate his movements to the new station.
26. On 24 September 2015 the claimant wrote a follow up message to the respondent that since his transfer he had not been allowed to check-in at his place of work.
27. There is no response to these letters.
28. The claimant did not report to his new station at Mazeras.
29. On 7 October 2015 the respondent issued the claimant with notice of absenteeism and that he was not at work from 16 September 2015. He was summoned and a hearing conducted and the decision to transfer him to Mazeras affirmed. He was given 7 days to report to Mazeras and failure to do so, his employment would stand dismissed. Hence, this served as a warning.
30. The claimant did not report at Mazeras as directed. At this point, his work station was not Mombasa but Mazeras.
31. The employer has the prerogative to organise its business. This may require movement of employees from one station to the other. Subject to sufficient notice, the employee is bound to take lawful and proper directions of the employer as held in *Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO)* [2017] eKLR that transfer of an employee is the prerogative of the employer and not the choice of an employee to choose where to work. The respondent as the employer should be allowed to follow its policy to transfer the claimant and failure to attend is insubordination and being absent from work without good cause as held in *Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others* [2014] eKLR.
32. The claimant was required to report to his new station from 16 September 2015. This time was extended by 7 days from 7 October 2015. Further notice of absenteeism issued on 17 October 2015. He did not oblige.



33. The invitation to attend for disciplinary hearing on 22 October 2015 and the eventual summary dismissal on 26 October 2015 on the given background is justified and valid. Such is allowed in terms of Section 44(4)(a) and (e) read together with Section 41(2) of the Act. An employee who is absent from his duty station for no good cause, an employee who refuses to take lawful instructions and directions of the employer is of gross misconduct. The sanction of summary dismissal is justified.
34. Notice pay and compensations are remedies removed on the finding that summary dismissal was justified.
35. On the claim for leave pay for 357 days, the respondent had a check-in system allowing the claimant to record his timelines while at work. He was allocated a daily wage rate of ksh.600 for every day he reported to work. An arrangement for more work was arrived at through mutual agreement for a bonus payment of ksh.600 for every extra trip taken to the KPA port for ferrying cargo. It therefore served the claimant well to be at work to earn these bonuses.
34. From the payment statement filed, the claimant had different total wages each month.
37. In July, 2015 he earned a gross wage of Kshs. 27,685; August 2015, he earned Kshs. 34,200; September 2015, he earned Kshs. 19,200;
38. Though consistent in his work attendance, there was motivation to take more trips to the KPA port to earn bonuses. The respondent has filed employee records to demonstrate his worksheets.
39. On the given schedules from 26 June to 25 July 2015, the schedule is that;
40. On 1st, 4th, 14th, 18th July 2015 the claimant reported to work without taking any trip and was allocated his daily wage of Ksh.500 only.
41. On 27 July, 11th, 17th August 2015 he only earned a daily wage of ksh.600 and no trip taken.
42. On 1st and 12th September 2015 he only earned a daily wage of Ksh.600 and no trip taken.
43. To claim for annual leave days within the context and nature of employment benefits secured for a daily wage, even with the right to annual leave secured under Section 28 of the Act, the daily attendance served to the advantage of the claimant. He cannot claim that being paid extra bonuses was a disadvantage that resulted in unfair labour practices. The right under Section 28 weighed against the gains of higher wage each month, to allocate a claim for 357 days is unjust enrichment.
44. On the Claim for off days every week, this is a right secured under Section 27 of the Act. The work records filed by the respondent become most relevant in this regard.
45. The schedules filed for the period 26 June to 25 July 2015 show the claimant reported to work for a total of 24 days for this payment period.
46. On the schedule; there was no work attendance of the following days;
 - 5 July 2015 a Sunday;
 - 7 July 2015 a Tuesday;
 - 12 July 2015 a Sunday;
 - 19 July 2015 a Sunday.
47. On the schedule for the period of 26 July to 25 August 2015, there was no work attendance as follows;
 - 5 August 2015 a Wednesday;



6 August 2015 a Thursday;

9 August 2016 a Sunday;

23 August 2015 a Sunday.

48. Cumulatively, each month, the claimant had a minimum of 4 days out of work. Such well served his rights under Section 27 of the Act.
49. On the claim for public holidays at 6 days for each year, there are no particulars of such public holidays.
50. On the claim for overtime pay, the claimant testified that he had a daily wage of Ksh.600 and a bonus for every trip he undertook. This was an arrangement agreed upon by the drivers. The respondent adopted such a system and it worked well and every driver was paid for every extra trip at a rate that was agreed upon. He cannot then justify a claim for overtime on his admissions of bonus payment for extra work and the time.
51. In the penultimate, the respondent relied on ELRC Cause No.758 of 2015. This matter related to an issue of redundancy and not related to the claim herein.
52. Accordingly, the claim herein without merit in its entirety and he hereby dismissed. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

