



REPUBLIC OF KENYA



**Kioko v Impel Tours and Safaris Limited (Cause 1198 of 2017)  
[2022] KEELRC 1125 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1125 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1198 OF 2017  
MN NDUMA, J  
MAY 19, 2022**

**BETWEEN**

**JUSTUS KIMATHI KIOKO ..... CLAIMANT**

**AND**

**IMPEL TOURS AND SAFARIS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on June 23, 2017, against the respondent seeking the following reliefs: -
  - (a) One-month salary in lieu of notice – 14,785.70
  - (b) Payment in lieu of untaken leave for 9 years – Kshs 133,071.30.
  - (c) Underpayment for 9 years – Kshs 608,655.60.
  - (d) Unremitted National Social Security Fund deductions - Kshs 28,400.
  - (e) Service pay – Kshs 798,427.80 and
  - (f) Maximum compensation for unlawful dismissal.
2. That demand was made and notice of intention to sue served but the respondent failed and or refused to make good the claim.
3. CW1 testified that he was employed by the respondent on or around July, 2007 as a driver. That he worked diligently and continuously until November 20, 2016, when he was summarily dismissed without any opportunity to defend himself. That the respondent did not provide the reason for the dismissal.
4. That he had served for 10 years and received an irregular pay which averaged Kshs 9,150 per month.



6. That upon dismissal he followed up his contribution record from National Social Security Fund and National Hospital Insurance Fund only to discover that despite deductions the same was not remitted since December, and November, 2009 and December 2011 respectively. That the dismissal was unwarranted and unlawful. That the claimant be paid as set out in the Statement of Claim.
7. That the claimant was now self-employed Taxi driver. CW1 produced list of documents marked bundle 'A'.
8. CW1 testified that he worked for 12 hours a day and later became 24 hours' continuous service. That he was not granted leave for the entire period he worked for the respondent. That one left the motor vehicle to the next driver after 24 hours. That they worked from Hurligham office and waited outside at a different location to be called. That motor vehicles had a tracking system and they had a supervisor and so could not work elsewhere. That salary was paid to his account or Mpesa Account and National Social Security Fund and National Hospital Insurance Fund was deducted but never remitted.
9. That he had a good record at work. That he did not receive alleged warning letters dated December 6, 2007 and December 21, 2010 and November 21, 2016. That he was sacked verbally on December 20, 2016 and did not receive letter dated December 20, 2016. That he did not write letter of apology as alleged or at all. That purported letter is not in his handwriting and he said he saw it in Court for the first time.
10. That on November 18, 2016, CW1 testified, he left work in the morning and had reported on 17<sup>th</sup> November, 2016. That he had served 24 hours and was to report on 19<sup>th</sup> November, 2016 to 20<sup>th</sup> November, 2016.
11. That at about 11 a.m on 20<sup>th</sup> November, 2016, the Director told CW1 to continue working but CW1 told the Director that he was tired after 24 hours' service. That CW1 was sacked verbally on the spot. That CW1 was not paid salary for that month. That he drove motor vehicle KPP 869N, and was not involved in an accident as alleged or at all. That the motor vehicle was at the office parking and he did not leave it on the road as alleged. That no charges were brought against CW1 regarding any traffic accident. CW1 stated he returned the keys of the motor vehicle when he was sacked. CW1 said he was not paid any terminal benefits and went home with nothing.
12. Under cross-examination, the claimant admitted that he worked 15 days a month on 24 hour shifts. CW1 denied that he caused a traffic accident and abandoned the motor vehicle on the roadside. That there is no police report of any such accident. That he always remitted car rental cash to the office and worksheets were recorded.
13. RW1 Betty Muthio Kivuva testified that she was Administration and Human Resource Officer of the respondent. That the claimant worked for the respondent for the year 2006 as a driver. That customers complained that the claimant was harsh and they did not want him and that claimant did not talk to the customers. That the respondent gave the claimant warning letters and verbal warnings over his conduct.
14. That on December 18, 2016, the claimant did not hand over the motor vehicle. That the claimant was telephoned but he did not return the call.
15. That the motor vehicle was found abandoned on the road side with dents on the bumper.
16. That the claimant simply absconded work. That the claimant had advance loans given to him which he would pay slowly.



17. That the suit lacks merit and it be dismissed. Under cross-examination RW1 stated that CW1 was paid 21% Commission on work brought to the company and received a retainer. RW1 denied that the drivers were underpaid. RW1 insisted that CW1 disappeared on 18<sup>th</sup> December, 2016. That he had worked up to December 17, 2016. That the respondent wrote to him. RW1 admitted that the letter did not state that the motor vehicle was abandoned. The letter was dated November 21, 2016. The letter did not also mention alleged dents on the motor vehicle. RW1 stated that they did not raise any of the alleged issues in the letter nor was any report made to the respondent. RW1 stated they had no receipts for any repairs undertaken. RW1 stated also they did not report the incident to the insurance. RW1 stated that the repair cost was Kshs 40,000 but there was no receipt. The invoice did not refer to KPP 869N driven by CW1. The invoice was dated May 14, 2018 long after the claimant had left.
18. The respondent counter claimed Kshs 90,000 which comprised of a new engine and Engine part.
19. RW1 admitted that the initial allegation was that the motor vehicle had bumper dent. RW1 denied that the documents produced were fake. RW1 admitted that the claimant served the respondent for about 10 years. RW1 alleged that at times the claimant did not remit money collected from customers and he received warnings. RW1 stated that CW1 worked for 15 days a month and was on leave for half a month. That monthly payments varied depending on commission payable. That commission was increased from 16% to 21%. That the claim has no basis and it be dismissed.

### **Determination**

20. The parties filed written submissions and the issues for determination are: -
  - (a) Whether the claimant's employment was terminated for a valid reason or he absconded work.?
  - (b) If the answer to (a) is in the affirmative, if a fair procedure was followed in the termination.
  - (c) Whether the claimant is entitled to the reliefs sought.
21. The claimant has testified and submitted that he was verbally summarily dismissed from employment on or about November 20, 2016.
22. The contract of employment produced does not specifically provide for a salary even though both parties testified that the drivers including the claimant were paid a retainer and then received a commission at 16% of the income generated by the vehicle. The contract could be terminated by either party by giving one month notice. The claimant testified that his average monthly payment was Kshs 9,150 and was deposited in the bank. The claimant testified that the employer did not remit statutory deductions made on his salary. The claimant submitted that the verbal dismissal was without notice and/or any reason at all and was unlawful and unfair. He sought compensation thereof. The claimant stated that he never took leave for the entire period he worked and sought payment thereof. RW1 did not respond to the claims for non- remission of statutory/benefits and non- grant of leave to the claimant. RW1 testified and the respondent submitted that the claimant absconded work and abandoned the motor vehicle which was damaged on the road side.

The respondent counterclaimed.
23. The statement from National Social Security Fund produced before Court dated February 22, 2017 shows that contribution of Kshs 400 per month were paid from the year 2003 to the year 2011.
24. National Hospital Insurance Fund statement dated March 30, 2012 shows payments were made from the year 2007 to the year 2010.



25. Whereas RW1 testified that the abandoned motor vehicle was damaged on the bumper, the respondent counter-claimed Kshs 54,000 for new Engine and parts; 23,000 for new Bumper, Kshs 7,000 for painting and Kshs 10,000 for labour making a total sum of Kshs 94,000. The respondent did not produce any accident report to the police or insurance and did not produce any receipt for the alleged expenses. The counter claim has not been proved on a balance of probabilities and is dismissed.
26. The respondent testified that the Commission percentage paid to the claimant was increased to 21% as at October, 2016 and so the claimant received different salary per month depending on the income generated per month and did not receive a constant sum.
27. The evidence by both parties is that the claimant worked 15 days a month on 24 hour schedule. Therefore, the claimant would not be at work for 15 days in a month. The contract of employment did not provide for any leave days but it would appear that the 15 days the claimant remained at home served as his leave.
28. Clearly, the claimant received no salary at all whilst he was not working. There is no evidence before Court that the claimant requested to be paid leave allowance whilst he stayed home. The contractual arrangement between the parties did not conform to the statutory provisions of the Employment Act, 2007 which provides under Section (28) that: -
- “ [28(1)] An employee shall be entitled: -
- (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;”
29. The contract of employment was silent on this matter but clearly the claimant was entitled to at least 21 days’ salary for each completed year of service. The claimant was not paid any salary whilst he took leave but did not claim payment either.
30. The claimant is entitled to payment for the last three years of service for unpaid leave days. The monthly payment will be calculated at the average amount received by the claimant every month which he stated to be Kshs (9,150 x 3) Kshs 27,450.
31. The claimant testified that he was underpaid for the entire period he served and stated that he ought to have been paid Kshs 14,785.70 instead of the average salary of Kshs 9,150 he received every month. Clearly, the claimant was paid on commission basis and no monthly salary was agreed upon. It is not in dispute that the Commission payable was initially at 16% of the income generated by the claimant in the month which amount was later increased to 21%. There is no basis for the claim for underpayment. Therefore, the claim has failed for want of proof and is dismissed.
32. The respondent deducted National Social Security Fund dues from the income of the claimant but did not remit. The claimant has proved that the respondent did not remit Kshs 28,400 and the amount is awarded to the claimant accordingly.
33. The contract of employment between the parties did not provide for service pay. The claimant was however an employee of the respondent and not a commission agent. The claimant received a monthly salary calculated on the basis of generated income. The claimant had social protection – via National Social Security Fund which however the respondent defaulted on for a considerable number of years hence denying the claimant that social cover. The claimant has however claimed payment of unremitted amount and the Court has awarded him accordingly. The claim for service pay therefore has not been proved and is dismissed.



## **Dismissal**

34. In his testimony before Court and in the witness statement, the claimant adopted as part of his testimony in Chief, the claimant did not name the person who verbally summarily dismissed him. In terms of Section 107, 108 and 109 of the Evidence Act, Cap. 80 Laws of Kenya as read with Section 47(5) of the Employment Act, the Claimant bears the onus of proving that a termination of employment or dismissal took place before the onus shifts to the employer in terms of Section 43, 45 and 47 of this Act to demonstrate that the termination or dismissal was for a valid reason.
35. The claimant in the present case did not satisfy the Court that any known person representing the respondent company summarily dismissed him verbally as alleged or at all.
36. The claim for summary dismissal has therefore failed for want of proof and is dismissed
37. The claimant is therefore not entitled to any compensation and payment in lieu of notice. The two claims are dismissed.
38. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows: -
- (a) Unpaid leave days for 3 years (9,150x3) Kshs 27,450.
  - (b) Kshs 28,400 unremitted National Social Security Fund dues.  
Total: Kshs 55,850.
  - (c) Interest at Court rates from date of filing suit till payment in full.
  - (d) Costs of the suit.
39. For the avoidance of doubt, the rest of the claim by the claimant and the counter-claim by the respondent are dismissed for want of proof.
40. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution}} and the provisions of Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**



Mr. Kimiti & Associates for the claimant  
Mutisya & Company Advocates for the Respondent  
Ekale – Court Assistant

