



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1242 OF 2016

BETWEEN

KENNETH MWIRIGI GITUMA.....CLAIMANT

VERSUS

SUNNY HAULIERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Wamwayi & Company Advocates for the Claimant

Okerosi Ochako & Company Advocates for the Respondent

JUDGMENT

1. The Claimant avers, through his Statement of Claim filed on 24th June 2016, that he was employed by the Respondent as a Truck Driver. He was employed on an unspecified date, in the year 2012. He was summarily dismissed by the Respondent on 17TH May 2016. His last salary was Kshs. 25,441 monthly.

2. He states that termination was without notice or valid reason. He states that he was entitled to 1 -month salary in lieu of notice; service over a period of 4 years, 3 months; service dues; holiday allowances; leave traveling allowances, salary in lieu of annual leave; and 12 month's salary in compensation for unfair termination.

3. Specific prayers under paragraph 4 of the Statement of Claim are: -

- a. Payment for 4 years, 3 months of service at Kshs. 101,176.
- b. House allowance for 4 years, 3 months at Kshs. 3,816 per month, at Kshs. 194, 616.
- c. Leave allowance being 21 days each year at Kshs. 25,441, total Kshs. 101,764.
- d. Overtime of 6 hours each Sunday for 4 years, at Kshs. 172,992.
- e. 1- month salary in lieu of notice at Kshs. 25,441.

Total...Kshs. 596,577.

f. Costs.

g. Interest.

h. Any further relief.

4. In his Closing Submissions dated 18th November 2021, the Claimant does not include his prayer for leave travelling allowance. He instead submits on unpaid leave of the same amount at Kshs. 101,764. He also introduces a prayer for salary for 17 days worked. Submissions are not Pleadings, and a party is not allowed to introduce fresh claims through Closing Submissions. ***The prayers for unpaid leave and salary for 17 days worked in May 2016, are declined from the outset.***

5. The Respondent filed its Statement of Response and Counterclaim, on 27th September 2016. It is the position of the Respondent that the Claimant was dismissed as per terms of his employment and the Employment Act. The Respondent states that the Claimant was engaged in an illegal strike. This resulted in business loss and damage to the Respondent, in the sum of Kshs. 4 million. The Respondent counterclaims this sum, and also prays for general damages for loss of business, costs and interest. It prays for dismissal of the Claim with costs.

6. The Claimant gave his evidence and rested his case on 5th March 2020. He adopted his Statements of Claim and Witness, as summarized by the Court above, in his evidence. Cross-examined, he told the Court that his contract was oral. He denied that there was a strike. He did not report dispute at the Labour Office. He earned Kshs. 25,441 monthly. It was basic salary. He did not have the pay slip in Court. He was subscribed to the N.S.S.F. He was denied house allowance. He did not write a letter to the Respondent complaining about denial of house allowance. He never applied for annual leave. Overtime was not documented. He was not instructed by the Respondent, prior to dismissal, to return to work, and disobeyed those instructions.

7. Anthony Ngige, Respondent's Accountant and Human Resource Manager gave evidence on the same date as the Claimant, closing the hearing. He told the Court that Respondent's Drivers, the Claimant among them, went on strike from 5th May 2016 to 15th May 2016. The Respondent sustained business loss. Ngige did not say in his Statement of Witness, that the Claimant abandoned his assigned Truck at Uzuri Limited. He did not disclose the involved Drivers' names, in his Statement of Witness. He did not disclose the cell phone numbers he used to call the Drivers. The Claimant was dismissed for desertion. Desertion happened on 6th May 2016 to 12th May 2016, when he abandoned the Truck at Uzuri Limited. He did not report back to office after this, or report at Uzuri Limited. The Respondent had to assign another Driver the Truck at Uzuri. It was retrieved on 13th May 2016. Nothing was destroyed on the day of the strike. He owed the Respondent Kshs. 50,000 on shortages. There was no record of these shortages. Redirected, the Witness told the Court that the sum of Kshs. 25,441 paid to the Claimant monthly, was all-inclusive. The Claimant and other Drivers drove to Uzuri, parked their Trucks and left. They never resumed duty.

The Court Finds: -

8. The Claimant was employed by the Respondent sometime in the year 2012, as a Truck Driver. His salary was Kshs. 25,441 monthly. He was summarily dismissed by the Respondent on 17th May 2016, on the ground that he incited other Employees to participate in an illegal strike; he organized and led that strike; and refused to resume work when requested to do so by the Respondent.

9. The Claimant denied engagement in an illegal strike, explaining that he drove to Uzuri Limited on 5th May 2016 and due to excess Trucks offloading, there was delay in offloading his consignment. He was at Uzuri waiting to offload, from 5th May 2016 to 12th May 2016.

10. There is considerable doubt about the Claimant's explanation that he spent the period 5th May 2016 to 12th May 2016, at Uzuri Limited, waiting to offload. He does not appear to have communicated to the Respondent, explaining that he was held up for about a week, at Uzuri Limited, waiting to offload.

11. There is a letter from Uzuri Limited dated 17th May 2016, addressed to the Respondent, complaining about disruption by Respondent's Truck Drivers, in offloading at Uzuri Limited's premises, between 6th May 2012 to 12th May 2016. Uzuri explains that Respondent's Drivers went on strike. Their trucks were loaded with Uzuri Limited's Latvian wheat, which had been loaded from the vessel MV NM SAKURA. Uzuri Limited confirms that there was a strike, and that it led to massive loss of business.

12. The Court rejects the Claimant's narrative that he was waiting to offload his consignment, and upholds the evidence by the Respondent, that the Claimant was engaged in an illegal strike. Uzuri Limited did not have reason to complain without reason, that the Respondent's Drivers had disrupted business at Uzuri Limited. They parked their trucks, and declined to offload the wheat consignment. There is no truth in the Claimant's assertion that for a whole week, he was waiting to offload at Uzuri Limited.

13. The Claimant was dismissed for valid reason.

14. He was available at the Respondent's premises on 13th May 2016. The Respondent would be expected to have Claimant's personal contacts, in any event, and could have contacted the Claimant to face disciplinary proceedings for his role in the strike.

15. There is no evidence of any letter to show cause, issued by the Respondent to the Claimant. There was no invitation to a disciplinary hearing. No charges were presented to the Claimant on any employment offence. The Respondent does not deny in its Pleadings, Evidence and Submissions, that it did not hear the Claimant.

16. Termination was based on valid reason under Section 43 of the Employment Act, but on a flawed procedure under Section 41 of the Employment Act.

17. The Claimant had worked for about 4 years. He played a major part, in the Respondent's decision to terminate employment. He withdrew his labour. ***He is allowed compensation for unfair termination, equivalent of 2 months' salary at Kshs. 50,882.***

18. The prayer for notice pay is declined, termination having been on valid reason.

19. There is no evidence to support the prayer for service pay. The Claimant conceded on cross-examination that he was subscribed to the N.S.S.F and therefore ineligible for service pay, under Section 35 [6] of the Employment Act.

20. He exhibited a copy of a document he referred to as Agreement of Employment, in his List of Documents. The document bears the name of the Respondent as the Employer. The name of the Employee is not shown. The document is not signed, but shows that the Respondent shall pay the Employee basic salary of Kshs. 21,625 and housing allowance of Kshs. 3,816 – total Kshs. 25,441. This total was the salary earned by the Claimant. Considering that this document is from him, it would not be unfair to accept the evidence of the Respondent on house allowance. It was part of the consolidated salary of Kshs. 25,441 paid to the Claimant monthly. The prayer for house allowance in arrears is declined.

21. Leave allowance claimed has no support in evidence. It is not a benefit given under any contractual clause. It has no support in the Employment Act. The Claimant appears to have confused various allowances, pleading that he was entitled to holiday allowances, leave travelling allowances and salary in lieu of annual leave, while praying for leave allowance. The prayer is declined.

22. His evidence was that overtime worked was not documented. If it was not documented, overtime pay is not enforceable. It is declined.

23. The Counterclaim is not based on verifiable and independent evidence. The Respondent exhibits its own computation of business losses at Kshs. 4,707,600. The author of the document is not named. There is no input of an external Accountant or Auditor. Anthony Ngige Njuguna, Respondent's sole Witness, who describes himself in his Statement of Witness as an Accountant and Human Resource Manager, appears to have generated the document himself. It is not explained how the Claimant is liable for losses attributed to all the Drivers who went on strike. It is not a document which the Court can place reliance on, to award the Respondent Kshs. 4 million. The Counterclaim is declined.

IN SUM, IT IS ORDERED: -

- a. The prayers included in the Closing Submissions, without being pleaded are declined.***
- b. Termination was based on valid reason, but flawed procedure and to that extent, unfair.***
- c. The Respondent shall pay to the Claimant 2 months' salary in compensation for unfair termination at Kshs. 50,882.***
- d. The Counterclaim is declined.***
- e. No order on the costs.***

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 16th day of March 2022.

James Rika

Judge