



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 242 OF 2018**

**ALWI OMAR MOHAMED.....CLAIMANT**

**- VERSUS -**

**LOTA AUTOMOBILES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> November, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 17.04.2018 through M/s Tindika & Company Advocates. The claimant's case is that he was employed by the respondent as a truck driver on 01.09.2009 by a written contract. Further, he was unfairly and wrongfully terminated verbally by the respondent's director one Naushad Kara on 25.11.2017. He had served for 8 years and 2 months but was not given a certificate of service. His last monthly pay was Kshs.42, 960.00.

Further, his duties involved driving car-carrier truck registration No.KBK 768 to transport used and new cars from Mombasa to Nairobi. His case is that on a normal trip he used about 280 litres of diesel from Mombasa to Nairobi and the truck's fuel outlay included a 140 litre main tank, a 100 litre reserve tank and he would normally be given money to buy about 40 litres as and when it was required. The claimant further pleaded as follows:

a. On 22.11.2017 the respondent's director Naushad Kara informed the claimant that the truck's reserve tank had been removed and that he was to use the 140 litres of fuel in the main tank and was given Kshs.3, 500.00 for additional fuel. The claimant expressed reservations about going on the trip without the reserve tank because he was not confident that he would arrive his destination safely. The director Naushad Kara would hear none of it and instead he instructed another employee known as Gabriel to make the trip to Nairobi. On 25.11.2017 Gabriel arrived in Mombasa from Nairobi as reassigned and on that day Naushad Kara summoned the claimant to his office where he accused the claimant of stealing or siphoning fuel from the truck. Further the director accused the claimant of stealing or siphoning 100 litres of fuel which was equivalent to the reserve tank capacity. Further, the director verbally abused and insulted the claimant by using extremely profane words to attack the claimant's character. Later the director verbally terminated the claimant's employment and branded him a thief and warned him to never go back to respondent's premises.

b. The claimant consulted counsel and he went back to find out if he would be paid salary for the month of November, 2017. He went back to the respondent on 04.12.2017 to seek clarification whether or not his services were actually terminated on 25.11.2017 and if so, to request for the letter of termination. He met the director who confirmed that his services had actually been terminated on 25.11.2017 but he declined to give the claimant the letter of termination but directed the accountant to pay him his net salary for November 2017 amounting to Kshs.35, 000.00.

c. The termination was unfair because the claimant was not given one-month notice per section 35(1)(c) of the Employment Act, 2007; reasons for termination were not explained per section 41(1) of the Act; he was not heard accompanied with a representative of his choice per section 41(1) of the Act; failure to consider his representations concerning the serious allegations of theft or misconduct as levelled against and per section 41(2) of the Act; and he was not given a certificate of service per section 51 of the Act. He prayed for 12 months' salaries in compensation Kshs. 42, 960.00 x 12 thus Kshs. 515, 520.00.

d. The claimant was deducted Kshs.200.00 per month for NSSF but was not remitted and he claimed service pay at half month salary for 8 completed years of service  $Kshs. 42, 960/2 \times 8 = Kshs.171, 840.00$ . The claimant claimed that he was deducted N.H.I.F dues but which was not remitted as particularised at paragraph 23 of the memorandum of claim being a sum of Kshs.53, 240.00. He also claimed one-month salary in lieu of the notice for termination being Kshs.42, 960.00.

The claimant prayed for judgment against the respondent for:

1. Certificate of service.
2. Declaration that the termination of the claimant's employment was unfair and wrongful.
3. Payment of terminal dues as claimed Kshs. 783, 200.00.
4. Costs plus interest and other incidentals.

The respondent filed the memorandum of response on 14.05.2018 through Cootow & Associates Advocates. The respondent admitted that it employed the claimant as a truck driver and assigned him motor vehicle No. KBK 786M. The claimant breached the contractual duty to transport cargo to Nairobi as was assigned and he left his place of work – particulars of which were in his knowledge. In particular:

- a. He was assigned truck KBK 786M with a capacity rating of 6920 and for the truck to transport cargo (four vehicles loaded) requiring 220 litres of fuel for the truck to travel from Mombasa to Nairobi and back. The truck consumed 120 litres to Nairobi and 100 litres to Mombasa. It had two fuel tanks for 180 and 60 litres respectively making a total of 240 litres and for a trip to Nairobi the claimant would fill the tanks and ask for a further Kshs.3, 500.00 allegedly for fuelling on the way. He also requested for 15 litres while on the way making a total of 295 litres.
- b. The truck required only 220 litres to go to Nairobi and back and the management decided to remove the 60 litres tank from the truck and fuelled 180 litres and instructed the claimant to ferry the cargo to Nairobi and upon arrival there, the Nairobi office would refuel the truck by adding 40 litres on the return trip to Mombasa. The claimant protested that decision to remove the reserve tank of 60 litres and insisted that he should be given 295 litres which was 75 litres excess. It was policy that a driver be accompanied by the turn boy but the claimant refused to be accompanied. Upon refusal, the respondent instructed another driver to ferry the cargo with the same fuel of 220 litres and since then the truck has been ferrying cargo to Nairobi and consuming even less than 220 litres per trip. The respondent discovered that the claimant had been siphoning fuel from the truck and that was the reason for failure to execute the respondent's instruction and he left employment.
- c. The respondent has not refused to issue the certificate of service. At leaving employment the claimant had not been paid the days worked and the respondent was obligated to pay and it paid and the payment does not imply that the claimant has been terminated as alleged. Per the statement by NSSF the deductions were remitted. Also the dues to NHIF were deducted and remitted per the NHIF statement.
- d. The claimant voluntarily left employment with the respondent amounting to constructive resignation. He was not terminated at all.

The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case and the respondent called 4 witnesses. Final submissions were filed for the parties. The Court has considered the pleadings, the evidence and final submissions and makes finding as follows.

To answer the **1<sup>st</sup> issue**, there is no dispute that the parties were in a contract of service. The respondent employed the claimant as a truck driver as pleaded for the claimant. The last pay was Kshs.42, 960.00 per month.

The **2<sup>nd</sup> issue** is whether the claimant was terminated on 25.11.2017 when he expressed reservations about removal of the reserve tank, another driver assigned in his place and verbally terminated by the director Naushad Kara, or, as per the respondent, the claimant voluntarily left employment when he protested the removal of the reserve tank, refused to take the assignment and another driver was assigned accordingly.

The claimant by his evidence confirms that on 22.11.2017 he was preparing for a trip to Nairobi when the director Naushad Kara informed him about removal of the reserve tank and that he would be given Kshs. 3, 500.00 for additional fuel and, at that point the claimant expressed his reservations about the removal of the reserve tank and he was reluctant to drive to Nairobi with only one tank. He states that he later got wind that the director had ignored his concerns and instructed another driver called Gabriel to travel to Nairobi. He states that Gabriel returned from the trip and on 25.11.2017 the director summoned him and accused him of stealing or siphoning fuel being 100 litres equivalent to the reserve tank's capacity – and the director branded him a thief and told him never to go back to the premises again. After legal advice he went back on 04.12.2017 when the director confirmed that he had dismissed him on 25.11.2017 but, no concise reasons for termination were given.

The respondent's witnesses No1, 2, and 3 testified that they were not present at the meeting of 22.11.2017 between the claimant and the director. The director Naushad Kara was the respondent's witness No. 4 (RW4). RW4 testified thus, **"On 22.11.2017 he refused to drive as assigned. So I assigned the mechanic to drive. He just left – he walked away. I verbally told him he had refused to follow instructions. I gave no written warning. On 25.11.2017 the claimant came back. I had told him to come back on that date when motor vehicle came back. I told him on 22.11.2017. On 25.11.2017 I told him to do 220 litres like other driver had done. On that date claimant came to office. He refused 220litres. He left. He refused to go to Nairobi. I gave him no document. He simply left. On 22.11.2017 and on 25.11.2017 I gave him no official letter or document. He left because he did not want to do 220 litres."**

The Court has considered the evidence. The claimant and the director met on 22.11.2017 when the claimant, in his own words, was reluctant to drive the truck because the reserve fuel tank had been removed. The claimant pleads that he went back on 25.11.2017 to confirm if he had been dismissed. The Court finds that by that pleading and the claimant having gone back on 25.11.2017, the claimant knew that on 22.11.2017 he had not been dismissed but parties had an issue about removal of the reserve tank. On 25.11.2017 the parties met and Gabriel had returned from Nairobi after a successful trip without the reserve tank. The Court has no reason to doubt the evidence of RW4 that on 25.11.2017 the claimant was given a second chance to consider driving the truck as assigned without the reserve tank but the claimant

declined as per RW4's evidence. The Court finds that the contract of employment ended on 25.11.2017 when the claimant maintained that he could not drive the truck without the reserve fuel tank. It is in section 45 (2) of the Employment Act, 2007 that it is provided that a termination of employment is unfair if the employer fails to prove that the reason for termination was valid and the reason was fair because it related to the employee's conduct, capacity or compatibility, or, based on the operational requirements of the employer; and, that the employment was terminated in accordance with fair procedure. The Court finds that the respondent was entitled to determine its operational requirements, systems and policies. Thus, the respondent was entitled to remove the reserve tank and there was no good ground for the claimant to protest, even without having tried to go on a trip upon that new operational requirement. The Court finds that it was for the claimant to go on the trip and if there emerged a challenge, then he would raise the grievance as appropriate. The Court further finds that by assigning Gabriel on the maiden trip without a reserve tank and thereafter meeting the claimant on 25.11.2017, the respondent was clearly inviting the claimant to reconsider his position but he appears to have failed to do so. The Court considers that the termination was not unfair within the test in section 45 of the Act and it related to the claimant's compatibility, conduct and the respondent's operational system or requirements. The procedure leading to the separation cannot be said to have been unfair. Whether the claimant walked away as per RW4 or was told to go away as per claimant's evidence, the reason triggering the separation was the claimant's refusal to drive the truck without the reserve fuel tank. The Court returns that since the respondent was entitled to determine the operational requirements and the claimant had refused to fit in the requirements, with or without an overt dismissal decision, he thereby became moribund in the respondent's staff establishment – so moribund for reasons attributable to himself and not the respondent – and so not amounting to a redundancy situation per definition in the Employment Act. The Court therefore finds that the claimant was his own author of his predicament and the issue of unfair termination and compensation as alleged does not arise – and the respondent's submissions in that regard are upheld.

The 3<sup>rd</sup> issue is on remedies. At the hearing the parties recorded a consent thus, **“By consent, on NHIF claim the amount in paragraph 23 of the claim was deducted as stated and if any not remitted to NHIF per NHIF statement, then the claimant would be refunded accordingly and submissions to be made.”** The submissions were not made on any specific amounts due as envisaged in that consent order and the claims and prayers in that regard are deemed abandoned. The respondent stated it had not refused to issue a certificate of service. The claimant was a member of NSSF and service pay was not due per section 35(6) of the Act.

The Court has considered that the respondent has failed to issue the certificate of service promptly and each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the certificate of service to be delivered in 7 days and each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19<sup>TH</sup> NOVEMBER, 2021**

**BYRAM ONGAYA**

**JUDGE**