



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 267 OF 2018

PAUL MWAKIO.....CLAIMANT

VERSUS

RELIABLE FREIGHT SERVICES LTD.....RESPONDENT

J U D G M E N T

1. The Claimant herein sued the Respondent vide a Memorandum of Claim dated 12th April 2018 and filed in Court on 24th April 2018, and pleaded, *inter alia*, as follows:-

- a) that the Claimant was sometimes in March 2014 employed as a Heavy Commercial Driver by the Respondent, earning ksh.28,427.43, payable on monthly basis.
- b) that the Claimant was terminated verbally by the Respondent on March 2016 without following the laid down procedure as provided under Section 41 of the employment Act, 2007.
- c) that the Claimant went to the Respondent’s premises in March 2016 and was informed by Mr. Kariuki, the Respondent’s Human Resource Manager, that the Respondent had decided not to work with the Claimant, hence termination without due process of the law.
- d) that from March 2014 and March 2016, the Respondent underpaid the Claimant by ksh.108,425.57.
- e) that the Claimant paid parking fees on the Respondent’s Motor Vehicle (Reg. No. KAB 271) for 24 days, amounting to ksh.11,500, which the Respondent never refunded to the Claimant.
- f) that the Respondent never served the Claimant with a Show Cause Memo or warning letter prior to the termination of this service in March 2016.
- g) that the Respondent failed to abide by procedural requirements as no notice was given and no payment was made in lieu thereof, the Claimant was not accorded a hearing before his termination, no show cause memo was served and substantive fairness was not followed.

2. The Claimant sought the following reliefs:-

- a) Notice pay.....ksh.28,477.43
- b) Underpayment as per minimum Wage Order 2013 (Underpaid by 2,881.59x15 months i.e. from March 2014 to May 2015)ksh.43,223.89
- c) Under payment as per Minimum Wages Order 2015 (underpaid by 5,927.43x11 months i.e. from May 2015 to March 2016).....ksh.65,201.68
- d) 12 months compensation for unfair termination of contract (12 months x28,427.43)..... ksh.341,129.10
- e) March 2016 salaryksh.28,427.43

f) Parking fees paid by the Claimantksh.11,500.00

Total Ksh.517,909.50

3. The Claimant also filed the following documents which accompanied the Memorandum of Claim:-

- a) A list of witnesses and a witness statement, both dated 12th April 2018.
- b) A list of Documents dated 12th April 2018 listing some four documents, these being:-
 - (i) the claimant's payslip for February 2016.
 - (ii) work Identity Card.
 - (iii) demand notice, and
 - (iv) a consignment receipt from Data Rush.

4. The Respondent entered appearance on 28th May 2018 and on 5th July 2018 filed Response to Memorandum of Claim, in which it also raised a Counter-Claim against the Claimant. The Respondent denied the Claimant's Claim and pleaded, *inter-alia*:-

- a) that the Claimant absconded duty in March 2016 and left employment on his own volition.**
- b) that the responsibility of paying parking fees is vested on the Respondent and not on the Claimant.**
- c) that the salary of ksh.22,500 paid to the Claimant was commensurate to the work bestowed on him, and that the Claimant had voluntarily accepted the same without coercion, and was therefore estopped from alleging any underpayment.**
- d) that it was impossible to serve a show cause memo or warning letter on the Claimant as he had deliberately decided to absent himself from work from March 2016 and to abscond, and as such the principle of substantive fairness could not be invoked.**
- e) that the Claimant was not entitled to any of the sums of money enumerated (by him) as he left employment on his own volition and absconded duty in early March 2016.**

5. The Respondent Counter-Claimed Ksh.22,500 against the Claimant being one months salary in lieu of notice.

6. The Respondent also filed the following documents, which accompanied the Response to Memorandum of Claim and Counter- Claim:-

- i. the Respondent's list of witnesses and a witness statement by one Philemon Koko, dated 21st June 2018 and 2nd July 2018 respectively.
- ii. the Respondent's List of Documents dated 21st June 2018 listing two documents but annexing only one document, the Claimant's payslip for February 2016.

7. On 18th September 2018, the Claimant filed a Reply to the Respondent's Response and a Response to the Counter-Claim, dated 14th September 2018. The Claimant denied absconding duty as alleged by the Respondent and denied the Respondent's Counter-Claim, which he termed as defective and a diversionary tactic.

8. When trial opened on 9th December 2019, the Claimant adopted his witness statement referred to in paragraph 3 of this Judgment as his evidence in chief and relied on his filed documents. He further testified, both in chief and under cross examination:-

- a) that he was employed on March 2014 and was terminated in March 2016, and his salary was ksh.22,500.**
- b) that he came from Safari in Uganda sometime in mid March 2016 and arrived in Mombasa on a Saturday at 12.00 and the truck KAB 271T had issues and he took it to the workshop. That the workshop worked until 12.00 noon on Saturday.**
- c) that they never worked on Sundays except when one was specifically called and that he did not receive any call.**
- d) that he (the Claimant) found that his truck had been assigned to another driver and had left on Sunday, and he was told that he could not be reached on phone.**
- e) that he kept on going to work until the end of March 2016 but was not given a pay slip for March 2016 and was not paid anything. That Kariuki told him that the boss was not happy with the Claimant, and that his job had come to an end.**

f) that at employment, he signed an employee form but was not given a copy.

g) that he used to sign at the gate.

h) that he did not desert work, and did not see any letter from the Respondent showing that he had deserted work.

i) that he never stole any fuel and was never called to any disciplinary hearing on that, was never arrested on these allegations and had no previous warnings.

j) that he was not a regular absentee, and was never called to defend himself on desertion charges.

k) that he paid parking fees of ksh.11,500 on his way to Mombasa and paid watchman but was not given receipt.

l) that he was paid a salary of ksh.22,500 and had been promised salary increment after three months; and had complained verbally.

m) that he was unfairly terminated.

9. The Respondent's case opened on 27th September 2021 and the Respondent called one witness (Philemon Koko – RW1), who adopted his filed witness statement referred to in paragraph 6 of this Judgment as his sworn evidence in chief. The witness further testified; both in chief and under cross examination:-

a) that the Claimant was not unlawfully terminated as alleged by him.

b) that the Claimant asked for annual leave in January 2016, and was granted leave in February 2016 and paid his salary for February 2016 and leave money, and never returned.

c) that the Claimant's failure to return to work did not amount to unlawful termination, and the company was still waiting for the Claimant to return.

d) that the Respondent's Human Resource Manager (Mr. Kariuki) made effort to call the Claimant and they learnt from other drivers, whom the Respondent did not call to testify, that the Claimant was elsewhere working.

e) that the Claimant was earning ksh.22,500 per month being the agreed remuneration, which was the salary for all drivers; and the Claimant never complained.

f) that the minimum wage for heavy commercial drivers was ksh.28,427; and the Claimant was paid less because he accepted the sum of ksh.22,500, which was being paid to him under the contract of employment; which contract the witness did not produce in court.

g) that the Claimant did not work during the month of March 2016 and was therefore not entitled to the claimed salary for that month.

h) that the claim for ksh.11,500 made by the Claimant was a false claim as the Respondent did not have any such expense as the drivers were given ksh.15,000 mileage to cater for such expenses, and where the expenses exceeded that amount, drivers presented receipts and were refunded. That the Claimant never presented any receipts.

i) that the disciplinary proceedings alluded to in the witness (filed) statement had not been exhibited, and there was nothing to prove absenteeism on the part of the Claimant.

j) that the Respondent had not produced any Attendance Register, which is normally kept by the Respondent (the employer).

k) that the Respondent had not filed any record on alleged siphoning of fuel, and that the Claimant had never been reported to the police for (fuel) siphoning/stealing.

l) that the Respondent had nothing to show that the Claimant absconded duty, and the witness (RW1) had no register to show when the Claimant went missing; and nothing to show that the Claimant was called by phone by Mr. Kariuki, who was still in the Respondent's employment.

m) that the witness (Rw1) had never written a letter to the Claimant calling him for disciplinary proceedings or calling him to go back to work; and had never written a demand asking the Claimant to pay the Respondent in lieu of notice.

n) that in the Counter- Claim, the Respondent is praying for one month's salary in lieu of notice.

10. I have noted a sharp contradiction in RW1's evidence as stated in his filed witness statement and oral evidence on how the Claimant allegedly left employment. Whereas the Respondent's witness (RW1) orally testified that the Claimant never returned to work after proceeding on leave in February 2016, he stated as follows in paragraphs 7 & 8 of his recorded and filed witness statement dated 2nd July

2018, which he adopted on oath as his sworn evidence in chief, as follows:-

“Apart from being a perennial absentee, there were also complains of fuel siphoning from the motor vehicle he was allocated.

That come March 2016, the Claimant was summoned through his phone by Mr. Kariuki, the Human Resource Manager for questioning and on other matters concerning his general conduct as an employee. The Claimant declined and that is how he vanished never to be seen again or heard from.”

11. In view of the pleadings filed by both parties herein and the evidence presented by them, issues that fall for determination, in my view, are as follows:-

a) whether the Claimant’s employment was unfairly terminated, or whether the Claimant absconded duty.

b) whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.

c) whether the Respondent is entitled to the reliefs sought in the Counter-Claim.

12. I will deal with the 1st issue in two parts as follows:-

a) Did the Claimant abscond duty?

As already stated in paragraph 10 of this Judgment, the Respondent has given two conflicting versions of evidence on how the Claimant allegedly absconded duty. The Respondent has, however, not presented any prove of either of the two versions of allegations. The allegation that the Claimant applied for, and proceeded on leave in February 2016 and failed to return to work was not backed up with any leave application forms/documents, approval thereof, particulars of the period of the leave allegedly taken and the date of resumption of duty.

13. Further the allegation by RW-1 that Mr. Kariuki, the Respondent’s Human Resource Manager, tried to reach the Claimant by phone when he failed to report to work remains a hearsay as Mr. Kariuki, whom RW-1 confirmed was still in the Respondent’s employment, was never called to testify. The allegation that the Claimant vanished in March 2016 after he was summoned through his phone by Mr. Kariuki for questioning over fuel siphoning remains a hearsay as well, as Mr. Kariuki was not called to testify.

14. Under Section 44(4) (a) of the Employment Act 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Respondent did not demonstrate that it commenced any disciplinary action against the Claimant under Section 41 of the Employment Act after he allegedly failed to report on duty. No attendance registers were produced to show that, indeed, the Claimant absconded duty or absented himself from work at any given time.

15. It was held in the case of RICHARD KIPLIMO KOECH –VS- YUKO SUPERMARKET LTD [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the Employment Act obtain. The Court stated as follows:-

“Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to Section 41 of the Employment Act, 2007, a hearing is necessary.

And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or efforts to reach the employee and seek any explanation to excuse itself from the application of Section 41 of the Employment Act, 2007. A prudent employer such as the Respondent will invariably keep contact details of its employees.”

16. The Respondent has, in my view, failed to prove, on a balance of probability, the allegation of absconding duty by the Claimant.

(b) Was the Claimant’s employment unfairly terminated?

17. The Claimant testified that his truck was assigned to another driver after he came from Safari in Uganda in Mid-March 2016 and took the truck to the workshop as it had issues. That he kept on going to work until the end of March 2016 when Mr. Kariuki told him that the boss was not happy with the Claimant and that his job had come to an end. This evidence was not challenged in any way by the Respondent under cross examination, and the said Mr. Kariuki was not called by the Respondent to testify in rebuttal thereof.

18. Section 41 of the Employment Act provides, in mandatory terms, as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

19. Under Section 43(1) of the Employment Act 2007, an employer is mandatorily required to prove the reason or reasons for termination of an employee's employment. Where the employer fails to do so, the termination shall be deemed to have been unfair within Section 45 of the Act. In the present case, the Respondent did not demonstrate that it complied with the law as spelt out in Sections 41 and 43(1) of the Employment Act in terminating the Claimant's employment. The termination was, therefore, substantively and procedurally unfair. I so find and hold.

20. The Court of Appeal held in the case of JANET NYANDIKO –VS- KENYA COMMERCIAL BANK LIMITED [2017] eKLR that an employer is enjoined to comply with the mandatory provisions of Section 41 and 45 of the Employment Act in terminating an employee's employment, and that failure to do so renders the termination unfair.

21. On the second issue, I proceed to address the reliefs sought by the Claimant in the Memorandum of Claim as follows:-

a) Salary in lieu of notice

Having made a finding that the Claimant did not abscond duty but was unfairly terminated, and there being no prove that any payment was made by the Respondent in lieu of notice, I find that the claim for one month salary in lieu of notice is founded; and I award the same.

b) Under payment.

22. The Respondent's witness (RW-1) admitted, under cross examination, that the minimum monthly salary payable to the Claimant, having been a Heavy Commercial Vehicle Driver, was **ksh.28,427**. The witness testified that the Claimant was paid less (ksh.22,500) because he accepted the same under the contract of employment. The contract of employment was, however, not produced in Court by the Respondent.

23. As correctly submitted on behalf of the Claimant, employer-employee relationship is, more often than not, skewed with the scale titled in favour of the employer when it comes to enforcement or negotiation of contracts. The Respondent cannot argue that the Claimant agreed to underpayment, and particularly when no agreement on waiver of the Claimant's right was presented to Court. The Claimant is not barred from coming to this Court and seeking relief on any proved underpayment. Counsel for the Claimant cited Section 48(1) & (2) of Labour Institutions Act which provides:-

“48. Wages Order do constitute minimum terms of conditions of employment.

(1) Notwithstanding anything contained in this Act or any other written law

(a) the minimum rates of remuneration or conditions of employment established in a Wages Order constitute a term of employment of any employee to whom the Wages Order apply and may not be varied by agreement.

(b) If the contract of an employee to whom the Wages Order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a Wages Regulations Order, or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages Order shall be inserted in the contract in substitution of those terms.”

It follows, therefore, that the Claimant's salary ought to have been ksh.28,427, but not ksh.22,500.

24. The Claimant pleaded the applicable Wages Order being the 2013 and 2015 Minimum Wages Order, and relied on the same in computing the amount of underpayment claimed. The computation, as pleaded by the Claimant, was neither challenged nor faulted by the Respondent. The total pleaded and claimed sum of underpayment being ksh 108,425.57, is justified and is allowed.

c) Compensation for unfair termination of employment

25. Having established that the Claimant did not abscond duty but was unfairly terminated, compensation for unfair termination of employment becomes an entitlement on the part of the Claimant. Taking into consideration the manner of termination of the Claimant's employment, I award him nine months salary as compensation for unfair termination of employment.

d) March 2016 salary

26. The Claimant pleaded that his employment was verbally terminated in March 2016. He testified that although the truck assigned to him was assigned to another driver in Mid-March 2016, the Claimant continued going to work until the end of March 2016 when the Respondent's Human Resource Manager, Mr. Kariuki, told him that his employment had come to an end. The Respondent pleaded that the Claimant absented himself from work as from March 2016; but did not present any evidence to firm up this allegation. The Respondent did not give the exact number of days that the Claimant worked during the month of March 2016; neither did it demonstrate that any salary for March 2016 was paid to the Claimant. The Claimant proved, on a balance of probability, entitlement to his March 2016 salary, which I award.

e) Parking Fees.

27. The Claim for refund of ksh.11,500 being parking fees allegedly paid by the Claimant was not proved. A claim of this nature is in the nature of a special damage, and must be strictly proved. No documents/receipt were presented in proof of the claim. The same is declined.

f) Certificate of Service

28. It is not disputed that the Claimant was employed by the Respondent as pleaded by the Claimant. The Claimant is entitled to be issued with a Certificate of Service pursuant to Section 51(1) of the Employment Act 2007.

29. On the third issue, the Respondent did not prove absconding of duty on the part of the Claimant. Having found that the Claimant was unfairly terminated by the Respondent, the Respondent's Counter-Claim against the Claimant for one month's salary in lieu of notice must fail. The same is declined and is hereby dismissed.

30. Consequently, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a) One month salary in lieu of notice.....ksh.28,427.43
- b) Under payment as per minimum Wages Order 2013. Underpaid by 2881.59x15 months i.e. from March 2014 -May 2015.....Ksh.43,223.89
- c) Underpayment as per Minimum Wages Order 2015. Underpaid by ksh.5,927.43x11 months from May 2015 to March 2016ksh.65,201.68
- d) Nine months' salary being compensation for unfair termination.....ksh255,846.87
- e) March 2016 salaryksh.28,427.43

Total ksh. 421,127.30

31. The Claimant is also awarded costs of both the Claim and Courter- Claim, and interest at Court rates.

32. The Respondent shall issue a Certificate of Service to the Claimant within thirty days of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

No appearance for Claimant

Mr. Furaha Respondent