



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 667 OF 2015

ABDALLA KAVALE MOHAMED.....CLAIMANT

- VERSUS -

SASA LOGISTICS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th February, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 02. 09.2015 through IRB Mbuya & Company Advocates. The claimant alleged as follows. He was employed by the respondent as a heavy commercial vehicle driver effective 17.10.2013 and he served until 30.04.2015. His last monthly pay was Kshs.26, 000.00. On 30.04.2015 he was terminated from employment on account that the vehicle he had been assigned had consumed a lot of fuel. His case is that the termination was unprocedural for want of due notice and he was never given a hearing. Further, the reason for termination was unfair and invalid. Further throughout the service he was not given annual leave and weekly off days. The claimant prayed for judgment against the respondent for:

- 1) One-month notice payment Kshs. 26, 000.00.
- 2) Unpaid salary for April 2015 Kshs. 26, 000.00.
- 3) Annual leave for period served Kshs. 37, 327.00.
- 4) Service pay Kshs. 15, 000.00.
- 5) Compensation for unprocedural, wrongful and unfair termination of employment Kshs. 312. 000.00.
- 6) Punitive damages.
- 7) Certificate of service.
- 8) Costs of the cause.

The respondent filed the response to the memorandum of claim on 28.07.2013 and through Okanga & Company Advocates. The respondent pleaded that it never terminated the claimant but that the claimant left the employment on 30.04.2015 when he was questioned about the extra-fuel he had asked for the truck he was driving and the respondent never saw the claimant again until he filed the present suit. The respondent's further case is that the claimant deserted duty on 30.04.2015 without notice and reason. Further, the claimant threw the keys (to the truck he was assigned) at the respondent's director one Said Hatimy after the claimant had been asked to write a commitment that the extra fuel which he had used and asked for be deducted from his salary. In view of the abrupt desertion, the respondent counter-claimed for Kshs. 26, 000.00 being one month pay in lieu of notice. The respondent prayed that the claimant's suit be dismissed with costs and the counterclaim be allowed with costs.

The claimant filed the reply to response and response to counterclaim on 15.12.2020. The claimant denied that he deserted duty as pleaded for the respondent but instead, he was orally terminated by the General Manager one Bilal Suleiman. He denied being paid Kshs.26, 000.00 purportedly claimed for in the counter-claim. He prayed the counterclaim be struck out with costs and judgment entered in his favour as prayed for in the memorandum of claim.

Parties filed their respective final submissions. The claimant testified to support his case and the respondent's witness (RW) was one Isaac Masika Makhanu, the respondent's Operations Manager. The Court has considered all the material on record.

To answer the **1st issue** for determination, the Court returns that the parties were in a contract of service as pleaded for the claimant who was employed as a long distance heavy commercial driver. His last monthly gross pay was Kshs. 26, 000.00.

The **2nd issue** for determination is whether the respondent terminated the contract orally on 30.04.2015 or the claimant walked away and deserted duty by himself.

The claimant's evidence and the testimony by RW is substantially similar. On 30.04.2015 the claimant had arrived from a long trip from Juba. On the return journey he had asked for extra 100 litres of fuel. His boss interrogated him on why he had asked for the extra fuel. In the process the claimant and his boss engaged in an exchange of words. It was an unpleasant scene. Thus the boss instructed the guards to escort the claimant out of the premises. Henceforth he was locked out and he never came back to work.

The Court finds that the relationship collapsed irretrievably on that 30.04.2015 and the respondent terminated the employment when the claimant was escorted and locked out of the premises. Things appear to have moved very fast but the Court considers that the termination was procedurally unfair for want of a notice and due hearing as per section 41 of the Employment Act, 2007. In particular, the respondent was bound to follow the due procedure and to accord the claimant a civilised due hearing instead of the ugly altercation that ensued. The Court further finds that the claimant appears to have failed to restrain and fully contributed to his termination by engaging in unpleasant exchange of words with his boss. In that consideration and in view that the claimant's 6 months' term contract had lapsed and he was serving on month to month contract that had not been formalised, he will not be awarded any compensation under section 49 of the Act – especially because he also fully contributed to his termination in the manner he exchanged with his boss and threw the truck keys at the boss on 30.04.2015.

There is no reason to doubt RW's evidence thus, **"...As they exchanged I was present. Confrontation was about the extra 100 litres. If truck was faulty he had to explain. He gave no explanation. He got irritated instead and threw key at boss. The confrontation was in open yard. Boss asked him to explain why he asked for extra 100 litres. There were other drivers on the trip."** RW contradicted himself on whether he was present as the claimant and the boss exchanged on 30.04.2015 but since his account is substantially similar to that of the claimant (the only omission being the claimant's assertion that the boss alleged that the drivers were thieves), on a balance of probability, the Court returns that RW was present and his account was accurate. As per section 35 of the Act and the minimum contractual terms, the claimant is awarded one-month payment in lieu of the termination notice being **Kshs.26, 000.00**.

RW confirmed that April 2015 salary was not paid and the claimant is awarded **Kshs.26, 000.00** as prayed for. RW also confirmed that the claimant was entitled to leave for the period served and is awarded **Kshs.37, 327.00** as prayed for. As submitted for the respondent the claimant was a member of NSSF and as per section 35 of the Act he is not entitled to service pay as prayed for.

The Court has already found that the respondent unprocedurally and therefore unfairly terminated the claimant and the counterclaim based on desertion will collapse and, as per the submissions made for the claimant. Certificate of service will issue per section 51 of the Act.

In conclusion, judgment is hereby entered for the claimant against the responded for:

- 1) The declaration that the termination was procedurally unfair.
- 2) The respondent to pay the claimant **Kshs.89, 327.00** by 01.04.2022 failing interest to be payable thereon at Court rates from the date of filing the suit until full payment.
- 3) The respondent to deliver the certificate of service by 01.03.2022.
- 4) The counterclaim is dismissed with costs.
- 5) The respondent to pay costs of the claimant's suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE