



**Ndungu v Sifa Investments Limited (Cause 317 of 2018)
[2022] KEELRC 1771 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1771 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 317 OF 2018**

**B ONGAYA, J
JULY 29, 2022**

BETWEEN

ISAAC NDUNGI CLAIMANT

AND

SIFA INVESTMENTS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 11.05.2018 through Ngonze & Ngonze Advocates. The claimant prayed for judgment against the respondent for:
 1. Public holiday payment Kshs. 26, 614.00.
 2. Unpaid overtime Kshs. 1, 366, 054.00.
 3. Maximum compensation for wrongful and unfair termination under sections 49 and 50 of the [Employment Act](#), 2007 Kshs. 172, 992.00.
 4. Costs of the cause.
 5. Interest on 1, 2, and 3 above at Court rates from the date of filing the suit till payment in full.
2. The claimant pleaded as follows. He was employed by the respondent as a Turn Boy from 01.10.2011 and he worked as such until termination on 23.01.2018. He reported on duty on 23.01.2018 but was terminated without a notice while he had a clean record of service. He was not paid terminal dues per section 18(4) and (5) of the [Employment Act](#), 2007.
3. The memorandum of response was filed on 21.06.18 through Moses Mwakisha & Company Advocates. The respondent admitted employing the claimant as pleaded in the memorandum of claim. The respondent admitted terminating the claimant's employment by the letter dated 23.01.2018 and the claimant did not have a clean record of service. He had received warnings on 30.03.2015 for being



found driving the respondent's truck on Mombasa-Nairobi Highway when he was not authorised or qualified to do so. The termination on 23.01.2018 was the consequence of having caused yet another accident inside the Company's yard on 18.01.2018. The respondent stated that the claimant's continued negligence was a good justification for the termination. It was denied that the claimant was entitled to or earned overtime and the trucking hours by policy were 6am to 6pm and which were strictly adhered to. All the claimant's claims were denied and the respondent prayed that the suit be dismissed with costs.

4. The claimant testified to support his case. The respondent's witness (RW) was Nashon Mutuku Timona, the respondent's Human Resource Manager. Final submissions were filed for parties. The Court has considered the material on record and returns as follows:
 1. There is no dispute that parties were in a contact of service as pleaded for the claimant and admitted for the respondent. The claimant was employed as a Turn Boy.
 2. There is no dispute that the contract of service was terminated. In May 2018 when the claimant crushed the respondent's truck. He was suspended and later told in view of that accident, he had been terminated from employment.
 3. The Court has considered the circumstances of the termination and returns that it was not unfair. The circumstances are that the claimant at the material time applied to be promoted to a Driver. He showed RW a driving licence. RW then assigned him truck No. KAG 573R to test him for promotional purposes. The Claimant was to drive the truck from the yard where it was for parking on to the road. He testified that in the process near the gate but before the road he wanted to break but then he accelerated and lost control of the truck. He drove into a ditch and the truck was seriously injured. The claimant discussed the incident with the respondent, he was suspended, and, later terminated. The Court finds that the claimant was the author of his own predicament when he misled the respondent to believe that he was competent as a driver but which turned out to be untrue. The respondent's truck was seriously damaged. The Court finds that the reason for termination was a fair reason per sections 43, 45 and 47 (5) of the *Employment Act*, 2007. Further it amounted to gross misconduct per section 44 of the Act and the respondent was entitled to dismiss with no or shorter notice than was contractually agreed upon. The respondent's submissions that the termination was not unfair is upheld. The undisputed evidence was that the claimant had previously caused an accident while driving the respondent's truck on Mombasa-Nairobi Highway and without due authority to do so. By his own evidence, he had thereafter been grounded to work within Mombasa without going on long trips. The Court finds that the termination was supported by such previous unclean record of service which amounted to an aggravating factor as a catalyst to the ensuing termination.
 4. The claimant prays for overtime and pay on public holidays. The particulars of the claims are not specifically pleaded and then strictly proved. The claimant testified that he reported at work at 8.00am and left sometimes at 6.00pm, 8.00pm, 10.00pm. or 11.00pm. Further, he stated that the clock out time was unknown. By that evidence the Court returns that it cannot establish the exact hours of the alleged overtime and the base for calculating the overtime payment. He also stated that he was given overtime and other times he was not. From such testimony, it is apparent that the claimant was not certain on the claims and applicable computation. There appears to have been no grievance about the claims until the suit was filed. The claims on leave, public holidays and overtime are found to have been mere afterthoughts and will collapse as unjustified per the submissions made for the respondent.



5. The Court finds that the respondent contributed to the accident when irrespective of the earlier accident the claimant had caused and the claimant being a Turn Boy, he was assigned the truck and without an instructor or a supervisor. Thus, the Court returns that there will be no orders on costs.
5. In conclusion judgment is hereby entered for the respondent for dismissal of the suit with no orders on costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH JULY, 2022.

BYRAM ONGAYA

JUDGE

