



REPUBLIC OF KENYA



KENYA LAW
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**Gumbo v Teo's Company Limited (Cause 322 of 2018)
[2022] KEELRC 1196 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 322 OF 2018**

**B ONGAYA, J
JULY 8, 2022**

BETWEEN

MELVIN OTIENO GUMBO CLAIMANT

AND

TEO'S COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on May 14, 2018 through M.K. Mulei & Company Limited. The claimant's case was pleaded as follows. He was employed by the respondent as a truck driver assigned to drive truck Registration No.KBS 611Y for delivery of cargo to various parts of the country. His gross monthly salary was Kshs.20, 000.00. His case is that he was terminated from employment in 2017 without justifiable reason or notice. Further the respondent undertook to pay the claimant salary arrears of Kshs. 260,000.00 for the months of July 2016 to July 2017. He was paid Ksh. 65,000.00 and the balance was Kshs. 195,000.00. the claimant claimed and prayed for judgment against the respondent for:
 - a) A declaration the termination was unlawful and unfair and that the claimant was declared redundant.
 - b) That the respondent is compelled to pay the terminal dues listed below.
 - c) Salary in lieu of notice Kshs. 20,000.00.
 - d) Salary arrears Kshs. 195, 000.00.
 - e) 6-months salaries compensation for unfair termination Kshs.120, 000.00.
 - f) 3-years' leave Kshs. 60,000.00.
 - g) Severance pay for 3 years at 15 days' salary per year Kshs. 34, 615.00.



- h) Costs and interest of the suit at court rates.
 - i) Any other relief that the Court will deem fit to grant.
2. The respondent filed the response to the memorandum of claim on June 21, 2018 through Marende Necheza & Company Advocates. The respondent's case is as follows. The claimant was employed by the respondent from March 2014 to March 2016 on need basis. The claimant was terminated due to the breakdown of the assigned truck KBS 611Y and which remained stalled to date. There was no any other truck to be assigned and the employment was terminated. The claimant was paid Kshs. 65, 000.00 but the remainder of the salary arrears was withheld as security for the payment of CTMS (Cargo Truck Monitoring System) as security for the payment of the balance which the respondent continues to pay in instalments. The CTMS is valued at Kshs. 75, 000.00 and to be applied to offset some of the owed salary arrears. Further, the respondent was willing to continue paying the salary arrears. It was prayed that the suit be dismissed with costs.
3. The claimant testified to support his case. The respondent's witness was Marion Wambui Mungai (RW). Final submissions were filed for the parties. The Court has considered the pleadings, the evidence, and the submissions and returns as follows:
- 1) There is no dispute that the respondent employed the claimant as a truck driver. By the certificate of service exhibited, he worked from 2014 to December 2017 being 3 years. His last monthly gross pay was Kshs.20, 000.00. RW testified that she could not tell days the claimant may have or not, attended work. The Court finds that he attended work without break for the three years.
 - 2) The evidence is that the respondent gave to the claimant a CTMS device and the claimant returned it to the respondent. There is no reason to doubt the claimant's evidence thus, "The gadget said I did not return in the 2nd month 2018 (February) I took it for trucking containers. It was used alongside the truck. I took it to charge it so as to be fully charged at time of loading containers. I returned it to office. I took device to him (Mr.Kilele). He confirmed it was okay. He asked me to put it at one corner of the office. I left it there. I do not recall date in February, 2018" in a consistent manner, in cross-examination he testified, "I took it November 2015 and returned it February 2018. I was not asked to sign anywhere when I was given it and when I returned it." RW testified that she could not tell if the claimant failed to return the device in issue. She also testified that by the exhibited documents the value of the gadget could not be told at all. The Court has considered the acknowledgement of debt by Michael. M.M. Kilele (now deceased) for the respondent and signed on October 24, 2017. There is no mention of the CTMS device in issue and that suggests that the claimant had returned it – the respondent having failed to plead about the due date he was to return it and he had been allocated the same. The Court returns that the claimant returned it as per his evidence and in any event, the value of the CTMS was not established at all. The Court finds that the claim for a set off by the respondent in that regard will collapse.
 - 3) The separation was in December 2017 per the certificate of service. On October 24, 2017 both parties had signed acknowledgement of separation debt fixed at Kshs. 260, 000.00 in salary arrears. While the certificate says he served until December 2017, the claimant testified that he worked until October 2017 when the Director said the truck would be sold. The claimant's evidence is credible as it tallied the signing of acknowledgement of debt on October 24, 2017 and which stated that the claimant had been in the respondent's employment and salary arrears would be payable once the respondent's assets had been sold.



4) The Court finds that by submissions, both parties mutually agree that the separation amounted to redundancy as per section 40 of the Employment Act, 2007. Whether the assigned truck was to be sold or it broke down, the termination was on account that the position of a truck driver held by the claimant became untenable free from attribution to the claimant - a classical redundancy situation per definition in section 2 of the Employment Act, 2007. The evidence was that the claimant was not prepared by way of a notice and prompt payment as per section 40 of the Act. It was unfair. The Court has considered the aggravating factor of retaining him in employment for long without payment of salaries. After he left, he was not paid and he had to institute the present suit. Within factors in section 49 of the Act, the payment of the six months' salaries is found fair. The evidence is that he was not given annual leave which is awarded as prayed and under section 28 of the Act. Notice pay and severance pay are due under section 40 of the Employment Act, 2007 and, they are awarded. All salary arrears were paid by the time of hearing of the suit and they have been satisfied. On the headings of claims and prayers made, he is awarded a sum of Kshs.234, 615.00. Costs are also awarded as the claimant has succeeded in his claim.

4. In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination was unfair and unlawful.
- 2) The respondent to pay the claimant Kshs. 234, 615.00 by September 1, 2022 failing interest to run thereon at Court rates till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 8TH JULY, 2022.

BYRAM ONGAYA

JUDGE

