



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 517 OF 2016

MAGHANGA NEWTON RAPHAEL.....CLAIMANT

VS

PANAL FREIGHTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 27th June 2016, the Claimant filed a claim against the Respondent, seeking compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Response on 30th May 2017.
2. The matter came up for hearing severally but did not proceed for various reasons, including referral to court annexed mediation with no outcome due to non-attendance on the part of the Respondent.
3. On 1st February 2021, the matter came up for hearing but there was no appearance for the Respondent, in spite of due service. The Court therefore heard the Claimant *ex parte*. In reaching my judgment I have however considered the Respondent's Response on record.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 2nd October 2015, in the position of Transport Coordinator. He earned a monthly salary of Kshs. 40,000.
5. The Claimant worked for the Respondent until 5th May 2016, when his employment was terminated. He claims that the termination was unjustifiable and unfair.
6. The Claimant further claims that he worked from 6.45 am to 7.00 pm on weekdays, 7.00 am to 4.00 pm on Saturdays and 9.00 am to 3.00 pm on Sundays.
7. The Claimant tabulates his claim as follows:

- a) 12 months' salary in compensation.....Kshs. 480,000
- b) 1 month's salary in lieu of notice.....40,000
- c) Service pay.....20,000
- d) Overtime.....286,572
- e) Certificate of service
- f) Costs

The Respondent's Case

8. In its Memorandum of Response dated 26th May 2017 and filed in court on 30th May 2017, the Respondent states that the Claimant was engaged in October 2015, under a six months' probation, pending confirmation.

9. The Respondent further states that in December 2015, a performance appraisal was carried out, where it turned out that the Claimant's performance was unsatisfactory.

10. The Respondent adds that the Claimant was put on a performance improvement plan, and another appraisal conducted in April 2016, where again it turned out that the Claimant's performance was below expectation.

11. The Respondent goes on to state that the Claimant's employment was terminated on 5th May 2016, on grounds of non-performance and the decision formally communicated to him by a letter of the same date.

12. The Respondent avers that from the appraisal, it was clear that the Claimant was unable to competently carry out his duties as Transport Coordinator. The Respondent accuses the Claimant of divulging classified information to the Respondent's competitors.

13. The Respondent further avers that at termination, the Claimant's dues totalling Kshs. 25, 957.79, being leave pay, salary for 6 days worked and notice pay were paid to the Claimant.

Findings and Determination

14. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

15. The termination of the Claimant's employment was communicated by letter dated 5th May 2016 stating:

"Dear Mr. Newton,

RE: TERMINATION OF CONTRACT

We regret to confirm to you that your contract has been terminated with effect from 6th May 2016.

Your dismissal is in line with our termination policy where either party may terminate the employee employer relationship with either one month notice or if without notice payment in lieu of notice.

You will receive your final paycheck after clearance and handover. Your paycheck will include payment in lieu of notice, days worked in the month of May, service pay and pending leave days' pay if any.

You are advised to proceed and clear with all relevant departments to facilitate payment of your final dues.

Yours sincerely,

(signed)

Margaret Juliet

Human Resource Administrator

(signed)

Mr. Ahmed Shimbwa, Mcom,

Managing Director/CEO

16. This letter does not disclose any reason for termination. However, in its Memorandum of Response filed in court, the Respondent states that the termination was occasioned by poor performance by the Claimant in addition to disclosure of confidential information to the Respondent's competitors.

17. The procedure for terminating employment on the ground of poor performance is now clear and it is this; that the employee is first made aware of their shortcomings and allowed a reasonable time to improve. Further, any performance appraisal upon which the decision to terminate is made must have the input of the employee (see *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR* and *Joshua Kabaka v Tandu Alarms Systems Limited [2019 eKLR]*).

18. The Claimant told the Court that he was not subjected to any appraisal and denied having been shown the appraisal forms filed by the Respondent. The appraisal forms, which the Court had occasion to look at, did not bear the Claimant's comments or signature. In fact, it looked as if the Claimant's supervisor just sat in his office and completed the forms.

19. In such a case, the only conclusion to make is that the Claimant was not subjected to any appraisal. Additionally, there was no evidence of any shortcomings having been pointed out to him nor was he given an opportunity to improve. The ground for poor performance was therefore not established.

20. Regarding the allegation that the Claimant had divulged confidential information to the Respondent's competitors, which falls within the general category of misconduct, no details were provided by the Respondent. This was therefore an empty allegation with no substance. Moreover, the Respondent did not require the Claimant to respond to any such charge at the shop floor, within the procedural fairness edicts of Section 41 of the Employment Act.

21. On the whole the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair, and he is entitled to compensation.

Remedies

22. I therefore award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in executing the termination.

23. I further award the Claimant one (1) month's salary in lieu of notice.

24. The Claimant told the Court that he was a contributing member of the National Social Security Fund (NSSF). The claim for service pay is therefore without basis and is disallowed.

25. The claim for overtime compensation was not proved and is dismissed.

26. Finally, I enter judgment in favour of the Claimant as follows:

- a) 3 months' salary in compensation.....Kshs. 120,000
- b) 1 month's salary in lieu of notice.....40,000
- Total.....160,000**

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

28. The Claimant will have the costs of the case.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY MAY 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. Maundu for the Claimant

No appearance for the Respondent