



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 436 OF 2018

ALEX ANYIRA AYANGA.....CLAIMANT

- VERSUS -

UNIGROUP TRANSPORTERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 22.06.2018 through Muneo Katu & Associates Company Advocates. There is no dispute that the respondent employed the claimant as a driver at Kshs. 20, 000.00 per month. While alleging and testifying that he was promised at the interview that after successful probationary service the salary would be increased to Kshs. 35, 000.00 per month, the claimant provided no written evidence of such pay rise. The Court therefore returns that throughout the claimant's service with the respondent, the agreed monthly gross pay was Kshs. 20, 000.00 per month as per the letter of appointment dated 09.10.2017.

The evidence is that it is not in dispute that on 09.06.2018 the claimant had been in the claimant's service for over 7 months when he was summoned to a meeting with the Human Resources Manager. The claimant's case and evidence is that he was not given an opportunity to attend accompanied with a co-employee per section 41 of the Employment Act, 2007. At the meeting the claimant was informed about an alleged video clip of a closed circuit television (CCTV) showing him siphoning fuel at the Kenya Ports Authority terminal from the respondent's motor vehicle registration number KAT 639A which the claimant was assigned to drive at the time. The claimant's case and evidence is that at that meeting the Human Resources Manager asked him to go away to be recalled later but he was not recalled back at all. His case is that he was unfairly terminated from employment because he was not given a letter to show cause and heard in presence of a representative of his choice per section 41 of the Act. The claimant's further case and evidence is that he was never shown the alleged video clip. He prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant by the respondent on 09.06.2018 was procedurally unfair.
- b) Wages for days worked 1st to 9th June Kshs. 1, 474.50 x 9 Kshs. 13, 270.00.
- c) One-month salary in lieu of notice Kshs. 35, 221.00.
- d) Under payment as per the legal notice for 2017 effective from October 2017 to 30.04.2018 (7 months) 33, 544.35 – 20, 000.00) x 7 months Kshs. 94, 810.45.
- e) Underpayment per legal notice for 2018 effective 01.05.2018 to 30.05.2018 (35, 221.60 – 20, 000) Kshs. 15, 221.60.
- f) Accrued leave for 8 months Kshs. 16, 491.70.
- g) Maximum compensation for unfair termination Kshs. 422, 659.20.
- h) Certificate of service.
- i) Total claim Kshs. 597, 674.55.
- j) Costs and interest of the suit.

The respondent filed the statement of response on 12.09.2018 through Cootow & Associates Advocates. The respondent admitted employing the claimant as a driver. The respondent pleaded that on 09.06.2018 the claimant was summoned at the meeting as pleaded for the claimant

but when he was shown the CCTV footage of the fuel being siphoned from the assigned motor vehicle, he stormed out of the hearing and declared he would go to Court. The respondent stated that the claimant's service therefore ended fairly on account of gross misconduct per section 44 of the Employment Act, 2007 on being suspected of siphoning and stealing the respondent's fuel.

Final submissions were filed for the parties. The Court has considered the evidence and makes findings as follows:

1) The evidence is that the termination was on 09.06.2018 and on account of allegations of siphoning fuel. The claimant was informed orally about the allegations and the evidence was that he was not heard in presence of a representative of his own choice and there was no notice as envisaged in section 41 of the Act. To that extent the termination was unfair procedurally. Further the video footage in issue was not exhibited in Court. However, the claimant has not denied in his statement of claim the existence of the video clip and his case appears to be that the termination was unfair on account of unfair procedure. The Court finds that the respondent has established on a balance of probability, the alleged reason justifying the termination as required in sections 43 and 47(5) of the Act. The termination was however unfair in procedure. Nevertheless, the Court has considered the factors in section 49 of the Act and finds that in view of the established reason for termination and the claimant having served only for 7 months, the claimant fully contributed to his termination and is undeserving of any compensation under section 49 of the Act.

2) The termination has been found to have been unfair. It was abrupt. The reason is found to have been established. To balance justice for parties, the Court finds that the claimant is not entitled to one month pay in lieu of notice Kshs. 35, 221.00 as prayed for because, in view of the established reason, despite the procedural lapses, the respondent was entitled to dismiss the claimant upon a shorter notice than was provided for in the contract or statute and upon the established gross misconduct as envisaged in section 44 of the Act.

3) He is entitled to wages for work on 1st to 9th June **Kshs. 13, 270.00** as prayed for. The respondent has not placed material before the Court disputing the underpayment as claimed per the minimum wage orders for 2017 and 2018 and the claimant is awarded **Kshs.94, 810.00** and **Kshs. 15, 221.60** respectively as prayed for. The respondent submits that the parties had a contract on the payable salary but the Court returns that it was not open for parties to contract outside the minimum statutory wage and the respondent was bound to pay the minimum wage. The Court further finds that the claimant is entitled to the certificate of service.

4) The Court has considered the parties' margins of success and the respondent will pay 50% of the claimant's costs of the suit.

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

- 1) The declaration that the termination of the claimant by the respondent on 09.06.2018 was procedurally unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.123, 301.60** by 01.09.2021 and failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- 3) The respondent to deliver the claimant's certificate of service by 30.07.2021.
- 4) The respondent to pay 50% of the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH JULY, 2021.

BYRAM ONGAYA

JUDGE