



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 145 OF 2018

PETER OTIENO MUTESI.....CLAIMANT

- VERSUS -

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 19.03.2018 through Otieno Asewe & Company Advocates. The claimant's case is that the respondent employed him as a mechanic at Kshs.22, 000.00 per month. Further on 23.03.2015 he was terminated from employment without justifiable reason or notice. The termination letter was dated 21.08.2015. It stated that subsequent to the disciplinary committee sitting held on the morning of the same 21.08.2015, it had been established that he had not been efficient in discharging his duties. The letter further stated that it had been established that on numerous occasions he had disregarded safety rules and procedures laid down by the respondent by failing and refusing to put on the requisite protective equipment that the respondent had supplied for use by the claimant – thereby the claimant exposing himself to risks and dangers of the workshop. The letter stated that the claimant had contravened company policy and section 44(4) (c) and (e) of the Employment Act. The letter concluded, “**In this regard, you are hereby asked to proceed for one-month leave pending your termination from employment upon expiry of the said leave.**” The claimant's case is that there was no disciplinary hearing on 21.08.2015 since he was not notified of the same and at the meeting he was only asked about the challenges he was facing at work and nothing more. Further he pleads that he was paid Kshs. 17, 798.00 as his terminal dues which was too little considering he had served for over five years without going on leave, holidays or off days and which were not paid for as terminal dues.

The claimant further states that the reason for his termination was that at the meeting he raised concerns about his safety and he asked for protective gears per the respondent's duty of care under section 6(1) of the Occupational Safety and Health Act, 2007 requiring that every occupier or employer shall ensure the safety, health and welfare of persons in his workplace. He pleaded that the termination was unfair, unprocedural and unlawful for breach of sections 41, 43, and 45 of the Employment Act, 2005. He claimed for:

- a) Payment in lieu of notice Kshs.22, 000.00.
- b) Unpaid leave for 2010 to 2015 Kshs.110, 000.00.
- c) Public holidays not paid 2010 – 2015 10 days for 5 years Kshs.84, 600.00.
- d) 15 days' pay for 5 years for service Kshs.63, 440.00.
- e) Compensation for unfair termination 12 months' pay Kshs.264, 000.00.
- f) Total claim Kshs. 544, 040.00.

The claimant prayed for:

- a) Payment of Kshs. 544, 040.00.
- b) A declaration that the claimant's termination was unfair, unlawful and unjust.
- c) Costs and interest at court rates.

The respondent filed the memorandum of response on 10.05.2018 through Isaac Onyango & Company Advocates. The respondent pleaded

as follows:

- a) The claimant's allegations were wholly denied.
- b) The claimant had not been efficient and effective in discharging his duties. He breached the safety rules.
- c) Termination was procedural, fair and lawful.
- d) He was personally informed the allegations in writing and prior to being served with the termination notice.
- e) The claimant was a member of NSSF and NHIF.
- f) The suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was the respondent's Human Resource Manager one Rajab Yeri Kombe. Final submissions were filed for the parties. The Court makes findings as follows.

The evidence is that the claimant was employed by the respondent as pleaded for the claimant. The respondent has exhibited the certificate of service showing the period served by the claimant as a mechanic from March 2010 to September 2015.

The further evidence is that the respondent terminated the employment by the notice of termination dated 21.08.2015.

The major dispute is whether the termination was unfair. The evidence is clear. The claimant attended a meeting on 21.08.2015. The meeting was about failure by the claimant to wear protective gear. However, in the process of the hearing the panel also discussed issues of whether the claimant had been performing efficiently and effectively. He was pressed to explain if he knew the basis of his redeployment from tractors to trailers.

The Court finds that the termination was indeed unfair in procedure and substance. First the claimant was not given a prior written notice of the allegations and while the disciplinary committee purported to hear him, the evidence is clear that the claimant did not know, well in advance, that he was attending a disciplinary meeting, he had no prior notice of the particulars and scope of the allegations, the meeting engaged in complex and detailed performance issues without the claimant's prior knowledge, and as urged and submitted for the claimant, the meeting fell short of the fair process envisaged in sections 41 and 45 of the Employment Act, 2007. The claimant explained that he put on his protective gear on daily basis except when he washed the overall and he had been provided only one such overall. The Court finds that the claimant's evidence that is not rebutted is about a grievance which was well founded being that he had not been provided sufficient protective gear so as to be able to wear them on daily basis while on duty. The Court also finds that the claimant was justified to work on certain days without the overall on account that he had washed it. In the Court's opinion, such are matters that ought to have been resolved in a genuine grievance management procedure but which appears not to have been put in place by the respondent.

On the issue of effective and efficient performance, the claimant was required to explain his frequent transfers and he explained on one occasion he was transferred to fix hitches on tractors upon a request by one Alubala to one Ng'ang'a and who thereafter asked him to stay at the tractors' section. He was told at the meeting that his performance was wanting as the basis for frequent transfers and he replied that was not the reason and on one assignment he took long to finish a task because a U-bolt was giving the working team a hard time to come out. The Court finds that the conversation shows a discussion about the claimant's performance in circumstances whereby he had no prior notice of the complaints or allegations and it was coming out as a grievance on the part of the respondent and not a case of poor performance duly stated for the claimant to answer. In any event there was no evidence of agreed targets or performance expectations that the claimant had failed to achieve and further, in event of any failure, there was no evidence that reasonable room or chance to improve had been accorded to the claimant.

As submitted for the claimant the Court finds that the procedure used to terminate the claimant was unfair and the reasons were not established at all. The Court finds that as submitted for the claimant sections 41, 43, and 45 of the Act were breached and the termination was unfair. The Court has also found that at the purported disciplinary hearing the claimant raised a valid complaint about the sufficiency of the protective gear and raising such grievance was not or would not amount to a fair reason for termination as per section 46 (h) of the Act – and the Court finds that the claimant was essentially initiating a move towards amicably discussing and resolving the grievance but instead, the respondent terminated his employment. It was unfair. The Court returns that in the circumstances there was no gross misconduct established as was submitted for the respondent and as was invoked in the termination notice or the termination letter.

The Court has considered the factors in section 49 of the Employment Act. He had served for over five years. He desired to continue in employment. The claimant did not contribute to his termination. RW confirmed that there were reports where the employee failed to use protective gear but no such reports had been exhibited with respect to the claimant's alleged failure. The court has considered the submission and evidence that the claimant was a person with a hearing impairment and may encounter a challenge in securing alternative employment. He testified that after he was terminated he had remained jobless. For the respondent it was submitted that compensation connotes a balancing effect - but the Court observes that no particular or material mitigating factors or contributory factors were urged for the respondent. The Court finds that the claimant has established a case for maximum compensation and he is awarded **Kshs. 264, 000.00** as prayed for.

The Court finds that as submitted for the respondent service pay was not available per section 35 of the Act, the evidence being that the claimant was a member of the NSSF. RW was not clear on the particulars of the final pay given to the claimant but the relevant voucher read one-month notice and the claimant having confirmed that he received that pay, the Court returns that the prayer in that regard is declined as already satisfied. RW when pressed in cross examination confirmed that he had no evidence that the claimant had been accorded annual leave because the relevant leave forms usually completed upon taking leave had not been exhibited. However, the Court finds that the leave

claim was a continuing injury and was time barred under section 90 of the Act. The attendance record filed showed that the claimant took off days and which he urged together with holiday pay. On a balance of probability, the claims will fail as not proved. In any event, as submitted for the respondent, the claims for leave and holiday payment were continuing injuries whose time of limitation under section 90 of the Act was 12 months from cessation and the claims were time barred as at the time the suit was filed.

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

- 1) The declaration that the termination of the claimant from the service of the respondent was unfair, unlawful and unjust.
- 2) The respondent to pay the claimant **Kshs. 264, 000.00** by 01.09.2021 failing interest at court rates to be payable thereon till full payment.
- 3) The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 23RD JULY, 2021.

BYRAM ONGAYA

JUDGE