



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 350 OF 2017

MURE KATANA CHENGO.....CLAIMANT

- VERSUS -

EASYTRANS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd December, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 03.05.2017 through M/s Stephen Jumbale & Company Advocates. The respondent filed the memorandum of response on 10.11.2017.

There is no dispute that the respondent employed the claimant as a driver on probationary service effective 01.08.2016. The probationary service was extended by the respondent's letter dated 21.10.2016 up to 01.02.2017 running from 01.11.2016. The respondent extended the probationary service the 2nd time by the letter dated 23.01.2017 and from 01.02.2017 to 01.05.2017. The extension was due to accident on 23.11.2016 resulting in damage to the truck he was assigned and to cargo. The respondent issued the 2nd warning letter dated 05.12.2016 about accident on 21.11.2016 and the 1st warning letter dated 04.10.2016 about over consumption of engine oil and diesel.

The claimant's case is that on 12.02.2017 he was served with a letter terminating his services based on unfounded and unproved allegations that the respondent was not impressed with his services. The claimant states that the termination was contrary to sections 35, 41 and 45 of the Employment Act, 2007 and Article 47 of the Constitution of Kenya 2010. At termination his monthly pay was **Kshs. 28, 000.00**. The claim is for:

- a) One-month salary in lieu of notice Kshs. 28,000.00.
- b) Compensation for unlawful termination Kshs.336, 000.00.
- c) Rest days Kshs. 48, 533.00.
- d) Public holidays Kshs. 10, 266.00.
- e) Total Kshs. 422, 799.00.

The claimant prayed for judgment against the respondent for:

- a) A declaration the termination was unfair, unjust and unconstitutional.
- b) Payment of Kshs. 422, 799.00.
- c) Certificate of service.

The respondent filed the response to the memorandum of claim on 01.08.2017 through Wandai Matheka & Company Advocates. The respondent's case is that the claimant's employment was terminated on 10.02.2017 while the claimant was serving on probation and per section 42(4) of the Employment Act. He was asked to clear and get paid the final dues but he declined to do so. The termination of probationary service was on account of gross misconduct. It was denied that he worked on public holidays or without off and when he did he was fully paid. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. Despite service the respondent failed to attend for hearing of the respondent's witness and case. The Court has considered all the material on record and makes findings as follows.

First, the evidence is that the respondent employed the claimant as a driver.

Second, section 42 of the of the Employment Act, 2007 on termination of probationary service states:

- 1) The provisions of section 41 shall not apply where a termination of employment terminates probationary contract.
- 2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.
- 3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).
- 4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

The claimant confirmed that he worked for about six months. The Court has considered the letters extending probationary service and finds that in view of the time served, indeed the claimant was on probationary service and the termination amounted to termination of the probationary service. Further, the claimant admitted that he had been involved in an accident and there is no reason to doubt that his performance was wanting and leading to the termination. While claiming pay for rest days and public holidays, the claimant testified that while on trips he managed his time and he received trip allowance and millage allowance and he testified that he had not specified the public holidays worked. In the circumstances, his claim for pay on public holidays and rest days will fail as unjustified because he had the liberty to manage time while on safari and he had been duly compensated through the allowances paid.

Third, the separation amounting to termination of a probationary service, the claimant is entitled to only 7 days' pay per section 42(4) of the Act and is awarded $7/30 \times 28000$ making **Kshs.6, 533.30**. The claimant is entitled to a certificate of service per section 51 of the Act. In view of margins of success each party to bear own costs of the suit.

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

- 1) Payment of **Kshs. 6, 533.30** by 24.12.2021 failing interest to be payable thereon at court rates from the date of filing the suit till full payment.
- 2) The respondent to deliver to the claimant the certificate of service by 24.12.2021.
- 3) Each party to bear own costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 3rd December, 2021.

BYRAM ONGAYA

JUDGE