



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 580 OF 2015

JACKSON MAINGA MTUNGI.....CLAIMANT

- VERSUS -

SHIVA CARRIERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd July, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 13.08.2015 through IRB Mbuya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) One-month notice payment Kshs. 25, 382.00.
- b) Outstanding house allowance Kshs. 64, 722.00.
- c) Outstanding rest days Kshs. 74, 193.54.
- d) Outstanding payment for public holidays worked Kshs.25, 381.98.
- e) Outstanding pay for overtime Kshs. 757, 424.32.
- f) Pay for annual leave accrued Kshs. 30, 751.245.
- g) Service pay 15 days for each completed year of service Kshs. 21, 965.18.
- h) Maximum compensation for unfair termination per sections 49 and 50 of Employment Act, 2007 Kshs. 304, 584.00.
- i) Any other entitled the Court may deem fit to grant or as may be proved at the hearing and per final submissions.
- j) Costs of the cause.
- k) Interest on prayers (a) to (h).

The claimant has pleaded his case as follows. The respondent employed him as a Heavy Commercial Driver under the respondent's Short Haulage Division and effective 17.01.2014. The claimant worked uninterrupted up to 10.06.2015 being 1 year, 5 months and 13 days. The claimant earned Kshs. 25, 382.00 per month as the last pay. On 17.01.2015 the respondent did not terminate the contract of service but offered the claimant to continue employment on contract basis effective 17.01.2015 being an annual contract lapsing on 17.01.2016. The claimant's case is that the failure by the respondent to pay his terminal dues now claimed was unfair and unlawful. Further despite demands the respondent has failed to pay the final dues. The claimant states that he worked overtime without pay, he had no offs, he worked on public holidays and he was not a member of NSSF or alternative pension scheme.

The respondent filed on 14.09.2015 a response to the claim through Muthee Soni & Associates. The respondent admitted it employed the claimant from 17.01.2014 to 10.06.2015 at Kshs. 25, 328.00 per month as pleaded for the claimant. The respondent alleged that the claimant was reckless, careless and negligent in performing his duties as employed. Further, the claimant was fairly, legally and reasonable cause terminated for gross misconduct and recklessness in performance of duty and per clause 2.5 (b) of the contract and the provisions of the Employment Act, 2007. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case on 13.11.2017 and was cross-examined by the respondent's counsel on 21.02.2018 and the claimant's case was closed. Despite opportunity as granted on numerous dates for the claimant to call its witness, the witness never attended Court. On 12.05.2021 orders were granted for the respondent's counsel to cease acting. The claimant filed submissions on 13.08.2019. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court finds that parties were in a contract of service per the letter of employment dated 06.01.2015. The pay was Kshs. 25, 382.00. The agreed working hours were 45 hours per week. He was employed as a Heavy Commercial Driver, Short Haulage Division.

To answer the **2nd issue** for determination, the Court returns that the contract of service was terminated by the letter of summary dismissal dated 10.06.2015 and on the account that the claimant was assigned truck registration number KPK 614 V ON 15th, 16th, and 18th May 2015 when he negligently and recklessly performed his duties in a manner that caused the respondent excessive losses. Further the claimant had been given an opportunity to explain himself at the disciplinary meeting but he had failed to do so. The letter stated that his actions amounted to gross misconduct under the Employment Act, 2007 because he had wilfully neglected to perform his work as assigned carefully and properly but, had been, careless. He was summarily dismissed in the circumstances.

The **3rd issue** is whether the termination was unfair. The claimant testified that on 15.5.2015 he was asked to carry fertilizer in the respondent's motor vehicle and some fertilizer bags fell off and split. Further on 16.05.2016 (2015) he was carrying more bags from Kilindini to Changamwe and the same thing happened because the bags were not well loaded. On 18.05.2015 he was assigned to transport rails at the port and he glanced the rails at the port. He further testified that after the incidents he was summoned to a meeting by the respondent. Further he had signed the Driver's Duties and Responsibilities and it was his duty to safeguard cargo. After the meeting he received the letter of summary dismissal and the clearance certificate. The Court has considered the claimant's own evidence and finds that the claimant has confirmed that the reasons for termination existed and were justified as at the time of termination as envisaged in sections 43, 45, and 47(5) of the Employment Act, 2007. They related to the claimant's capacity, compatibility and the respondent's operational requirements. Further the claimant has confirmed that he was heard by the respondent prior to the termination and the Court finds that the respondent adopted a fair procedure in terminating the contract of service per section 45 of the Act. The misconducts were in a succession within three consecutive days and the Court finds that the claimant fully contributed to his termination from employment. It was not unfair both in procedure and substance.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The parties agreed on 45 hours of work per week and the applicable salary per the letter of offer and acceptance of employment. While alleging and testifying about overtime worked, no rest days, work on public holidays, and house allowance as claimed, the claimant offered no evidence of a grievance raised about those claims while the contract subsisted. Further, the parties clearly agreed on the consolidated monthly pay. In particular, clause 7.1 of the contract provided thus, "**If you have a grievance relating to your employment, you should proceed in accordance with company's grievance procedure.**" The claimant gave no evidence of ever invoking that clause throughout his employment and it appears to the Court that the claims were an afterthought or not genuine or premature for failure to invoke the agreed grievance procedure and which was not shown to have been impaired or unavailable one way or the other. The Court finds that the prayers were an afterthought and falling outside the binding written terms and conditions of service.
2. The claimant was a member of NSSF per the pay slips exhibited and was not entitled to service pay per provisions of section 35 of the Act. The Court finds that the prayer for service pay was unfounded.
3. The Court has found that the termination was upon gross misconduct and under section 44(1) of the Act, the respondent was entitled to dismiss with a shorter notice than the contractual notice and as per clause 6.3 of the contract. The prayer for pay in lieu of a month's notice of termination will therefore collapse.
4. The termination was not unfair and compensation for wrongful and unfair termination does not arise in the instant case.
5. The claimant has established that annual leave was not granted and is awarded Kshs. 30, 751.245 for leave as prayed for and as per section 28 of the Act.
6. The claimant has exhibited the certificate of service dated 29.06.2015 and the prayer in that regard is found superfluous.
7. The Court has considered the claimant's margins of success and the respondent will pay 25% of costs of the suit.

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

- a) The respondent to pay the claimant **Kshs. 30, 751.245** by 01.09.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- b) The respondent to pay the claimant's 25% of the costs of the suit.

Signed, dated and delivered by video-link and in court at **Mombasa** this **Friday 23rd July, 2021.**

BYRAM ONGAYA

JUDGE