



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 428 OF 2015

EDISON NYALE.....CLAIMANT

- VERSUS -

MASS INVESTMENT COMPANY LIMITED.....RESPONDENT

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

JUDGMENT

The claimant is Edison Nyale. He filed the memorandum of claim on 30.06.2011 in person. He later appointed Thabit Wampy & Kitonga Advocates to represent him. He prayed for judgment against the respondent for:

- 1) A declaration that the termination was unlawful and unfair.
- 2) Payment of benefits amounting to Kshs.233, 156.25 per agreement between the parties.
- 3) Payment of 12 months' salary as compensation for unlawful termination of the claimant.
- 4) Costs of the suit.
- 5) Interest.
- 6) Any other or further relief the Court may deem just.

The particulars of terminal benefits are pleaded thus:

- 1) One-month salary in lieu of notices Kshs. 9, 000.00.
- 2) Severance pay or gratuity for a year worked at half monthly salary Kshs. 4, 500.00.
- 3) One year accrued leave Kshs. 9, 000.00.
- 4) 1825 hours in overtime Kshs. 37.50 x 1.5 Kshs. 102, 656.25.
- 5) 12 months' salary for unlawful termination Kshs. 233, 156.25.
- 6) Total Kshs. 233, 156.25.

The claimant pleads that the respondent employed him orally from 18.09.2013 to 19.02.2015 at Kshs. 9, 000.00 per month payable at Kshs. 4, 000.00 advance and Kshs. 4, 600.00 at end month. Kshs. 400.00 was deducted for NHIF and NSSF. He states he worked every day 8.30am to 10.00pm. Further, on 18.02.2015 the claimant was assigned to travel from the respondent's yard at Bombolulu to Malaba on a truck loaded with salt. The workshop manager confirmed that the salt was well loaded and the truck was fit for the journey and the driver was one Ali. Further, at Mariakani Weigh-Bridge the sensors showed that the truck was overloaded with 560 Kg. The claimant was required to reorganise or realign the load prior to proceeding with the journey. Thus the respondent's manager one Salim Kingi telephoned the claimant and driver angrily, asking why the claimant and the driver were still at Mariakani despite departing the previous day. He demanded that the claimant returns to the office. The manager then informed the claimant that his services had been terminated with immediate effect but the driver and other turn-boy assigned together with the claimant were not terminated at all. The claimant pleads that the respondent was angry about the true state of things and the termination was unfair for want of a notice and a hearing and the reason for termination was not valid.

The reply to the claim was filed through Muturi Gakuo & Kibara Advocates. The respondent has per paragraph 5 of the reply to the claim admitted the events of 18.02.2015 as pleaded for the claimant at paragraph 5 of the memorandum of claim. Further the respondent pleaded that Salim Ali was the respondent's Transport Manager who had called the driver for the truck the claimant had been assigned and, the driver had conveyed that the claimant had refused to reorganise or redistribute the load on the truck as required by the Weigh-Bridge authority; and the manager had summoned the claimant back to the office so that another turn man could be re-assigned. Instead of returning to the office, the claimant sent to the manager abusive Swahili text messages thus:

- a) Mimi sitaki story nyingi na wewe kaa na madereva wako ambao hata kucheza na air bag remote ni shida kila siku shida mimi nataka pesa yangu ya leave nimefanya mass mwaka na nusu upende utanilipa usipende utanilipa.
- b) Mimi sitaki mchezo na wewe na sitaki tulauminiane baadaye nipigie hesabu nipate pesa yangu.
- c) Wewe unafikiria watu wote ni m*****a kama wewe ambaye a*****a v*****e vya m*****u na hao warabu pesa yangu mpaka utatoa nakupa week moja mimi sio wale watu unawasimamisha kazi kiholela mimi sianzi hapo mass kazi mimi nilikuwa nakuangalia tu upumbavu wako siku nyingi.

The respondent denied unlawfully dismissing the claimant and averred that the claimant absconded duty and ran away with Kshs. 80, 000.00 and other car valuables worth Kshs. 40, 000.00 namely car jack, and computer boxes. Further, when he was called back to the office and the matter reported to Makupa Police Station as OB 45/ 20/ 02/ 2015.

The respondent prayed that the suit against it be dismissed with costs.

The claimant filed on 05.06.2020 his reply to the reply to the claim. He joined issue with the respondent's response and reiterated his memorandum of claim.

The claimant testified to support his case. The respondent's witness(RW) was Salim Kingi, the Transport Manager. Final submissions were filed for the parties.

The Court has considered all the material on record and makes findings as follows.

- 1) There is no dispute that the respondent employed the claimant as a turn-boy.
- 2) The events of 18.02.2015 to the effect that the load on the truck needed to be reorganised to achieve better balance is not in dispute. The dispute is whether the claimant refused to re-organise the load and whether RW dismissed him on that account or he absconded duty. The claimant testified that he re-arranged the load as required and he found somebody to assist him to do so. Thereafter RW summoned him to the office and told him to go home as there was no more job for the claimant. The claimant denied sending the alleged abusive messages to RW. On his part RW testified that the respondent had contracted Al Barakat Agencies Limited to supply employees. At end month the agency presented an invoice and the respondent paid. RW testified that the alleged abusive text messages send on 19.02.2015 had not been exhibited. Further, RW testified that after the text messages the claimant never came back. RW confirmed he supervised the claimant and all respondent's turn boys and drivers. RW confirmed he never saw the claimant take the items as alleged for the respondent. The Court has considered the account by RW and the claimant. In absence of the alleged abusive text messages which are not exhibited, there is no reason to doubt the claimant's account. The evidence by RW will collapse as incredible and the Court finds that the claimant rearranged the load and despite performing his work as expected, he was orally dismissed when RW summoned him at the office and told him to go home as there was no more job for the claimant. The reason for termination being there was no job, the Court finds that the termination amounted to unfair redundancy under section 40 of the Employment Act, 2007 because a month's notice was not served upon the claimant and the area labour officer as required. It was abrupt and unfair. The intertwined circumstance was that the termination was surrounded with unfounded allegations that the claimant had refused to reorganise the load on the truck but there was no reason for the Court to doubt the claimant's evidence that he had rearranged the load as required – and section 41 of the Employment Act, 2007 on notice and hearing, and, section 43 of the Act on existence of a valid and genuine reason for termination were not complied with at all. While making that finding the Court further finds that looking at the evidence of the reason for termination, that there was no more work for the claimant, it was misconceived when it was submitted for the respondent that the claimant had been dismissed summarily under section 44(3) and (4) of the Act on account of gross misconduct, namely, absconding duty.
- 3) The Court has already found that parties were in a contract of service. The Court has considered that the respondent had contracted Al Barakat Agencies Limited to supply employees and finds that as the principal employer the respondent remained liable. RW confirmed that he was the claimant's supervisor and the Court has found that the respondent terminated the contract when RW told the claimant to go home as there was no more work for him. In any event, under section 2 of the Employment Act, 2007 employer includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company which has entered a contract of service to employ an individual. The Court considers that the statutory definition is consistent with the submission for the claimant that in **Cable & Wireless Plc –Versus P. Muscat [2006]EWCA Civ. 220** it was held that so long as the remuneration was provided by the employer, it mattered not that it was not paid directly but through some other arrangement made by the employer, and, the fact that a person who would otherwise be the worker's employer did not cease to be his employer simply by arranging for the wages to be paid via a third party(per majority in **Dacas case** cited therein) and further, **“35. In our opinion, the view of the majority in Dacas was correct. The essentials of a contract of employment are the obligation to provide work for remuneration and the obligation to perform it, coupled with control. It does not, in our view, matter whether the arrangements for payment are made directly or indirectly....”**
- 4) The Court has considered the provisions of sections 40, 41, 43 and 49 of the Employment Act, 2007. The Court finds that the termination was abrupt and unlawful for failing to comply with sections 40, 41 and 43 of the Act. That amounted to an aggravating factor against the respondent. The claimant had carried out the instructions to rearrange the load. The Court finds that the claimant

desired to continue in employment and he otherwise had a clean record of service. He had served for slightly over one year. The respondent while alleging that the claimant took away its motor vehicle equipment, the Court finds that no evidence was provided to establish the same as RW provided hearsay evidence – that he was told by a person who was never called to testify. Taking the factors into consideration the claimant is awarded 8 months' salaries in compensation making **Kshs. 72, 000.00**. He is awarded one month pay in lieu of the termination notice **Kshs. 9, 000.00**. He is also entitled to half year pay in severance pay as claimed **Kshs. 4, 500.00**. The Court finds that it was otherwise misconceived for the claimant to urge a case for gratuity or service pay in view of his evidence that NSSF had been deducted and further, in view of provisions of section 35 of the Act. The Court finds that on a balance of probability the claimant was not paid in lieu of annual leave or given leave per section 28 of the Act and is awarded **Kshs. 9, 000.00** as prayed for. Particulars of the 1825 overtime hours and the basis of the computation making Kshs. 102, 656.25 were not specifically pleaded and strictly proved – and the claim and prayer will be declined.

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

- 1) The declaration the termination was unlawful and unfair.
- 2) The respondent to pay the claimant a sum of **Kshs. 94, 000.00** by 01.08.2021 failing interest to be paid thereon at Court rates from the date of this judgment 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 18TH JUNE, 2021.

BYRAM ONGAYA

JUDGE