



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 237 OF 2016**

**ABDILLAHI ABUSHIRI MWINYI.....CLAIMANT**

**VERSUS**

**ODAY TRANSPORTERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. What is before me for determination is a claim by Abdillahi Abushiri Mwinyi and a counterclaim by Oday Transporters Limited.
2. The claim is contained in a Memorandum of Claim dated 14<sup>th</sup> October 2015 and filed in court on 29<sup>th</sup> March 2016. The Respondent responded by a Memorandum of Response and Counterclaim dated 28<sup>th</sup> May 2019 and filed in court on 29<sup>th</sup> May 2019. The Claimant filed a Reply to the Respondent's Response and Counterclaim on 15<sup>th</sup> July 2019.
3. When the parties appeared before me on 28<sup>th</sup> September 2020, they elected to dispense with the matter by way of written submissions.

This judgment is therefore based on the parties' pleadings and their written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Heavy Commercial Truck Driver from February 2013 to September 2013. He claims to have earned a monthly net salary of Kshs. 30,000.
5. The Claimant further states that his employment was unlawfully terminated on 30<sup>th</sup> September 2013, after he sustained injuries in a road traffic accident, while working for the Respondent in Jinja-Uganda. The Claimant claims that the brakes of the truck assigned to him failed while he was transporting goods for the Respondent.
6. The Claimant's case is that his employment was terminated without valid reason and in contravention of due procedure.
7. The Claimant avers that the Respondent stopped paying his salary immediately after the accident and cut all communication with him.
8. The Claimant's claim against the Respondent is as follows:
  - a) One month's salary in lieu of notice.....Kshs. 34,500
  - b) Salary for the month of September 2013.....34,500
  - c) House allowance for 8 months.....36,000
  - d) Prorata leave.....20,899
  - e) 12 months' salary in compensation.....414,000

f) Certificate of Service

### **The Respondent's Case**

9. In its Memorandum of Response and Counterclaim dated 28<sup>th</sup> May 2019 and filed in court on 29<sup>th</sup> May 2019, the Respondent denies the Claimant's claim of unlawful termination of employment.

10. The Respondent admits having employed the Respondent as a Truck Driver but states that the Claimant did not discharge his obligations in a diligent manner.

11. The Respondent states that after the accident, the Claimant did not report back to work.

12. The Respondent further states that:

- a) The Claimant was involved in a self-involving accident in Jinja, Uganda while fleeing from a mob after hitting a roadside vendor;
- b) The Respondent's truck was badly damaged from the said accident;
- c) The Claimant refused to report the accident at the police station for fear of being arrested for the hit and run;
- d) The Respondent expended huge amounts of money totalling Kshs. 916,976 to repair the Claimant's designated motor vehicle registration number KBS 203C, which expenses would have been catered for by the insurer had the Claimant reported the accident;
- e) The Respondent's motor vehicle was a commercial vehicle making an average income of Kshs. 30,000 per day, which revenue the Respondent lost for the three (3) months the vehicle was grounded, pending repairs;
- f) The vehicle was towed to Mombasa at a cost of Kshs. 150,000;
- g) The Claimant caused the Respondent to suffer financial loss and damage;
- h) The case filed by the Claimant is misleading, mischievous and an attempt to use the courts to gain money from the Respondent unfairly.

13. By way of Counterclaim, the Respondent states that it has suffered loss and damage as a result of the Claimant's actions.

14. In this regard, the Respondent sets out the following particulars of gross misconduct, negligence and/or recklessness on the part of the Claimant:

- a) Failing, refusing and/or ignoring to heed to the Highway Code and traffic rules;
- b) Hitting a pedestrian in Jinja, Uganda and speeding off;
- c) Causing injuries to a pedestrian through careless driving;
- d) Driving the motor vehicle at an excessive speed;
- e) Speeding off after causing an accident and in the process causing another accident;
- f) Failing, ignoring and/or refusing to give regard to other road users;
- g) Failing, ignoring and/or refusing to report an accident;
- h) Driving while intoxicated;
- i) Otherwise causing the accident.

15. The Respondent avers that the Claimant's actions were in total breach of his contract of employment and/or statutory duty; particulars being:

- a) Failing, neglecting and/or refusing to report an accident;
- b) Driving the Respondent's motor vehicle in a reckless manner;
- c) Causing an accident;

d) Damaging the Respondent's motor vehicle;

e) Failing to report back to work after treatment.

16. The Respondent states that the Claimant's action caused it to suffer financial loss and damage and gives the following particulars in this respect:

a) Cost of repairs.....Kshs. 916,976

b) Loss of income @ Kshs. 30,000 per day for 90 days.....2,700,000

c) Towing charges from Uganda.....150,000

17. The Respondent therefore counterclaims the sum of Kshs. 3,766,976 plus general damages from the Claimant.

### **Findings and Determination**

18. There are three (3) issues for determination in this case:

a) Whether the Claimant has made out a case of unlawful termination of employment against the Respondent;

b) Whether the Claimant is entitled to the remedies sought;

c) Whether the Respondent has made out a proper counterclaim against the Claimant.

### **Unlawful Termination?**

19. In his Memorandum of Claim dated 14<sup>th</sup> October 2015 and filed in court on 29<sup>th</sup> March 2016, the Claimant pleads that his employment was unlawfully terminated on 30<sup>th</sup> September 2013 after he sustained injuries in a road traffic accident, while working for the Respondent in Jinja-Uganda.

20. The Claimant did not however adduce any evidence to substantiate his pleadings and there was nothing before the Court to support an allegation of unfair termination of employment.

21. Section 47(5) of the Employment Act places the burden of proving the ingredients of unfair termination or wrongful dismissal on the employee. Having chosen not to testify before the Court, the Claimant failed to discharge the legal and evidential burden placed upon him.

22. The claims for compensation and notice pay therefore fail and are dismissed.

### **Other Claims**

23. The Claimant did not demonstrate before the Court the basis upon which he was claiming house allowance nor did he prove his claim for salary for September 2013. These claims therefore also fail and are dismissed.

24. In the absence of leave records to the contrary, the Claimant is entitled to prorata leave pay for the seven (7) months worked.

### **The Respondent's Counterclaim**

25. The Respondent's Counterclaim as pleaded in the Memorandum of Response and Counterclaim dated 28<sup>th</sup> May 2019 and filed in court on 29<sup>th</sup> May 2019 is in the nature of special damages.

26. The Respondent was therefore required to present specific documentary evidence to support its Counterclaim. Having failed to do so, the Counterclaim must fail.

### **Final Orders**

27. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs. 12,250** being prorata leave pay for 7 months.

28. This amount will attract interest at court rates from the date of judgment until payment in full.

29. The Claimant is also entitled to a Certificate of Service.

30. Each party will bear their own costs.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 4<sup>TH</sup> DAY OF FEBRUARY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ganzala for the Claimant

Ms. Abdi for the Respondent