



**Wainaina v Shreeji Enterprises (K) Limited (Cause 1317 of 2017)
[2022] KEELRC 4031 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4031 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1317 OF 2017**

M MBARÚ, J

JUNE 6, 2022

BETWEEN

NAHASON MUNGA WAINAINA CLAIMANT

AND

SHREEJI ENTERPRISES (K) LIMITED RESPONDENT

JUDGMENT

1. The claim is based on the facts that in March, 2014 the respondent employed the claimant as truck driver at a month wage of Ksh 28,000 with duties which included transporting goods from the Port of Mombasa to the respondent's premises in Nairobi or to any other destinations depending on the instructions given.
2. The monthly wage was then increased to Ksh 30,000 with the claimant working from 6am to 11pm daily without rest days.
3. In June, 2016 the respondent sent the claimant on medical leave.
4. On February 27, 2016 while the claimant was on duty he was involved in a road traffic accident along Mombasa road while driving the respondent's truck Registration Number KBY 370G to Mombasa to collect goods after the breaks malfunctioned and failed due to mechanical problems forcing the vehicle to violently ram onto another vehicle and the claimant suffered serious bodily injuries. The claimant was admitted at Voi hospital and then transferred to Coast General Hospital and then airlifted to Nairobi West Hospital on February 29, 2016 since he had suffered spinal injury following the traffic accident.
6. The respondent paid all the medical bills and upon being discharged on March 10, 2016 the respondent issued him with a clinic card which allowed him access to treatment at Nairobi West Hospital as out-patient. He attended clinics until June, 2016 when the respondent withdrew the clinic card and was



- sent on indefinite medical leave and that he would be compensated for his injuries within 2 weeks under the *Work Injury Benefits Act* which compensation has not been paid to date.
7. The respondent also stopped payment of salary from June, 2016 and stopped remittance of NSSF in February, 2017. No letter or notice terminating employment has ever been issued. The claimant is seeking the following dues;
 - a. Damages for wrongful and unfair termination of employment;
 - b. Unpaid salaries from June, 2016 to February, 2017 at Ksh 30,000 per month;
 - c. Notice pay of one month;
 - d. Payment in lieu of leave days not taken;
 - e. Overtime pay;
 - f. Costs of the suit.
 8. The claimant testified that in February, 2016 while at work and driving truck registration KBY xxxG along Voi-Mombasa road he had an accident where he got injured and admitted in hospital. The respondent paid the bills at Nairobi West Hospital and allocated him a medical card to access free treatment upon discharge on March 10, 2016. The claimant continued with outpatient treatment until June 2016. The doctor had given him 120 sick off days from March 10, 2016. He filed the sick off sheet with the respondent.
 9. 120 days ended on July 5, 2016 and he continued with treatment at the clinic.
 10. The respondent said that they could not afford more treatment and the claimant was advised to follow up with NHIF and to also go to the Ministry of Labour for assessment which the claimant did and returned the assessment forms to the respondent who said compensation awarded was too high. He was not paid his wage in June, 2016.
 11. After the end of the 120 sick off days the claimant did not resume duty since he was on treatment on his own means. The respondent was paying for NHIF but not the salary until February, 2017 when they stopped the NHIF payments. He was then resident at Sultan Hamud where he was attending at a local clinic which was near his home in Oloitoktok.
 12. The respondent alleged that the claimant absconded duty but he kept on reporting to seek payment of his wage until September, 2016 and no letter terminating employment issued to date.
 13. There was unfair termination of employment, the terminal dues claimed should issue as prayed with costs.
 14. In response, the respondent's case is that the claimant was employed as a driver and was never sent on medical leave as alleged. The claimant was involved in a road accident and the respondent paid all the medical bills. The respondent never withdrew the claimant's clinic card or failed to pay compensation under the *Work Injury benefits Act*.
 15. The claimant absconded duty and failed to report his whereabouts and also failed to attend medical therapy sessions which the respondent was paying for. He did not issue notice or indicate why he abandoned medical therapy.
 16. The respondent had no reason to consider the claimant as its employee and his conduct led to the conclusion that he had resigned and the claims made are without basis and should be dismissed with costs.



17. In evidence the respondent called Barack Odera Otieno the human resource manager who testified that when the claimant had an accident, he was treated at various hospitals at the expense of the respondent but in June, 2016 when his medical sick off ended he failed to resume work and his whereabouts could not be traced. The respondent wrote to the claimant through his last noted address PO Box 547 Bungoma but there was no response. Later the claimant said he was resident in Oloitoktok but had not noted such details with the respondent. The claimant did not communicate the change of address.
18. The claimant was paid his wages from June, 2016 to February, 2017 through his bank account. He was paid fully and the payment records are filed. While the claimant was on medication the doctor issued him with certificate and was to be allocated light duties and he was paid until he failed to account for his whereabouts.
19. The respondent paid all statutory dues to NSSF and NHIF until February, 2017 hoping the claimant would report to work. Such stopped for good cause. The claimant deserted work and the claims made are not justified. On August 3, 2016 the claimant collected his work injury assessment forms but was not reporting to work.
20. At the close of the hearing, both parties filed written submissions which have been put into account and the single issue for determination is whether there was unfair termination of employment and the relief sought justified.
21. It is not in dispute that the claimant was the employee of the respondent as a truck driver and on February 27, 2016 he suffered a road accident while driving the respondent's vehicle registration KBY xxxG along Mombasa road. He was treated at Nairobi West Hospital and upon discharge on March 10, 2016 he was given 120 days sick off from 10th March to June 15, 2016.
22. The law allow an employee who falls sick or is unwell while at work to enjoy the right to medical treatment in terms of section 34 of the *Employment Act, 2007* that;
 1. Subject to subsection (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.the claimant was therefore treated at Nairobi West hospital and given time off to resume work after June 15, 2016.
23. Where the claimant remained unwell and required further medical attention, resource was back to the same doctor for more medical time off. In the alternative, a report back to the employer to be granted permission to get more time off due to sickness, injury or as approved by the employer.
24. Absence from work must be for good cause, with approval of the employer and where sick, upon authorisation by a medical officer. In this case, the claimant's sick off lapsed on June 15, 2016.
25. The claimant testified that in none, 2016 he continued to be unwell and the respondent withdrew the clinic card which he was using t access free medical services at Nairobi West Hospital. He started attending treatment at Sultan Hamud near his home in Oloitoktok. There is however no sick off sheet issued from any known government facility in Sultan Hamud with regard to the claimant and which was submitted to the employer.
26. Absence from work is defined under section 44(4)(a) of the *Employment Act , 2007* as gross misconduct. on the absence of the claimant, the respondent as the employer was required under section 41(2) to issue him with notice to attend and address such gross misconduct.
27. A notice issued to the claimant through his last known address on PO Box 547 Bungoma as noted in the employment form of 2014 and there was no attendance. The respondent discharged its duty



under section 44 and 41 of the [Employment Act, 2007](#). The claimant frustrated his own employment by failing to account for his whereabouts after the sick off days lapsed on June 15, 2016. He cannot turn around and blame the employer. No notice pay or compensation is due.

28. On the claim for unpaid salaries from June, 2016 to February, 2017 the claimant cannot seek pay for work not done after June 15, 2016 when he ought to have resumed duty. The only wage due is up to and until June 15, 2016. The respondent filed the payment statement for June, 2016 and the claimant was paid Ksh 28,428 gross and deposited to his bank account. He cannot claim outside such payment.
29. The claim for leave days not taken, on the payment statements filed by the respondent, in February, 2016 the claimant was paid Ksh 17,304 in lieu of taking leave. On the claim for overtime, save to urge the court that work hours were 6am to 11pm daily the claimant only places a general claim without details.
30. Accordingly, the claim is hereby found without merit and is hereby dismissed with costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

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and

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