



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 274 OF 2016

THOMAS KITAKA NZIOKA.....CLAIMANT

VERSUS

ROADTAINERS (MOMBASA) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd October, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 01.04.2016 through M/S Otieno Otwere & Associates Advocates. The amended memorandum of claim was filed on 13.09.2016. The claimant's case is that he was employed by the respondent as a turn boy on 05.01.2007 and he was promoted to the position of heavy commercial driver effective 25.03.2013. The claimant alleges that effective 25.03.2013 he was underpaid at Kshs. 23, 566.00 per month instead of Kshs. 25, 380.00 per month.

The claimant's further case is that on 15.06.2015 he was assigned to drive truck No. KAP 005E/ZE 8514 from Mombasa to Kampala, Uganda when the same was involved in road traffic accident due to mechanical problem or brake failure. The claimant states that he was hospitalised and later reported the accident and resumed work and asked to report on duty daily but without payment until sometimes in October 2014 when the respondent's authorised agent one Mrs. Jackline, without notice, unfairly and unlawfully terminated the claimant's employment with the respondent. The claimant further states that in January 2015 he reported the complaint of unfair termination to the labour officer at Mombasa and in absence of favourable action his advocates issued the demand notice dated 26.08.2015. The claimant claimed:

- a) Gratuity for 7 years of service $\frac{1}{2} \times 7 \text{ years} \times \text{Kshs. } 25, 380.00$ making Kshs. 88, 830.00.
- b) Pay in lieu of notice Kshs. 88, 830.00.
- c) Unpaid leave Kshs. 25, 380.00.
- d) May 2014 salary Kshs. 25, 380.00.
- e) Unpaid salary for June to October 2014 Kshs. 25, 380 x 5 making Kshs. 126, 900.00.
- f) Underpayment of wages Kshs. 25, 380 – Kshs. 23, 566 = Kshs.1, 814 x 13 months thus Kshs. 23, 582.00.
- g) 12 months' pay for unfair termination Kshs. 25, 380.00 x 12 = Kshs. 304, 560.00.
- h) Total claim Kshs. 620, 012.00.

The claimant prayed for judgment against the respondent for:

- 1) Terminal benefits of Kshs. 620, 012.00.
- 2) A declaration that the claimant was employed permanently.
- 3) 12 months' payment for unfair termination of employment.
- 4) The respondent to issue certificate of service and recommendation letter.

- 5) 13 months' payment for underpayment, may 2013 to June 2015.
- 6) Leave and house allowance.
- 7) Costs of the suit.
- 8) Interest in 1, 2 and 3 above.
- 9) Any other relief the Court may deem just.

The respondent filed on 04.08.2016 the reply to the memorandum of claim and counterclaim through Dominic Anaya Advocate. The respondent admitted employing the claimant in January 2007 as a turn boy and in 2013 promoted the claimant to a driver at Kshs. 23, 566.00 per month. The respondent denied dismissing the claimant unfairly on 15.06.2015 as alleged for the claimant. The respondent denied receiving a demand notice from the claimant's advocates. The respondent denied all claims made for the claimant and stated:

- a) The respondent had issues with the claimant and even after promotion to a driver, the claimant was uncooperative.
- b) After warnings and reprimands the claimant failed to reform from the habit of driving under the influence of alcohol.
- c) On 11.05.2014 the claimant negligently and carelessly drove motor vehicle KAP 005 E and caused an accident at Chimoi Bridge along the Eldoret – Webuye road. At the time of the accident the claimant was under influence of alcohol.
- d) The claimant was given a hearing in presence of his colleague before termination and after failing to explain why he had continued causing losses to the respondent. He was summarily dismissed after failing to explain himself at the disciplinary hearing. The claimant was asked to clear with the respondent and come for his final dues but never showed up to clear after he came to learn that he owed the respondent a total of Kshs. 129, 385.40 being net outstanding from his terminal dues after deduction of the accident recoveries.
- e) He was paid in lieu of annual leave or given annual leave and as at termination had only 32 pending leave days.

The respondent counterclaimed that it had suffered loss as a result of the claimant's breach of contract. The particulars of the claimant's breach of contract and statutory duty included driving under the influence of alcohol contrary to the contract of service and law; failing to adhere to the supervisors' instructions; failing or neglecting to drive the designated truck in a cautious manner to avoid loss of cargo; causing accidents leading to loss of the respondent's client's cargo; and causing delays to the respondent's clients for failure to deliver goods in time. The respondent claimed loss whose particulars included:

- a) Damage to truck KAP 005 E for Kshs. 158, 072.00.
- b) Delays to clients for failure to deliver goods on time.
- c) Damage to client's container for Kshs. USD 1, 773.00.
- d) Kshs. 338, 899.00 being payment for taxes and exercise duty for loss of transit cargo within Kenya.
- e) Causing the respondent to deliver goods to clients with shortages.

The respondent prayed for dismissal of the claimant's suit and for judgment against the claimant for:

- 1) Kshs. 467, 899.00 and USD 1, 773.00.
- 2) General damages.
- 3) Costs of the cause.
- 4) Interest on 1, 2, and 3 above.

The claimant filed on 22.09.2016 the reply to the response and defence to counterclaim. The claimant denied the particulars of negligence and pleaded that the accident was due to mechanical failure of the truck he was assigned to drive. The claimant stated that no evidence of a charge of traffic offence against him had been exhibited and no evidence of alleged influence of alcohol had been provided. He denied the particulars of loss and damage alleged in the counterclaim and any damage and loss was due to allocation of un-roadworthy truck. Further the counterclaim was a mere afterthought triggered by the present claimant's suit and the earlier Mombasa Civil Suit No. 2548 of 2015 where the claimant sued the respondent for injuries sustained while in the respondent's employment. The claimant prayed that the response to the claim and counterclaim filed for the respondent be dismissed with costs to the claimant and judgment be entered for the claimant as prayed for the claimant.

The claimant testified to support his case. The respondent called two witnesses being David Kago, the Workshop Foreman (RW1) and Akbar Khan, the Workshop Manager (RW2). The Court has considered the pleadings, the evidence and final submissions. The Court makes

findings as follows.

To answer the **1st issue** for determination, the Court finds that parties were in a contract of service. The respondent has admitted the claimant's pleading that the respondent employed the claimant as a turn boy in January 2007 and in 2013 promoted the claimant to a driver at Kshs. 23, 566.00.

To answer the **2nd issue** there is no dispute that the respondent terminated the claimant's employment. What is in dispute is whether the termination was by the letter exhibited for the respondent and, the effective date of the dismissal. The respondent has exhibited a letter of summary dismissal dated 22.05.2014. The letter stated that the claimant was being summarily dismissed effective 22.05.2014 because on the night of 12.05.2014 and under the influence of alcohol he caused an accident damaging the entire truck KAP 005E and loosing goods of high value at the same time causing delay and a huge monetary lose to the respondent. The claimant's testimony is that he saw the letter in Court as exhibited for the respondent. The respondent has pleaded that the accident was on 11.05.2014. The claimant has pleaded that the accident was on 15.06.2015 as per paragraph 4 of the amended memorandum of claim at which he also states that he was dismissed in October 2014. In his witness statement the claimant states that it was on 11.05.2014 when the accident occurred. He testified that he was hospitalised and when he went back to Mombasa he was asked to continue reporting at work but he was not assigned duty until in October when he asked the human resource manager about the failure to be given the statutory injury claim forms. He testified that he kept on asking for his salary but he was asked to remain patient. The claimant then testified that he was locked out on 15.06.2015 per paragraph 4 of his amended memorandum of claim. But the evidence is that the Labour Officer wrote to the respondent on 26.01.2015 (per exhibit at page 44 of respondent's documents) that the claimant had reported that he had been unlawfully terminated on 07.06.2014 and he was claiming salary for May, notice pay and leave pay.

The Court has evaluated the evidence and returns that in absence of evidence of service of the letter of summary dismissal, the letter cannot be relied upon to validly establish the effective date of termination. On the other hand, the Court finds the claimant's evidence and pleading contradictory as relates to the date of termination. It cannot be that he was locked out on 15.06.2015 whereas by 26.01.2015 he had reported to the Labour Officer a complaint about the termination and claiming pay for May (which the Court construes to have been May 2014), the month of the accident. The Court therefore returns that the claimant's employment would be deemed to have ended on 11.05.2014, the date of the accident and being the last day the claimant actually worked. However, the respondent by itself, as the employer, fixed the date at 22.05.2014 and there is no reason for the Court to deviate from that date. The Court finds that the effective date of separation and therefore termination of the employment was on 22.05.2014.

The **3rd issue** for determination is whether the termination of the employment was unfair. The claimant in cross-examination testified as follows, **"I claim salary for May 2014; then June – October 2014. They are days I reported at work but I was not paid and assigned duty. I was not terminated on 22.05.2014. I see R24. I have seen the letter of summary dismissal in Court. I see computation of final dues at page R25. I was never shown. I never left in protest upon being shown tabulation. I have seen it in Court. After accident and motor vehicle was being repaired I reported at work but I was not assigned duty. After I was locked out. I was never assigned by the respondent. Accident was on a date I do not recall. It was in 2015. After accident I reported for 3 months. I do not recall the 3 months. I do not recall date I was locked out. I do not recall month I was locked out. I was locked out 2015."** In re-examination and in a contradictory manner, the claimant testified thus, the letter of summary dismissal was dated on 22.05.2014, but further, **"I worked until 15.06.2015. That is the date I was locked out as pleaded in paragraph 4 of amended claim."** But paragraph 4 of amended memorandum of claim does not refer to a lock out on 15.06.2015 but stated, **"4. On or about the 15th June 2015, the claimant was assigned to drive truck number KAP 005E/ZE 8514 from Mombasa to Kampala Uganda when the same was involved in road traffic accident due to mechanical problems / brake failure. The claimant was hospitalised and later reported the accident and resumed work where he was asked to report on duty daily but without payment until sometimes in the month of October 2014 when the respondent and/or its authorised agent one Mrs. Jackline without any notice unfairly and unlawfully terminated the services of the claimant."**

The Court has considered the contradictory pleading and evidence by the claimant about the circumstances of the termination. The Court has further considered that the claimant's evidence is at variance with his pleaded case. The Court finds that the claimant has therefore failed to discharge his burden of proving that an unfair termination of employment or wrongful dismissal had occurred and as per section 47 (5) of the Employment Act, 2007. Under the same section, the respondent was required to justify the grounds for termination of employment or wrongful dismissal. The respondent has pleaded at paragraph 8 of the reply to the memorandum of claim that after the accident on 11.05.2014 due to negligence of the claimant and being under influence of alcohol, the claimant was heard in presence of the colleagues, he failed to explain himself, he was summarily dismissed but failed to show up to clear when he discovered that he owed the respondent Kshs. 129, 385.40 being net outstanding dues after deduction of accident recoveries. The Court finds that the undisputed circumstance of the separation was the occurrence of the accident. Further, the Court has already found that the effective date of termination was on 22. 05.2014. The Court finds that while alleging and testifying that he was assigned an old and defective truck, paragraph 3 of the employment contract dated 25.03.2013 required the claimant to ensure that the vehicle designated to him is maintained and could not remove the vehicle from the yard at all unless, the claimant was fully satisfied with repairs carried out as indicated on the Job Card. Further, there was no evidence before the Court that the accident was due to failing brakes as per the claimant's allegation. While the respondent's letter dated 13.05.2014 confirmed that truck No. KAP005E/ ZB8514 had a mechanical problem, the letter came after the accident and it is difficult to tell if the mechanical problem pre-existed the accident in issue. In view of those considerations, the Court considers that in absence of any other evidence and the evidence being that there was no other intervening circumstance such as other motorists, the termination cannot be found to have been unfair as it related to the respondent's operational requirement that the claimant drives carefully and further related to the claimant's conduct, capacity or compatibility as a driver and as envisaged in section 45 of the Act. The claimant has confirmed that after the accident and hospitalisation he reported at the office in Mombasa and upon balance of probability, there is no reason to doubt the respondent's case that the matter was discussed and the claimant heard, and, the claimant having testified that he met the human resource manager – and the procedure cannot be faulted as unfair.

Thus in the circumstances of the case and evidence, the Court declines to make a finding of unfair termination. While finding that the claimant is not entitled to compensation for the alleged unfair termination and as per section 49 of the Employment Act, 2007, the Court returns that the claimant is so disentitled in view of the unclean record of service. There is no reason to doubt that RW1 held several meetings with the claimant and urged him to change his ways. The Court has in that regard considered the claimant's letter of apology dated 09.10.2010. The Court further finds that in absence of a finding of unfair termination, the claimant would not be entitled to pay in lieu of the termination notice because under section 44 of the Act, in event of gross misconduct, as appears to be the case in the instant case, the

respondent was entitled to terminate with a shorter notice than was provided for in the contract.

The 4th issue for determination is whether the claimant is entitled to the other remedies as prayed for. The termination has been found to have been on 22.05.2014. The suit was filed on 01.04.2016. Underpayment of wages as claimed was a continuing injury whose time of limitation was 12 months per section 90 of the Act and the claim is found time barred. The Court has found that after the dismissal, the claimant never worked for the respondent so that, the claim for unpaid salary for June to October 2014 is unjustified, as well as, in any event, time barred as a continuing injury under section 90 of the Act. At paragraph 8(viii) of the reply to memorandum of claim and counterclaim the respondent admitted to 32 leave days. The claimant is awarded **Kshs. 35, 910.10** at the rate of statutory 21(per section 28 of the Act) working days per year with the base of the last agreed monthly salary. While making that finding the Court considers that it was misconceived to be submitted for the claimant that he is awarded Kshs. 177, 660.00 for due leave for 7 years served whereas there was no pleading and claim in that regard.

As submitted for the respondent the claimant made no justification for gratuity and which is declined - and the claimant having been a member of NSSF and therefore precluded from claiming gratuity per section 35 (6) (d) of the Act. Further, as submitted for the claimant he is entitled to pay for 22 days worked in May 2014 making 22/31 x Kshs. 23, 566.00 thus an award of **Kshs.16, 724.30**. The Court finds that the claimant is entitled to a certificate of service per section 51 of the Act.

The 5th issue for determination is whether the respondent is entitled to the prayers in the counterclaim. RW1 testified that he was not aware of a disciplinary process prior to the claimant's dismissal because he was only involved at the workshop. RW2 testified that after the accident the claimant was called for a meeting and he explained his case. RW2 confirmed that prior to the dismissal he was not aware of a letter to show cause about the matters in the counterclaim. RW2 further testified thus, "**The said motor vehicle did not have comprehensive cover. It had a 3rd party cover. It was not duty of the claimant to insure the motor vehicle comprehensively. We got insurance. We never failed. No third party policy in issue filed in Court.**"

The Court has considered the evidence. The evidence is that the respondent did not subject the claimant to a disciplinary process with respect to the alleged losses and then payments. It is also clear from the contract dated 25.03.2013 that the claimant's responsibility as a driver were limited. They included, as expressly stated, thus:

- 1) The claimant ensuring that the motor vehicle is maintained per the job card prior to leaving the yard.
- 2) A charge of Kshs. 10, 000.00 per day for unjustified delay during safari.
- 3) Termination for non-performance per clause 7 of the contract of service.
- 4) Ensuring that prior to proceeding on safari the vehicle road licence, inspection, insurance, TLB, transit goods licence (if applicable) are valid, per clause 8 thereof.
- 5) Per clause 12, to immediately inform the office for any incidence occurrence and immediately appropriate details of the third party be taken.

The Court finds that the parties are bound by their own contract. The claimant's responsibilities and liability as well as consequences were limited to the contractual provisions. There was no contractual clause that the claimant would be liable with respect of the claims and prayers made in the counterclaim. The contractual provision was that relevant insurance would be in place and the claimant's duty was to ensure that the insurance was in place prior to embarking on a safari. The respondent has not shown that the claimant breached the contract in that regard. The Court therefore finds that the contract of service did not make the claimant liable for the matters counterclaimed and in any event the respondent did not undertake internal disciplinary process to establish such culpability for the losses alleged so that the counterclaims and prayers are declined.

The Court has considered the parties' margins of success putting it at 10% for claimant's case and 100% on the counterclaim for the claimant and the respondent will pay 55% costs of the entire proceedings.

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

- 1) Payment of **Kshs. 52, 634.40** by 01.12.2021 failing interest at court rates to be payable thereon from the date of filing the suit till full payment.
- 2) The respondent to deliver the certificate of service in 30 days from the date of this judgment.
- 3) The respondent to pay 55% claimant's costs of the entire proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND OCTOBER, 2021.

BYRAM ONGAYA

JUDGE