



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2508 OF 2017**

**STANLEY KYULE MUTUKU.....CLAIMANT**

**VERSUS**

**SWAN CARRIERS LTD.....RESPONDENT**

**JUDGEMENT**

1. The claimant brought into this Honourable Court a claim through which he alleges that the respondent verbally terminated his services. As a result, he sought the sum of Kshs 160,232/= being notice pay, salary for days worked, unpaid leave days and gratuity.
2. The respondent contested the claim and in its defence, averred that the claimant verbally intimated his wish to terminate his employment and as such, it had calculated his terminal dues but the same remained uncollected.
3. The matter came up for part hearing on 4<sup>th</sup> November, 2021 when the court took the claimant's case. The same was later adjourned to 12<sup>th</sup> November, 2021 for defense hearing.

**Claimant's case**

4. At the outset, the claimant sought to rely on his witness statement and bundle of documents which he asked the court to adopt the same as part of his evidence. The bundle of documents were also produced as exhibits before court.
5. In his testimony before court, the claimant averred that he was employed as a driver by the respondent company between June, 2016 till September, 2017. He stated that his employment was terminated abruptly and verbally. It was his testimony that he was given a faulty motor vehicle which required extra fuel. He averred that the demand to the respondent through his Advocate, had gone unanswered hence his terminal dues remained unpaid.

**Respondent's case**

6. The respondent tendered oral evidence through Mr. Joseph Ole Mwanunga who testified as RW1. He identified himself as the respondent's human resource officer. He also adopted his witness statement and the respondent's bundle of documents as evidence in chief. He also produced the documents filed by the respondent as exhibits before court.
7. RW1 denied the claimant's assertion that he was terminated on account of a faulty motor vehicle. That every driver must sign on a job card that the motor vehicle is in a good condition before driving out of the respondent's yard. He averred that it is the claimant who verbally informed the respondent of his intention to terminate his employment. That his termination was not met with objection hence he was advised to collect his terminal dues but he refused to do so. That as a result, the respondent wrote to the labour office communicating as much.

**Submissions**

8. Notably, the claimant did not file any written submissions despite the Court's directions on 12<sup>th</sup> November, 2021 and 16<sup>th</sup> December, 2021. As such, the court did not have the benefit of considering the same.
9. The respondent filed written submissions and reiterated the averments contained in its pleadings and maintained that the claimant's termination was not unfair and unlawful. It further posited that the claimant had not discharged the burden of proof as by law required under section 47(5) of the Employment Act and section 107 of the Evidence Act by proving the fact of termination. On this issue, it relied on the authorities of **Kennedy Maina Mirera vs Barclays Bank of Kenya Limited (2018) eKLR** and **Rudolf Shitanda Daraja vs Zablon Juma Atulo t/a Atulo & Co. Advocates (2016) eKLR**.

**Analysis and determination**

10. From the pleadings on record as well as the evidence placed before court, the issues falling for the court's determination are;

a) **Whether the claimant's employment was terminated?**

b) **If the answer to (a) is in the affirmative, was the termination of the claimant unfair and unlawful?**

c) **Whether the claimant is entitled to the reliefs sought?**

**Was the claimant's employment was terminated?**

11. The claimant has alleged that his employment was terminated verbally by the respondent. On the other hand, the respondent avers that it is the claimant who verbally intimated that he intended to terminate his employment. In the face of these competing positions, it is imperative for the court to evaluate the circumstances appertaining this case against the relevant provisions of the Employment Act (Act).

12. **Section 47 (5) of the Act** provides as follows:

**“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”**

13. In following with the above provision, the claimant thus had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. It is upon such proof that the respondent would be tasked under **section 43 (1) to prove the reason or reasons for the termination, and failure to do so, such termination shall be deemed to have been unfair within the meaning of section 45.**

14. The aforesaid legal position was amplified by the Court of Appeal in the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR.**

15. In the instant case, the claimant has not produced any letter and/or document through which his employment was terminated. As such, the fact of termination has to be inferred from the evidence presented before the court, which I must say, is quite scanty.

16. The respondent produced before court a letter dated 30<sup>th</sup> September, 2017 addressed to the claimant and referenced **“Final dues – full and final settlement”**. It reads in part as follows;

*“We refer to your verbal intimation and further discussion on the issue of your final settlement. The management has no objection to relieve you from your services. Please find below calculation of your dues;*

*Calculation of amount payable;*

*Balance of leave encashed now* *Kshs 7,761/-*

*Salary payable upto 30<sup>th</sup> September, 2017* *Kshs 26,775/=*

***One-month Notice pay*** ***Kshs 26,775/=***

*Total Gross amount payable* *Kshs 61,311/=*

*Less pay: PAYE, NSSF, NHIF* *Kshs 13,156/=*

*Less: Outstanding dues/advances* *Kshs 34,870/=*

*Balance amount payable/recoverable* *Kshs 13,285/=*

*We wish you luck in the future.*

*Yours faithfully...”*

17. From the letter above, the respondent refers to the claimant's intimation to terminate his employment. Be that as it, it goes ahead and purports to pay one-month salary in lieu of notice. This is such a paradox if indeed, the intention to terminate the employment emanated from the claimant. Why do I say so?

18. **Section 35 (1) (c) of the Act** provides as follows;

**“(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—**

**(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”**

19. **Section 36** of the Act provides for payment in lieu of notice. It provides thus;

**“Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”**

20. The import of the above legal provisions is that, an employment is terminable by either party giving notice and in the place of such notice, paying the other party the sum equivalent to one month’s salary, otherwise known as notice pay.

21. More importantly, it is the party initiating the termination that is responsible for issuing the notice or paying the one-month salary in lieu of notice.

22. In the instant case, the respondent included in its calculation of the claimant’s terminal dues, the item of **“One-month notice pay”**. It is apparent that this was pay in lieu of notice. Accordingly, and in light of the provisions of **section 35(1) (c)** read together with **section 36** of the Act, the termination emanated from the respondent’s end. Otherwise, why would it be paying the claimant notice pay?

23. In the event the termination of employment was from the claimant’s end, then he would have been required to either serve the notice period or pay the respondent notice pay.

24. Taking into account the foregoing circumstances and in light of the relevant statutory provisions, I find that the claimant’s employment was indeed terminated by the respondent.

25. Having found as such, this brings us to the next issue of issue of whether the claimant’s termination was unfair and unlawful?

#### **Was the termination of the claimant unfair and unlawful?**

26. The Employment Act has addressed the issue of fairness of an employment under sections 43(1) and 45(2) of the Act. These provisions provide for substantive justification and procedural fairness. Substantive justification entails proving the reasons leading to the employee’s termination, while procedural fairness entail proving that the procedure applied by the employer in effecting the said termination was fair. The specifics of procedural fairness are provided for under section 41(1) of the Act.

27. On its part, **Section 43(1)** of the Act, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination as unfair. On the other hand, **section 45 (2)**, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.

28. In the case at hand, the respondent did not advance any reasons for the termination of the claimant’s employment. It is apparent that it just calculated the dues and asked the claimant to collect the same.

29. In absence of such reasons being advanced, the termination can be deemed to have been substantively unfair. Logically, it is not practical for the court to determine whether the reasons are fair and valid as the same are totally nonexistent.

30. As the court has already found that that the claimant’s termination was substantively unfair, it would be a mere academic exercise to consider and determine whether the procedure applied by the respondent was fair. In any event, the respondent has not stated or even suggested that it subjected the claimant to any process.

31. The net effect of the foregoing findings is that the claimant’s employment was terminated and the same was unfair and unlawful in light of the provisions of sections 43(1) and 45(2) of the Employment Act.

#### **Available Reliefs**

32. I have noted that the claimant has not prayed per se for compensatory damages for unlawful termination. However, he has sought an award of 3 months gross salary being compensation for the inconvenience and hardship caused while looking for alternative employment. Strictly speaking, the same is equivalent to a prayer for compensatory damages as the loss sought to be compensated, arose from an unlawful termination. On this account, I will award the claimant 3 months gross salary as compensation.

33. The claimant is awarded one (1) month’s salary in lieu of notice, noting that the same had been included in the respondent’s computation of his terminal dues.

34. The claimant has prayed for compensation for 15 days leave earned and not taken. The respondent in its computation of the claimant’s terminal dues, provided for the same hence I will assume that the information was derived from its leave records and the court will not interfere with the said computation.

35. The claimant is also awarded salary for the month of September, 2017 as it is apparent that his employment terminated on the 30<sup>th</sup> day of September, 2017. It is also notable that the same was part of the respondent’s computation, hence the claimant is awarded the same.

36. The claim for salary for 9 days worked in October, 2017 is declined as I have found that the claimant was effectively terminated with effect from 30<sup>th</sup> September, 2017.

37. The claim for gratuity/service pay is also denied on account that during cross examination, the claimant admitted being a contributor to the National Social Security Fund (NSSF) and as such, fell within the exclusions stipulated under section 35 (6) of the Act.

38. The employment relationship having been admitted, the claimant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

**Orders**

39. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

- (a) One month's salary in lieu of notice being Kshs 26,775.00.**
- (b) Salary for September, 2017 being the sum of Kshs 26,775.00.**
- (c) Unpaid leave days being Kshs 7,761.00.**
- (d) Compensatory damages in the sum of Kshs 80,325.00 which sum is equivalent to 3 months gross salary**
- (e) The total award is Kshs 141,636.00.**
- (f) Interest on the amount in (e) at court rates from the date of Judgement till payment in full.**

40. Since the claimant's case has succeeded, I would have ordinarily awarded him costs of the suit but I note that he failed to comply with the court's directions issued on 12<sup>th</sup> November, 2021 as regards filing of submissions. Indeed, at the time this Judgment was being written, he was yet to comply. As such, he loses on the order in respect of costs, in which case, each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

**FOR THE CLAIMANT MR. OLIETI**

**FOR THE RESPONDENT MS. MWIKALI**

**COURT ASSISTANT BARILLE SORA**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**