



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 839 OF 2016

BETWEEN

RASHID ALI MASINDE.....CLAIMANT

VERSUS

HAKIKA TARSPORTERS SERVICES LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

I.R.B. Mbuya & Company Advocates, for the Claimant

Isaac Onyango & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 27th October 2016. He states, he was employed by the Respondent from 13th January 2005 to 27th April 2015 as a Tractor Driver. He was paid a daily rate of Kshs. 400 at the inception, and Kshs. 600 at the time of termination.

2. He was asked by his Supervisor, Richard Okwiri, on 27th April 2015, to withdraw from his Trade Union. He refused. He was referred to the Personnel Manager Yeri Kombe, who ordered the Claimant to leave employment. The Claimant was told to go home, and wait for his terminal benefits. The Claimant avers, there was no notice or valid reason justifying termination. He never went on annual leave. He was not registered to a Pension or Provident Fund. He seeks Judgment against the Respondent for: -

- a. 1-month salary in lieu of notice, at Kshs. 15,860.
- b. Annual leave over a period of 10 years, 4 months, at Kshs. 133,224.
- c. Service pay at the rate of 15 days' salary for 10 complete years of service at Kshs. 91,500.
- d. 12 months' salary in compensation for unfair termination, at Kshs. 188,160
- e. Any other suitable order.
- f. Costs.
- g. Interest.

3. The Respondent filed its Statement of Response on 13th February 2017. Its position is that the Claimant and Co-Employees, disrupted Respondent's operations on or about 2nd April 2015. He was invited to a disciplinary hearing consequently, on 22nd April 2015. He compounded his situation by refusing to attend the hearing. His contract was terminated. He was paid all his dues. He reported the existence of a dispute to the Ministry of Labour. It was concluded by the Ministry, that the dispute was fully settled. He was registered with the N.S.S.F. He utilized his annual leave. The Respondent prays the Court to dismiss the Claim.

4. The Claimant was heard, and closed his case, on 23rd September 2019. Rajab Kombe gave evidence for the Respondent on 4th February 2020, closing the hearing. The matter was last mentioned in Court on 17th December 2020, when Parties confirmed filing of their Closing Submissions, and the file transmitted to the Trial Judge sitting at Nairobi, for preparation of Judgment.

The Court Finds: -

5. The dispute herein was reported to the Ministry of Labour, Social Security and Services, by Claimant's Trade Union, Kenya Long Distance Truck Drivers Union. This report was made pursuant to the Labour Relations Act 2007. A Conciliator was appointed by the Chief Industrial Relations Officer in the Ministry, on 31st March 2016.

6. He held conciliation meetings with the Parties. The issue in dispute was stated to be: '*unfair termination of Kelvin Owino Malumba and 7 others.*' The 7 others included the lone Claimant herein. Parties agree that the dispute was taken through conciliation. But, there is no telling how the process ended.

7. Regrettably, the Claimant did not file any document arising from the conciliation process.

8. Rule 5 of the E&LRC [Procedure] Rules 2016, requires that, where a Claim has been subject of conciliation: -

a. The Statement of Claim shall be accompanied by a Report of the Conciliator, on the conciliation process, supported by the minutes of the conciliation meeting.

b. A certificate of conciliation, issued by the Conciliator, under Section 69 [a] of the Labour Relations Act.

c. Where the Conciliator has not issued certificate of conciliation, the Statement of Claim shall be accompanied by an Affidavit sworn by the Claimant or by his Representative, attesting to the reasons, why the Conciliator has not issued certificate of conciliation.

d. Where conciliation has not taken place, the Statement of Claim shall be accompanied by an Affidavit from the Claimant or by his Representative, attesting to the reasons, why conciliation has not taken place.

9. The Claimant has not complied with any of the above rules. The Court does not know what took place on conciliation. It does not have the certificate of conciliation, to determine if the dispute remained unresolved at the time the Claim was filed herein. Section 69 of the Labour Relations Act states that, the dispute is unresolved, if the Conciliator issues a certificate, that the dispute has not been resolved by conciliation. The Claimant or his Representative, did not file an Affidavit, in lieu of the certificate of conciliation, attesting to the reasons why the certificate did not issue. If it was issued, it was not presented to the Court. Parties were left struggling in their evidence, in clarifying the fate of the conciliation process.

10. Section 73 of the Labour Relations Act, grants this Court jurisdiction to deal with disputes which have not been resolved at conciliation. It must be known, through a legal instrument, if a dispute has not been resolved at conciliation.

11. The Claimant did not comply with the Employment and Labour Relations Court [Procedure] Rules, 2016, governing proceedings filed pursuant to disputes which were subject of conciliation. The Court was not properly seized of jurisdiction, without the certificate of conciliation, or an Affidavit from the Claimant or his Representative, explaining why there was no certificate of conciliation. This default, is not a procedural technicality, but goes to the root of the Court's jurisdiction, in determining Claims subject of conciliation.

12. Rule 5 of the E&LRC [Procedure] Rules, 2016, and Section 69 of the Labour Relations Act, must be strictly adhered to. They relate to the jurisdiction of this Court, to hear and determine claims of the nature contemplated by these Rules and Statutory Provision.

IT IS ORDERED: -

a. The Claim is improperly before the Court and is hereby struck out.

b. No order on the costs.

Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 19th day of February 2021.

James Rika

Judge