



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 389 OF 2018**

**MUMO KIMINZA MUNUVE.....CLAIMANT**

**VS**

**ROADTAINERS MOMBASA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 8<sup>th</sup> June 2018, Mumo Kiminza Munuve filed a Memorandum of Claim seeking compensation for unfair termination of employment plus terminal dues.
2. The Respondent filed a Response on 4<sup>th</sup> March 2019 and an amended Response and Counterclaim on 24<sup>th</sup> July 2020. The Claimant then filed a Reply to the Respondent's amended Response and Counterclaim on 23<sup>rd</sup> September 2020.
3. On 24<sup>th</sup> May 2021, the Claimant took the witness stand but owing to memory lapse, he could not recall the events leading to the termination of his employment. He was therefore stood down and the parties agreed to dispense with the matter on the basis of their pleadings and written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Long Distance Truck Driver from November 2013 until 24<sup>th</sup> October 2015. He earned a monthly salary of Kshs. 28,428.
5. The Claimant further states that on 24<sup>th</sup> October 2015, while on his way from Malaba to Mombasa, he was involved in a road traffic accident at Webuye. He was treated at Webuye District Hospital and on 25<sup>th</sup> October 2015, he was transferred to Moi Teaching and Referral Hospital, Eldoret.
6. After being discharged from Hospital, the Claimant returned to Mombasa and continued with treatment as an out-patient.
7. The Claimant avers that on 31<sup>st</sup> March 2016, he went to work and was directed to go to Aga Khan Hospital, Mombasa to see Dr. Mulunga for medical examination. Dr. Mulunga recommended that the Claimant be assigned alternative duties other than driving trucks.
8. The Claimant further avers that sometime in May 2016, he was called to the Respondent's office where he was informed that he should not report back to work because of the injuries he had sustained when he was involved in the road traffic accident.
9. The Claimant's case is that the decision to terminate his employment was unlawful, unfair and unprocedural.
10. The Claimant claims that while working for the Respondent, he never proceeded on leave. He adds that he used to work seven days a week, including public holidays, without pay.
11. The Claimant's claim is for:

- a) One month's salary in lieu of notice.....shs. 28,428

- b) Leave pay for 2 years.....56,856
- c) Public holidays for 2 years.....39,348
- d) 12 months' salary in compensation.....341,136
- e) Certificate of service
- f) Costs plus interest

**The Respondent's Case**

12. In its Response as amended on 24<sup>th</sup> July 2020, the Respondent states that the Claimant was in a self-involving accident, whereby he carelessly drove, managed and controlled his designated motor vehicle, causing it to overturn at Webuye.

13. The Respondent adds that the Claimant sustained head injuries that left him unable to perform his duties due to 50% incapacity as assessed by his Doctor.

14. The Respondent accuses the Claimant of negligence which caused the Respondent loss and damage, including:

- a) Medical bills;
- b) Breakdown and recovery services for the overturned truck;
- c) Damage to container;
- d) Payment of salaries while on sick leave;
- e) Damage to KBS 485W, Beiben Truck.

15. The Respondent states that upon confirmation that the Claimant could not recover fully to revert to his usual duties; in consideration of any light duties available to the Claimant vis-à-vis the hazardous nature of the Respondent's work environment, the Claimant was called to a meeting where it was explained that the Respondent could no longer afford him in his state.

16. The Respondent claims that the Claimant was paid all his terminal dues in the presence of his wife and a colleague.

17. In its Counterclaim the Respondent avers that the Claimant grossly breached the terms of his employment, Company Policy and Code of Conduct.

18. The Respondent cites the following particulars of breach of contract by the Claimant:

- a) Driving a motor vehicle carelessly and/or without any regard to the Highway Code;
- b) Failing, neglecting and/or refusing to abide by the Company Policy and Code of Conduct;
- c) Failing to protect the cargo entrusted to him to ferry safely;
- d) Failing to pay attention to the road while driving the Respondent's motor vehicle;
- e) Otherwise causing loss to the Company as a result of the accident herein.

19. The Respondent states that the Claimant's negligent actions led to the accident herein causing injuries to the Claimant and damage to the motor vehicle.

20. The Respondent adds that as a result, the Claimant stayed away from work, undergoing treatment for several months, while still on the Respondent's payroll and at the same time incurring medical expenses.

21. The Respondent sets out the following particulars of loss and damage on its part:

- a) Breakdown or recovery charges for M/V KBS 485W.....Kshs. 158,500
- b) Refund of salaries paid beyond sick leave.....78,170

**Total.....236,670**

22. The Respondent also claims general damages for loss of business while the said M/V KBS 485W was undergoing repairs.

23. The Respondent therefore claims the following from the Claimant by way of Counterclaim:

- a) Special damages in the sum of Kshs. 236,670
- b) General damages for lost business and breach of contract
- c) Costs plus interest

### **Findings and Determination**

24. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

### **The Termination**

25. The Respondent produced a termination letter dated 14<sup>th</sup> May 2016, addressed to the Claimant as follows:

*“Dear Sir,*

**RE: TERMINATION OF SERVICES**

*The above matter refers.*

*You were involved in a road traffic accident on 25<sup>th</sup> October 2015, while driving truck registration number KBS 485W. Unfortunately, you sustained serious injuries from the said accident a fact that has limited your ability to perform your duties with the Company. The Company has walked with you throughout this journey of recovery to your current position.*

*As per your Doctor's report you are unable to comprehend clearly and still suffer memory lapses and poor eye sight. He has recommended light duties for you.*

*The Company has tried to find a suitable position to place you but in vain. In the circumstances, the company is left with no option but to terminate your services with effect from 14<sup>th</sup> May 2016.*

*Kindly surrender all Company properties in your possession and collect your final dues from the Cashier.*

*The Company wishes you well in your future endeavors.*

*Yours faithfully,*

***For: Roadtainers (Msa) Ltd***

*(signed)*

***I.A. Pasta***

***Managing Director***”

26. From this letter, it is evident that the Claimant's employment was terminated on account of incapacity as a result of injuries sustained in the course of duty. Under the Employment Act, 2007 an employer may terminate the employment of an employee on this ground subject to due procedure.

27. In its decision in ***Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR*** this Court stated the following:

***“While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination. Treatment notes and sick off sheets do not qualify as medical reports for purpose of termination of employment on medical grounds. Third, the***

*employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness."*

28. In *Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & another* [2015] eKLR my brother, Rika J rendered himself as follows:

*"Where an employee is injured or taken ill during employment, the Employer has the obligation to reasonably accommodate the employee. This goes beyond the grant and exhaustion of sick leave. Reasonable accommodation calls on the Employer to genuinely explore ways through which the job performed by the stricken Employee can be temporarily modified to suit the medical restrictions of the Employee. The Employer could limit the working hours for the Employee in the same job, not necessarily to the 2 hours recommended for Children in the Employment (General) Rules. Thirdly the Employer may change the working environment through physical modification of the workplace to suit the affected Employee. This may involve the Employer acquiring special equipment to enable the injured or diseased but qualified Employee, continue being productively employed. Fourthly and lastly, reasonable accommodation requires the Employer explores the possibility of reassignment of the Employee, to a different job within the same enterprise."*

29. In the case now before me, the Respondent broke every rule in the book; no attempt was made to re-deploy the Claimant as recommended by his Doctor nor was he subjected to due process prior to the termination.

30. For the foregoing reasons, I find and hold that the termination of the Claimant's employment was unfair and he is entitled to compensation.

### **Remedies**

31. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award I have taken into account the Claimant's length of service, the Respondent's unlawful conduct in executing the termination plus the fact that the Claimant is unlikely to secure alternative employment.

32. From the evidence on record, the Claimant was paid one (1) month's salary in lieu of notice plus leave pay. These claims are therefore without basis and are dismissed.

33. The claim for public holidays was not proved and is also dismissed.

### **The Respondent's Counterclaim**

34. The Respondent's Counterclaim is based on the allegation that the Claimant was solely to blame for the accident of 25<sup>th</sup> October 2015. However, no evidence was led to establish causation and the special damages claim was not proved with precision as required.

35. The Respondent's Counterclaim against the Claimant therefore fails and is dismissed.

### **Final Orders**

36. Finally, I enter judgment for the Claimant as against the Respondent in the sum of **Kshs. 341,136** being 12 months' salary in compensation.

37. This amount will attract interest at court rates from the date of judgment until payment in full.

38. The Claimant is also entitled to a Certificate of Service plus costs of the case.

39. Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OCTOBER 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Tolo for the Claimant

Mr. Anaya for the Respondent