



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.395 OF 2017

JOHN SHIKOLI KHASIANI.....CLAIMANT

VERSUS

FLAMCO LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was verbally employed by the Respondent as a loader in February, 2008 which position he held till August, 2008 when he was transferred to transport department and worked as a turn-boy till September, 2013 when he was transferred back to become a loader a position he held till his termination on 18th August, 2016 earning a monthly salary of Kshs. 12,501.62.

2. The Claimant states that while he was a loader, he used to report to work at 5am till 10 pm from the time of appointment till April, 2012 and from May, 2012 till termination, he could work for 9 hours with one-hour lunch break. When he was serving as the Respondent's turn-boy he could report to work at 12pm and embark on a journey with the driver overnight till the next day without receiving any overtime pay in compensation according to section 27(1) & (2) of the Employment Act.

3. The Claimant admitted having taken his leave days save for leave accrued for the year 2016 which was to be taken in February 2016. He also stated that he never took his off days for the year neither was he compensated for the same.

4. The circumstances leading to the termination were that, sometimes on the 18th August, 2016, while the Claimant was on duty he was arrested together with 3 other employees and taken to Nakuru central police station on allegation of pilferage of fuel. They were later released from the police station on the basis that the police had not received sufficient evidence to charge them with any offense and they were directed to go back to work. On reporting back to work they were send back to seek clearance from the police. The Police turned them away indicating that they do not issue clearances.

5. The Claimant informed the Respondent about the police response and instead of taking up the Claimant, the Respondent verbally terminated his services and paid for the 18 days worked in August, 2016 and ordered him to leave the Respondent's premises.

6. The Claimant contends that no notice of termination was served upon him, neither was he subjected to disciplinary hearing. He thus avers that his termination was unfair in the circumstances and sought the following reliefs; -

- a) Notice pay of Kshs. 11,623.15.**
- b) Normal overtime of Kshs 971,922.25**
- c) Off duties of Kshs 462, 752.55**
- d) One annual leave for 2016 of Kshs. 7,075.55**
- e) Compensation under section 49(1)(c) of Kshs 139,477.80**

7. The Respondent entered appearance on the 19th October, 2017 and filed a response to claim on 7th November, 2017 admitting to employing the Claimant in the various positions stated at the salary indicated in the pay slips attached.

8. The Respondent however contends that they did not terminate the services of the Claimant as alleged and on the contrary that the Claimant absconded duty and never reported back to work.

9. With regard to the arrest of the Claimant, the Respondent avers that the Claimant was suspected of pilferage and the police were called upon to carry out investigation into the issue which investigation came to an end without any charges being preferred against anyone and the matter was settled at that.

10. The next day on 19th August, 2016 the Claimant did not report to work as usual and despite frantic efforts to find out his whereabouts the Claimant failed to report to work and on 23rd August, 2016 the Respondent reported the absence of the Claimant at the county Labour office who never responded to them.

11. The Respondent contends therefore that the Claimant absconded duty without leave and therefore is not deserving of the reliefs sought.

12. During hearing the Claimant testified as CW-1 and testified that he was arrested while carrying out his duties of offloading on allegation of pilferage and was released on police bond. That he then reported to work the next day however he was not allowed into the premises without a clearance from the police. That the police sought for 21 days to complete their investigation and throughout this time he used to report to work but turned away until his termination.

13. With regard to the letter to the labour office dated 23.8.2016, the Claimant stated that the letter could not be justified since he continued reporting to work though he was turned away during that period.

14. Upon cross examination by **Kamau Advocate**, the Claimant testified that he was arrested on suspicion of stealing together with other colleague however that he was the only permanent employee and he was released on a police bond of Kshs 2,000 till the Respondent writes a statement. He testified that upon reporting to work he was sent back for clearance from police while the police insisted on having the Respondent write a statement therefore that he was back and forth between the Respondent and the police station.

15. The Respondent called one witness, **Shah Sanjay** as the Respondent RW-1. The witness testified that he is the Operations Director of the Respondent and adopted his statement dated 26.10.2018 which basically reiterates his defence and in addition adopted the Respondent's list of documents dated 7.11.2017 as their exhibits.

16. Upon cross examination by **Juma Advocate**, RW-1 testified that the Claimant worked for the Respondent from 2008 to 2016. That he used to go for off days and the unutilized days were always paid for. With regard to termination, the witness maintained that the Claimant absconded duty and stayed away even after investigation were completed. That he was called back to work but refused to report back to work.

Claimant's submissions

17. The Claimant submitted that the Respondent terminated his services without following due procedure given under the Section 41 of the Employment Act and without any justifiable reason as provided for under section 43 of the Employment Act therefore that the termination failed in both substantive and procedural fairness. In this they cited the case of **Rashid Jeneby V Prime Bank Limited [2015] eKLR** and the case of **Sikuku Nzuki Ngii V Gacal Merchants Limited[2015] eKLR**.

18. It was submitted that, the allegation by the Respondent that the Claimant absconded duty cannot stand in light of the fact that no evidence was tendered before Court to demonstrate that indeed the Respondent tried contacting the Claimant. The Claimant then relied on the case of **Moses Daniel Kyalo V Treadsetters Tyres Limited [2019] eKLR**.

19. The Claimant then submitted that the termination was unfair in the circumstances and urged this Court to allow the claim as prayed.

Respondent's Submissions.

20. The Respondent on the other hand submitted that the Claimant deserted work and their efforts to reach him were futile forcing it to inform the labour office of the said desertion therefore that they tried to find out about the Claimant whereabouts to no avail and the termination was procedurally done in the circumstances. In this they cited the case of **Stanley Omwoyo Onchweri V Board of Management Nakuru YMCA Secondary School [2015] eKLR**.

21. It was then argued that having tried to contact the Claimant to no avail, they should not be condemned to pay for the reliefs sought, rather that the claim to be dismissed with costs.

22. I have examined all evidence and submissions of the parties herein. The Claimant has contended that he was terminated by the Respondents after he was arrested for alleged pilferage of fuel. No charges were preferred against him.

23. The Respondents aver that the Claimant absconded duty and their attempt to trace him failed. That they even reported the matter to the Labour Office as per their letter dated 23/8/2016.

24. The letter is however not copied to the Claimant and the Claimant aver that he reported to the Respondents daily but was turned away and not allowed into the premises.

25. There is no indication that the Respondents tried to reach out to the Claimant through his last known address or through any other known

means. There was no notice of any disciplinary hearing due to absconding duty.

26. It is therefore my finding that the allegation that the Claimant absconded duty is not viable.

27. The Claimant was dismissed without following due process as envisaged under Section 41 of Employment Act 2007.

28. I therefore find the dismissal unfair and unjustified.

29. In terms of remedies I find for the Claimant and award him as follows;

1. 1 month salary in lieu of notice

= 11,623.15/=

2. 10 months salary as compensation for the unfair and unfair termination = 10 x 11623.15/=

= 116,231.50/=

3. Leave for one year

= 7,075/=

TOTAL AWARDED 134,930/=

Less statutory deduction

4. The Respondent will pay cost of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant present in Court

Juma for Respondent – present

Court Assistant - Fred