REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 425 OF 2017 CONSOLIDATED WITH CAUSE 821 OF 2017

BAKARI SALIM BAYA.....CLAIMANT

- VERSUS -

CONSOLBASE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th March, 2022)

JUDGMENT

The claimant filed on 30.05.2017 the memorandum of claim in Cause 425 of 2017 through Okanga & Company Advocates. The claimant pleaded that at all material time he was employed by the respondent as a heavy commercial driver from 2012 and as at filing of the suit he was still in the respondent's service at Kshs. 26, 000.00 per month. The further terms of service included 45 hours of normal weekly work; 24 fully paid leave for every complete year of employment; one-month termination notice or pay in lieu of that notice; off days; and overtime payments. The claimant alleged that he had worked on off days, Saturdays, Sundays, and overtime. He claimed 224 off days Kshs. 221, 820.00; 25 holidays Kshs. 24, 756.00; 26, 880 hours of overtime Kshs. 3, 326, 400.00 and, total claim of Kshs. 3, 572, 796.00. He also claimed for costs, interest, and any other just and expedient relief.

The respondent filed the response on 24.07.2017 through Akanga Alera & Company Advocate. The respondent admitted that it had employed the claimant as pleaded. The respondent pleaded as follows. The parties agreed to a shift of more than eight hours (for 2 months) in which the claimant did two trips and felt underutilised and parties reverted to initial trips. All Saturday overtime had been paid. All Sunday overtime had been paid except for two months. Leave days were paid for or compensated for over the period served. As at filing of the suit the disciplinary process against the claimant had commenced and the claimant had been terminated on 22.06.2017. The respondent prayed that the suit be dismissed with costs.

Consequential to the dismissal on 22.06.2017 the claimant filed Cause 821 of 2017 through Okanga & Company Advocates. The claimant pleaded that he had worked for the respondent from 2012 to 21.06.2017 as a heavy commercial vehicle driver. The claimant alleged that the termination was unfair dismissal because he was not accorded a hearing; the reason for termination was not valid; and he was not paid the full terminal dues. He claimed notice pay Kshs. 29, 708; compensation for unfair termination Kshs. 356, 496; total claim Kshs. 386, 204; costs; interest; and any other relief the court thinks just and expedient.

The respondent filed a response on 13.02.2018 through Akanga Alera & Associates Advocates. The respondent pleaded as follows. As at filing the earlier Cause 425 of 2017 the process for terminating the claimant had been commenced. The claimant was given a hearing in presence of his aid and was terminated on 22.06.2017. Further the dismissal was not unfair because the claimant attended the hearing and the reasons were valid. In particular, the claimant failed to satisfactorily explain why he was found in the client's premises outside working hours and found to be loitering around. Further, the claimant breached the respondent's policy not to carry any unauthorised passenger. The respondent prayed that the suit be dismissed with costs.

The suits were consolidated by consent order given on 23.07.2021. The claimant testified to support his case. The respondent's witness (RW) was Sauda Said, the respondent's Assistant Administrator and Human Resource Manager at the time of the cause of action. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.

To answer the **1st issue** for determination the Court returns that the parties were in a contract of service. The claimant was employed by the respondent from 01.03.2012 as a heavy commercial driver on permanent terms of service. The claimant's last gross monthly pay was Kshs. 29, 708.00 per month as per the exhibited pay slip for March 2017.

To answer the **2nd issue** for determination, the Court returns that the contract of service was terminated by the letter of summary dismissal dated 22.06.2017. The termination followed a letter to show cause dated 02.06.2017. The case levelled against the claimant was that on 08.05.2017 while assigned to deliver a container at Enduro Kenya along Malindi Road, the claimant arrived as was assigned and he was notified to leave because the customer was unable to offload till the next day. However, the claimant failed to leave and the guards at the customer's premises noticed the claimant's presence at the premises and the claimant explained that having noticed that it was late, he had

decided to sleep inside the truck till morning. That claimant's action prompted the customer to complain to the respondent. The respondent was perturbed that the claimant had decided to sleep in the truck till morning without notifying the management or security. It was suspicious how the claimant had been out of sight of everyone at the customer's compound from evening till night when he was noticed and his intention was suspect. He was invited to a disciplinary hearing accompanied by a representative or fellow employee. The hearing was scheduled for 06.06.2017. He was entitled to bring witnesses and if he failed to attend the hearing would continue in his absence.

The claimant attended the disciplinary hearing and the letter for summary dismissal summarised the reason for dismissal thus, "**There was no credible mitigation or explanation to explain why you would remain behind in a client's premises without notice to them (on the necessity) or permission. The explanation that it was raining and you couldn't leave was not convincing. All staff and clients left the premises despite the rains**.

The complaint about you being with a second person is a grave violation of the company policy as well as jeopardizing the company's insurance policy by carrying unauthorised person in the truck. As to why you were with a non-company staff during an official duty raised a lot of suspicion on your intention, why you were walking in the premises at night. As deduced from the client and his security, and our conclusion in support of their position, you had malicious intent in remaining in the compound and in roaming therein as well as breached the company's and insurance policy by being with an unauthorised person in the truck and while in course of official duty…." Further, the letter stated that the claimant was summarily dismissed effective 22.06.2017 as per section 44 (4) (c) and (g) of the Employment Act, 2007 which provides that it amounts to gross misconduct if an employee wilfully neglects to perform any work which was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly; and, if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

To answer the **3rd issue** for determination, the Court returns that the summary dismissal did not amount to unfair termination of the contract of service as urged for the claimant. The Court finds that the claimant confirmed in his testimony that he received the show cause letter, he attended the disciplinary hearing with his Advocate, he was heard, and the dismissal issued. He was given an opportunity to bring witnesses and to present and test evidence at the disciplinary hearing as per the letter inviting him to the hearing. The Court considers that the respondent complied with section 41 of the Act on notice and hearing and the procedure was such that the respondent adopted a fair manner of dealing with the customer's complaint and as envisaged in section 45 of the Act.

Further, the claimant by his own evidence in Court confirmed that he was at the customer's premises at night on the material date. He testified thus, **"…I reported at work. HRM assigned me to transport some container with tiles to a place called Enduro – near Bamburi Cement. I undertook assignment. It was a very rainy day. At Enduro I signed check-in book. It was rainy. By around 5pm Enduro boss came to my truck. It was rainy. Boss said tiles could not be offloaded that day. So the offloading did not take place. In that case I called respondent's office to inform them. They advised customer would provide me transport to the stage. No transport was provided. When I decided to leave alarm went off. KK Security caught up with me at stage and said I had been reported as a thief. KK Security transported me to Bamburi. Following day, I was summoned about the events. I wrote a statement. HRM gave me notice for disciplinary hearing in company of a witness. I went with my Advocate. They told my Advocate not to get involved. I was heard.**"

In cross-examination, the claimant testified thus, **"…. At 5.00pm it was raining heavily. I had parked at customer's yard but I did not leave at 5.00pm because it was wet and rainy and, my health was poor. Between 5.00pm and to 8.00pm when I left, I had not left due to heavy rain. I was at yard of customer at night. I had employer's card. I wrote statement to explain. I was dismissed on account that I was at customer's yard at night; is not true I was fired for filing Cause 425 of 2017….**"

The Court has considered the evidence. The claimant was not consistent in his testimony on why he remained at the customer's yard to late hours, in his evidence, up to 8.00pm. One he says the respondent advised that the respondent would provide him transport and if that was true, he gave no evidence of his effort to seek that transport from the customer. Second he says he delayed at the yard due to heavy rains coupled with his failing health. Third he says when the alarm went on, the KK Security caught up with him at the stage – but does not explain whatever he may have been running away from and no evidence of steps he may have taken to leave the customer's yard with due permission of the customer's guards on duty. The Court returns that with such testimony, the respondent cannot be faulted for the finding that the claimant was at the customer's yard at night in unexplained circumstances and that his intentions were suspect. The reason for termination related to the claimant's conduct, capacity or compatibility, and, the respondent's operational requirements as was envisaged in section 45 of the Act. The contractual duties of the claimant included punctuality, adherence to working hours as required from time to time, acting in accordance with instructions and compliance with lawful directions of the respondent's operations, and, to safeguard at all times the interest of the company and its business and not to do anything detrimental to respondent's interests. As submitted for the respondent, by being found loitering in the client's premises at night without any permission or knowledge of either the client or the respondent, the claimant acted in a manner to bring the respondent company into disrepute thus causing substantial detriment to his employer. The reason for termination is found to have existed as at the time of termination, it was valid as envisaged in section 43 of the Act and was a fair reason under section 45 of the Act.

The Court returns that the termination was not unfair both in procedure or substance. The prayers for 12 months' compensation and notice pay will collapse – the respondent having been entitled to terminate with a notice shorter than the contractual notice per section 44 of the Act and on account of the established gross misconduct.

The claimant suggested that it was the initiation of Cause 425 of 2017 that had caused his termination but the Court returns that Cause 425 of 2017 had been filed on 30.05.2017 and the summons filed and served on 06.06.2017 whereas the letter to show cause was issued on 02.06.2017 and with respect to events of 08.05.2017. It therefore appears to the Court that the disciplinary process was initiated genuinely. Further, Cause 425 of 2017 was based on the claimant's grievances per his letter of 27.12.2016 about hours of work and claim for payment for meals, trip allowance, off days, and no sign out system. The respondent had replied to the grievance letter by its letter of 04.01.2017 explaining why the claimant's grievances were not valid. That was on 01.01.2017 and about four months had lapsed since parties had engaged in that correspondence about the grievances. The Court therefore considers that the parties had engaged in genuine grievance management process and the respondent had no malice in that regard and the disciplinary action arising out of a third party's complaint, it

does not begin to emerge that Cause 425 of 2017 had any proximity to the initiated disciplinary action. In any event the Court has perused the memorandum of claim in cause 821 of 2017, again and again, but nowhere does the claimant plead that the reason for the termination was his initiation of Cause 425 of 2017 against the respondent and the claimant is bound by his pleadings accordingly.

The **4th issue** for determination is whether the claimant is entitled to the prayers in Cause 425 of 2017. While claiming for 224 off days worked, 25 days of public holidays, and 26, 880 hours of overtime, the claimant provided no evidence on the particulars of the claims. Indeed, the particulars were not pleaded at all. It is not clear how the claimant arrived at the days and hours as was claimed. It was not also clear how the claimant arrived at the daily multiplier of Kshs. 990.27 and the multiplier for the overtime remained at large. It is trite law that special damages are specifically pleaded and then strictly proved. The Court finds that the claimant has failed to do so and the claims and prayers will collapse as not established at all and not justified.

The claimant testified thus, "**Cause 425 of 2017 is for overtime, off days and public holidays. I reported at work 6.00am and worked for 24 hours until 6.00am following day. I would have a short break and resume duty. If not called I would remain at home. I worked 6.00am to 6.00am. I signed on check in and not on check out…I signed every day I worked. We did not work on shifts. I signed every day I worked. No shifts.**" By that evidence, it is clear that the claimant would sometimes remain at home without being called to work and after some overnight stay at work. That evidence appears to tally with that of RW that overtime was compensated with extra off days and the respondent had no policy to pay overtime. Further, the evidence on likely off days is generalised and there is no evidence on the details establishing the numbers of days for off days or public holidays and hours of overtime as was alleged and claimed in the memorandum of claim. The Court finds the claims and prayers to have been speculative and generalised falling short of necessary specific pleading. The evidence was equally generalised and insufficient to support an award as was prayed for.

While making that finding the Court has considered the contract between the parties and the evidence on record. Clause 9 on hours of work provided that the claimant shall be required normally to work a total of 45 hours spread over not more than 6 days a week excluding meal break hours as defined from time to time by the respondent Further, "**In this connection, you may be required to put in extra hours work, which is clearly covered by your emoluments since payment of overtime will not be paid but you will be entitled to meal and trip allowance while on duty**." It is not pleaded and established that clause 9 of the contract breached the statutory minimum terms and conditions of service and the parties agreed that in lieu of overtime, owing to nature of the claimant's duties as a heavy commercial driver, he would be entitled to meal and trip allowance. In that regard the claimant testified that while on long distance trips he was given trip allowance for subsistence and on such trips he had a discretion to determine his rest times. He further testified that there was a trucking system and his location was known by trucker so that in event of trouble, the respondent readily knew about it and could resolve it accordingly. In re-examination, the claimant testified thus, **"…. Trip allowance to Nairobi was Kshs. 2,500.00. For Kisumu was Kshs. 4, 500.00…."**. In view of that evidence, the Court returns that the respondent complied with the contractual clause on hours of work and overtime so that the claimant's grievances and claims in that regard are found unjustified. The Court also upholds the submission made for the respondent that under section 27 of the Act, the employer was entitled to regulate the working hours of each employee in accordance with provisions of law (on permissible hours of work) and further, an employee is entitled to at least one rest day in every period of seven days – a rest day may therefore fall on any day of the week. The parties' express contractual terms on hours of work are found to be within the provisions of section 27 of the Act and the evidence has not established a breach as was alleged for the claimant.

The claimant's suits as consolidated are liable to dismissal with costs.

In conclusion the suits as consolidated are hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 11TH MARCH, 2022.

BYRAM ONGAYA

JUDGE