



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 842 OF 2015

FREDRICK MWANYIRO JOHANE KILENGETA.....CLAIMANT

- VERSUS -

SIFA INVESTMENTS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 05.11.2015 through Stephen Oddiaga & Company Advocate. The claimant pleads that he was employed by the respondent as a forklift operator for 5 years at basic monthly salary of Kshs. 25, 382.00 (from 19.08.2010 to 31.08.2015). Further, he received a letter dated 31.08.2015 on summary dismissal. He also received another letter dated 31.08.2015 titled damage to radiator KBL 774Z compelling him to sign to accept liability. The claimant states that the summary dismissal was unfair as the procedure in law was not followed and he was not given a fair hearing. He further states that his August 2015 salary was unfairly deducted together with the accrued leave in purchasing a new radiator in view of depreciation costs and the radiator was not brand new. Further he had not been paid work on weekends, holidays and overtime pay throughout his service. The amended memorandum of claim was filed on 14.05. 2015. The claimant claimed to be paid by the respondent:

- a) Notice Kshs. 25, 382.00.
- b) Compensation for unfair termination Kshs. 25, 382 x 12 Kshs. 304, 584.00.
- c) Accrued leave for 2015 for 21 days Kshs. 17, 761.00.
- d) Weekends 25, 382 / 30 x 1-day x 4 weeks x 12 months x 5years Kshs. 203, 056.00.
- e) Holidays 25, 382/30 x 9 days x 5 years Kshs. 38, 073.00.
- f) Overtime 25, 382/30 x 30 x12 x 5years Kshs. 1, 522, 920.00.
- g) Total Kshs. 2, 111, 776.40.

The claimant prayed for judgment for:

- a) A declaration that the dismissal was wrongful.
- b) A finding the entire process was flawed, nullity and unprocedural.
- c) Compensation for wrongful dismissal.
- d) Award of Kshs. 2, 111, 776.40.
- e) Costs and interest.

The respondent filed the response to the memorandum of claim on 30.11.2015 through Moses Mwakisha & Company Advocates. The amended response was filed on 29.03.2016. The respondent admitted that it employed the claimant and admitted terminating the contract of employment consequential to the claimant's admission of the liability and apologising after the notice to show cause had been served. The respondent stated that the claimant voluntarily signed the documents presented to him. Further, he was accorded chance to be heard and he

apologised as he admitted the allegations. The respondent further stated that the claimant had ventured into a neighbouring enterprise and rendered service thereat without the respondent's permission. He also recklessly manipulated the respondent's machinery entrusted to him thereby damaging their property. The claimant was terminated after accepting liability. The claimant never worked on weekends, holidays or overtime and the respondent stated that the claims be declined as unfounded. The claimant admitted accrued leave days at Kshs. 17, 761.00 and the claimant's suit be otherwise dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Nashon Mutuku Timona, the Human Resource Manager. Final submissions were filed for the parties. The Court makes findings as follows.

- 1) There is no dispute that parties were in a contract of service as pleaded for the claimant and admitted for the respondent.
- 2) There is no dispute that the contract of service was terminated by the letter of summary dismissal dated 31.08.2015. The claimant was terminated in view of his apology in relation to his actions leading to damaging a radiator belonging to a third party. As at the date of termination the respondent had been informed that the radiator would not be repairable but was awaiting the second expert opinion prior to tabulating the claimant's final dues (which would be related to the expenses in view of replacing the damaged third party's radiator).
- 3) The claimant testified that he received a letter laying out the allegations against him. He wrote a response and he received another letter on the damage of the radiator asking that he accepts liability. He testified that he wrote back apologising. RW testified that the claimant damaged the radiator belonging to a third party. The circumstances were that the claimant accepted to push a lorry using the forklift and he thereby damaged the lorry's radiator. The Court has considered the evidence and returns that the respondent has established that as at termination the reason for termination existed as genuine per section 43 of the Employment Act, 2007. The Court further finds that the reason related to the claimant's conduct or compatibility and the respondent's operational requirements per section 45 of the Act. Further the procedure the respondent invoked was fair because the claimant was required to explain himself and he wrote an apology and in view of that apology the Court finds that the respondent was entitled to consider him liable or culpable. The Court finds that the respondent substantially complied with section 41 of the Act on notice and hearing and the procedure was fair per section 45 of the Act. In any event the claimant admitted liability and he apologised. The Court finds that the termination was not unfair both in substance and procedure.
- 4) The Court finds that the claimant has failed to establish a case for a declaration the termination was wrongful and for compensation in that regard.
- 5) The claimant simply testified that he was called and assigned to work extra hours. RW testified that the agreed pay was Kshs. 22, 071.00 per month plus house allowance of Kshs. 3, 311.00 making a gross of Kshs. 25, 382.00 per month. In absence of any further evidence on when the claimant may have been called and assigned extra duties and in absence of evidence of grievances in that regard, the Court finds that the claimant was fully paid for work done and per agreed wages. Similarly, there was no evidence of the alleged work on weekends and holidays or a grievance shown to have existed in that regard. The parties agreed on hours of work per letter of employment dated 19.08.2010 thus, "**Reporting time Morning session Monday to Friday 8.00am to 12.30pm – Afternoon session 2.00pm to 5.30pm. Saturday 8.00am to 1.00pm. Public holiday (s) is not a working day**". The Court finds that parties are bound by that written clause on hours and days of work and the claims and prayers on overtime, weekends and holidays will collapse. In any event no submissions were made, in that regard, for the claimant and the prayers are deemed abandoned as are unjustified.
- 6) Accrued leave Kshs. 17, 761.00 is not in dispute and is allowed accordingly as per the respondent's submissions.

In conclusion, the suit is determined with orders:

- 1) The respondent to pay the claimant **Kshs. 17, 761.00** by 01.08.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till the date of full payment.
- 2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH JUNE, 2021.

BYRAM ONGAYA

JUDGE