



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 118 OF 2017

JOSEPH KIPKEMOI ARAP MASAS.....CLAIMANT

VERSUS

FARGO COURIER LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The issues in dispute in this claim arises from the termination of the Claimant's employment by the Respondent.
2. The claim is contained in a Statement of Claim dated 21st December 2016 and filed in court on 24th January 2017. The defence is by way of a Memorandum of Response filed in court on 2nd February 2018. The Claimant filed a Reply to Memorandum of Response on 4th April 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Operations Manager, Raphael Kaveva.

The Claimant's Case

4. By a letter of appointment dated 25th January 2005, the Claimant was employed by the Respondent as a Courier Driver. He was confirmed on 18th February 2009 and earned a monthly salary of Kshs. 24,788.
5. The Claimant worked for the Respondent until 14th May 2015, when his employment was terminated, on allegations of carrying an unauthorised passenger in the company vehicle assigned to him.
6. The Claimant denies the said allegations and adds that he was paid below the minimum wage for Heavy Commercial Drivers.
7. The Claimant accuses the Respondent of failure to afford him a fair hearing as required by the mandatory provisions of Section 41 of the Employment Act.
8. The Claimant further states that the Respondent refused to pay him his terminal dues.
9. The Claimant tabulates his claim as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 24,788
- b) Service gratuity for 10 years.....123,940
- c) 12 months' salary in compensation.....297,456
- d) Certificate of Service
- e) Costs plus interest

The Respondent's Case

10. In its Memorandum of Response filed in court on 2nd February 2018, the Respondent states that the Claimant was confirmed in his position as a Courier Driver on 18th February 2009. The Respondent admits that the Claimant's monthly salary was Kshs. 24,788.
11. The Respondent states that the Claimant's employment was terminated upon sufficient evidence that he had carried an unauthorised passenger in the Respondent's motor vehicle used for courier business, contrary to the regulations of the Company.
12. The Respondent avers that on the day the Claimant carried the unauthorised passenger, the motor vehicle was involved in an injury causing accident. The Respondent adds that it was subsequent to the accident that it came to its attention that the Claimant had carried an unauthorised passenger in the Respondent's motor vehicle.
13. The Respondent asserts that the Claimant was accorded a reasonable opportunity to be heard before his employment was terminated.
14. Arising from the above infraction, the Claimant was issued with a show cause letter dated 6th May 2015 to which he responded on 7th May 2015.
15. According to the Respondent, the Claimant admitted carrying an unauthorised passenger in the Respondent's motor vehicle assigned to him.
16. The Respondent goes on to state that the Claimant was invited to a disciplinary hearing vide letter dated 8th May 2015.
17. The said letter informed the Claimant that he was invited to a disciplinary meeting to be held at the Respondent's Head Office on 12th May 2015. The Claimant was also notified of his right to be accompanied by a fellow employee of his choice. According to the Respondent, the Claimant chose not to be accompanied to the disciplinary meeting.
18. The Respondent avers that the Claimant attended the meeting of 12th May 2015, which was also attended by the following:
 - a) The Respondent's Human Resource Manager;
 - b) The Respondent's Courier Operations Manager;
 - c) The Respondent's Transport Manager;
 - d) An Administrative Assistant who took minutes of the disciplinary hearing.
19. The Respondent avers that at the hearing, the Claimant admitted being aware of the Respondent Company's rule against carrying unauthorised passengers and further admitted that the individual he had carried was neither an employee of the Respondent nor was he in any way authorised to be carried in any of the Respondent's motor vehicles.
20. Following the disciplinary hearing, the Claimant was issued with a letter of summary dismissal dated 13th May 2015. The Claimant was also issued with a letter dated 24th July 2015, setting out his final dues calculations.
21. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

22. There are two (2) issues for determination in this case:
 - a) Whether the Claimant's dismissal was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

23. The Claimant was dismissed by letter dated 13th May 2015 stating thus:

"Dear Mr Masas,

RE: CARRYING OF UNAUTHORIZED PASSENGER USING COMPANY VEHICLE – KBV 749V

Our letter to you of 06/5/2015 and subsequent Disciplinary Committee Meeting held on 12/05/2015 refer.

From the deliberations of above referred to meeting and it became apparently clear that you carried an unauthorized passenger

without any express authority from the company. Carrying of an unauthorized passenger using company vehicle for personal gains or otherwise as you very well know is a very serious violation of standing company regulations which cannot be condoned whatsoever for it constitutes an act of gross misconduct and therefore attracts a very severe disciplinary action.

In view of the gravity of the foregoing, the company has decided to dismiss you summarily from its employment in accordance with the Employment Act 2007 section 44(4)(g) with effect from 14/05/2015. Consequently, you are instructed to ensure you return all the company property or documents in your possession with immediate effect to your immediate Supervisor. Also note that it will only be after successfully completing the company clearance procedure that your terminal dues will be paid to you through our Accountant which will be paid net of statutory deductions and company liability, if any.

Yours faithfully

For: Fargo Courier Ltd

(signed)

JOHN KABIRO

HUMAN RESOURCE MANAGER

24. According to this letter, the administrative offence that led to the Claimant's dismissal was carrying an unauthorised passenger in the Respondent's motor vehicle assigned to the Claimant.

25. Prior to the dismissal, the Claimant was issued with a show cause letter to which he responded on 7th May 2015. In his response, the Claimant states that on 23rd March 2015 he was assigned motor vehicle registration number KBU 749V, to ferry customer goods from Eldoret Branch to Kitale Branch.

26. The Claimant claims to have been called by a Mr. Richard Too, an employee of a customer known as LSP (Acceler) asking that the customer's goods be delivered at a shopping centre. The Claimant further claims to have consulted his accompanying escort, who confirmed that the customer's goods were on board. The Claimant stopped to pick Mr. Richard Too to direct them to the place where the goods were to be delivered. The Claimant admits that the motor vehicle was involved in an accident while Too was on board.

27. The Claimant testified that he was aware of the Respondent's rule against carrying unauthorised passengers. He however shifted the blame to the escort, who he claims admitted Too into the motor vehicle. The Court was not convinced; first, the Claimant being the driver was in command of the motor vehicle and he could have declined to drive it unless the unauthorised passenger disembarked and second, the Claimant could have called his supervisor to get instructions on what to do in the circumstances, which he did not do.

28. As an employee responsible for his employer's motor vehicle, which is a major asset by any standard, as well as safe and timely delivery of customer goods, the Claimant acted irresponsibly in this case. At any rate, there was no excuse for him to violate the express rule against carrying unauthorised passengers.

29. The Respondent's Operations Manager, Raphael Kaveva told the Court that the reason behind the aforesaid rule is that unauthorised passengers are not covered by insurance underwriters. In addition, carrying unauthorised passengers would be an exposure to customer goods.

30. Overall, it is evident that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.

31. The remaining question is whether in effecting the dismissal, the Respondent followed due procedure.

32. By his own admission, the Claimant was issued with a show cause letter to which he duly responded. He also attended and defended himself at a disciplinary meeting, whose minutes he signed as a true record. To my mind this satisfies the procedural fairness requirements of Section 41 of the Employment Act.

33. In the end, I find and hold that the Claimant's dismissal was substantively and procedurally fair. The claims for compensation and notice pay are therefore without basis and are dismissed.

34. No basis was laid for the claim for service gratuity which also fails and is disallowed.

35. The Claimant's Certificate of Service is on record and there is no order to make under this head.

36. In the ultimate, the Claimant's entire claim fails and is dismissed.

37. Each party will bear their own costs.

38. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JANUARY 2022

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JUDGE

Appearance:

Miss Wavinya h/b Mr. Nyabena for the Claimant

Mr. Owino for the Respondent