



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 287 OF 2017

BETWEEN

KHAMISI MWANDIA KALINGA.....CLAIMANT

VERSUS

MODERN COAST EXPRESS LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Mogaka Omwenga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 21st April 2017. He states that he was employed by the Respondent on or about early August 2008 to 6th June 2016, as a Pressure Mechanic and Conductor on various buses operated by the Respondent. His role included assisting Respondent's Passengers and Drivers, and repairing the vehicles on their various journeys.
2. His claim is that he worked more than 8 hours daily. Some occasions he worked for 24 hours nonstop. His first salary was Kshs. 7,000 monthly, increased to Kshs. 13,606 by the time he left employment. He was underpaid. He did not have rest days, and worked on Sundays and Public Holidays without compensation.
3. His contract was terminated by the Respondent's General Manager without notice or justifiable cause, on or about 6th June 2016. He was not heard. He was denied service pay and other terminal dues.
4. He prays for Judgment against the Respondent for: -
 - a. Notice pay at Kshs. 17,003.
 - b. Annual leave days at Kshs. 93,434.
 - c. Underpayment of salary at Kshs. 392,320.
 - d. 12 months' salary in compensation for unfair termination, at Kshs. 204,042.
 - e. Certificate of Service.

- f. Any other suitable order.
- g. Costs.
- h. Interest.

5. The Respondent filed its Statement of Response on 31st May 2017. It is conceded that the Claimant worked as a Conductor for the Respondent. He was not a Mechanic. He did not work from early 2008 as pleaded. His role was to assist Respondent's Passengers. He did not work excess hours. He was paid Kshs. 12,148 in accordance with his contract. He was dismissed for ferrying unauthorized Passengers. He is not entitled to Certificate of Service as he was in breach of contract. The Respondent urges the Court to dismiss the Claim with costs.

6. Hearing was scheduled for 19th November 2018. It did not take off, because the Advocate for the Respondent was engaged in other litigation before the High Court at Mombasa. It was rescheduled to 15th October 2019, when the Court was informed that the Advocate for the Respondent, had a problem in tracing his Client, the Respondent herein, and that the Advocate wished to have leave of the Court to cease acting for the Respondent. The Court adjourned the matter and directed the Respondent's Advocate to file its Application for such leave, within 14 days. On mention date, 21st November 2019, no Application had been filed. The Court directed that the Claim is heard on 19th February 2020, and that the Application for leave be filed and dealt with between the Respondent and its Advocate, before the 19th February 2020. Hearing Notice was to issue to both the Respondent and its Advocates. On 19th February 2020, the Advocate for the Respondent appeared, informing the Court that the Advocate had filed the Application for leave. Further adjournment was sought to enable the Advocate serve the Respondent.

7. Adjournment was declined. Hearing proceeded in the absence of Ms. Kerubo for the Respondent, who walked out of the Court, upon the rejection of the Application for further adjournment. The Claimant gave evidence and closed his case, on 19th February 2020. The Court ordered Respondent's case closed as well, and the file was subsequently forwarded on 21st May 2021, to the Trial Judge on transfer to Nairobi, for preparation of Judgment.

8. The Claimant adopted his Witness Statement and Documents on record, as his evidence-in-chief. His Witness Statement is word for word, a regurgitation of the Statement of Claim. His last pay slip on record is for April 2016. It shows he earned a monthly basic salary of Kshs. 11,565 and house allowance of Kshs. 2,041 – total Kshs. 13,606. The pay slip also indicate the Claimant worked as a Pressure Mechanic. The Claimant emphasized that termination was without notice and just cause. It was at the instigation of the Respondent. He was not heard.

The Court Finds: -

9. The Claimant states he was employed by the Respondent in early August 2008 to 6th June 2016. He does not have a specific date of employment. In the absence of documentary or evidence from the Respondent disproving the Claimant's position, the Court is content with the evidence of the Claimant- that he was employed by the Respondent in early 2008.

10. He states that he was employed as Conductor/ Pressure Mechanic. The Respondent pleads that the Claimant worked exclusively as a Conductor. The pay slips of record, issued by the Respondent, designate the Claimant as Pressure Mechanic.

11. He states that he was underpaid salary throughout. He has exhibited The Regulation of Wages [General] [Amendment] Order, 2013 and 2015. These do not support his prayer for underpayment of salary, which is made ranging from 1st August 2008. The Claimant has not shown what was the rate applicable to Conductor/ Pressure Mechanic, over the period 2008 to 2016; what was paid to him for specific periods; and what the underpayment would be, under specific legal notices falling in the period 2008 -2016. The prayer for underpayment of salary is declined.

12. He was not clear in his prayer for annual leave pay. His computation presupposes that there was underpayment of salary, which the Court has concluded was not established. Although the Respondent did not give evidence, there are annual leave forms filled by the Claimant, which are in the bundle of documents filed by the Respondent. The Claimant did not make any comment about these forms.

13. The Respondent states in its Pleadings that the Claimant was dismissed because he ferried unauthorized Passengers. There was no evidence adduced by the Respondent, to show that this statement was correct. The Claimant was not a Driver, but a Conductor/ Pressure Mechanic. It is doubtful that it was his role to drive Passengers around. No names of unauthorized Passengers were given to the Court by the Respondent. The date and place of the offence was not disclosed. The Claimant was not issued a letter to show cause, and taken through a disciplinary hearing.

14. The Respondent states perplexingly, that the Claimant was not issued Certificate of Service, because he was in breach of Respondent's Rules and Regulations, having ferried unauthorized Passengers. Breach of an Employer's Rules and Regulations does not disentitle an Employee the Certificate of Service, under Section 51 of the Employment Act.

15. The Court is persuaded that termination was unfair under Sections 41, 43 and 45 of the Employment Act 2007.

16. The Claimant is granted 1-month salary in lieu of notice, based on his monthly gross salary of Kshs. 13,606.

17. He worked for 8 years. His employment record was not shown to have blemishes in those 8 years. He was not paid any terminal benefits after 8 years of service. He did not contribute in a material way, to the Respondent's decision, to terminate his contract of employment. His identity card, in Respondent's Documents filed in Court, shows he was 33 years on termination. His contract was term-indefinite. He expected to continue working for a good number of years before retirement.

18. *The Court awards him compensation for unfair termination, equivalent of 8 months' salary, at Kshs. 108,848.*

19. *Certificate of Service to issue under Section 51 of the Employment Act 2007.*

20. *Costs to the Claimant.*

21. *Interest allowed at 16% per annum, from the date of Judgment, till payment is made in full.*

In sum it is ORDEERED: -

a. Termination was unfair.

b. The Respondent shall pay to the Claimant compensation for unfair termination equivalent of 8 months' gross salary at Kshs. 108,848 and 1-month salary in lieu of notice at Kshs. 13,606 – total Kshs. 122,454.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest allowed at the rate of 16% per annum, from the date of Judgment till payment is made in full.

Dated, signed and delivered at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 7th day of July 2021.

James Rika

Judge