



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 917 OF 2017

BETWEEN

KITSAO SAID TUVA.....CLAIMANT

VERSUS

AL-BARAKAT AGENCY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Thabit Wampy & Kitonga, Advocates, for the Claimant

Muturi Gakuo & Kibara Advocates, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 15th December 2017. He avers, he was employed by the Respondent as a Yard Clerk, from 28th May 2010, to 26th September 2017, when the Respondent unfairly terminated his contract. He was accused of causing damage to a vehicle owned by the Respondent's Client, Bash Hauliers Limited. He admitted doing so, and offered to pay the Respondent for the damage. The Respondent went ahead, and terminated Claimant's contract. He states, termination did not follow a fair procedure prescribed under the Employment Act. He was denied terminal dues. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 20,800.
- b. Salary arrears for the month of September 2017 at Kshs. 20,800.
- c. Accrued annual leave of 1 year at Kshs. 20,800.
- d. Service pay at Kshs. 72,800.
- e. 12 months' salary in compensation for unfair termination at Kshs. 249,600.
- f. Less salary advance of Kshs. 7,000.

Total...Kshs. 391,000.

- g. Certificate of Service to issue.
- h. Any other suitable relief.
- i. Costs of the Claim.

2. The Respondent filed its Statement of Response on 23rd March 2018. It concedes to have employed the Claimant, but denies it terminated

his contract unlawfully. He was employed as a Clerk, not a Driver. He did not have any authority to drive Trucks. He drove a Truck without authority, and exposed the lives of other Employees to danger, and was therefore summarily dismissed. He was given an opportunity to explain himself. He said he was used to driving while the Drivers were unavailable. He was dismissed for gross misconduct. Terminal dues are payable only when an Employee retires, is declared redundant or is unlawfully dismissed. The Claimant was lawfully dismissed and is not entitled to the prayers claimed.

3. The Claimant gave evidence, and closed his case, on 15th July 2019. The Respondent gave evidence through its Supervisor Ismael Mohammed Ali and Human Resource Manager Maadhi Bakari Bendera, on 15th October 2019 when hearing closed. The matter was last mentioned in Court on 9th December 2019, when the Claimant confirmed filing of his Closing Submissions.

4. The Claimant told the Court he is currently a Truck Driver, and a resident of Changamwe. He was employed by the Respondent, a labour outsourcing business, on 28th May 2010. He was outsourced to Bash Hauliers Limited, a Transportation Company, as a Clerk.

5. On 17th September 2017, he inspected his Truck and while driving it for fueling, an accident occurred. He was required by the Respondent to explain. He explained and apologized. He offered to pay the cost of repair through salary check-off. The Respondent did not agree with the offer, and summarily dismissed the Claimant. He was paid nothing on dismissal. He had worked for 7 years. Cross-examined, he confirmed he was employed as a Clerk, not a Driver. He did not have authority to drive. It was not the first time he drove. He did not endanger the lives of other Employees. It was wrong for him to drive. Redirected, he told the Court it was usual for him to drive Trucks for fueling. It was not necessary to have the authorization of the Respondent.

6. Ali confirmed that the Respondent is a labour outsourcing business. The Claimant was an Employee of the Respondent, outsourced to Bash Hauliers Limited. He drove a Trailer and knocked another vehicle, causing serious damage. He was a Clerk, not a Driver. He conceded on being asked for an explanation, to have driven without authorization and to have caused an accident. He was issued letter to show cause by the Human Resource Office. Details of the charges were set out. He replied conceding the charge. He asked for pardon. He was called for a hearing. He did not show up. He turned up on 26th September 2017. He was issued the letter of dismissal. He did not clear with the Respondent. He did not collect his terminal dues.

7. Cross-examined, Ali told the Court he was Claimant's Supervisor. The Claimant worked at Bash Hauliers. Bash is a transportation business. The Claimant worked outfield with the Drivers. The Respondent had an office within Bash Hauliers' premises. Ali was not present on the date of the accident. Bash and Respondent's Employees work together. The Claimant worked for 7 years. He was experienced. He did not have warnings. He conceded his error, and was ready for surcharge. The Respondent did not invite him to disciplinary hearing in writing. Redirected, Ali told the Court he called the Claimant to clear. He conceded he used to drive without authorization. His work was to check tyre conditions. He was not capable of paying for the damage he occasioned.

8. Bendera told the Court it was reported to his office, on 17th September 2017, that a Turn Boy drove a Truck belonging to Respondent's Client Bash Hauliers without authorization causing an accident. The Claimant accompanied by his Supervisor, went to the Human Resource office and explained his position. He said it was an error on his part. It was not his role to drive. He was issued notice to show cause. His response was not satisfactory. He was asked to keep away, as the Respondent assessed the extent of the damage, and arranged for disciplinary hearing. He did not turn up when asked to report for disciplinary hearing. He did not clear.

9. Bendera told the Court on cross-examination that he was employed by Bash Hauliers. The Respondent supplied Employees to Bash Hauliers. The Claimant was employed by the Respondent. Disciplinary panel was manned by Employees of the Respondent and Bash Hauliers. The Respondent did not produce Claimant's contract in Court. It is not true that the Claimant's job description was unknown. There are alternatives to summary dismissal. The Claimant apologized. He offered to pay for the damage occasioned. He failed to attend disciplinary hearing. The Respondent assessed damage before making a conclusion that the Claimant would not be able to pay. Bendera was not able to say how much was assessed in damage. He could not recall how much salary the Claimant earned. Redirected, he reiterated that the Claimant did not have authority to drive Bash Hauliers Trucks.

The Court Finds:-

10. It is not in contention that the Claimant was employed as a Yard Clerk, on 28th May 2010 until 26th September 2017. He was assigned duty at Bash Hauliers Limited. Bash Hauliers is Client of the Respondent herein. The Respondent is a labour outsourcing business.

11. It is similarly not contested that the Claimant was not a Driver. He was a Yard Clerk. He was not authorized to drive. He drove a Truck on 17th September 2017, occasioning an accident. He caused damage to the Truck he was driving, and another Truck. He wrote to the Respondent on 19th September 2017, apologizing. He wrote that he was aware he was not allowed to drive. He undertook to meet the costs of repair.

12. The Respondent did not agree with his offer. It was felt that the Claimant was not capable of paying the cost of the damage to two Trucks. He was asked to show cause, admitted the offence and was dismissed.

13. The Court does not think dismissal was unfair. The Claimant drove while he was not authorized to do so. He did not stick to his role of a Clerk. He did not work in accordance with the instructions of his Employer. He occasioned damage to two Trucks. The Respondent was not obliged to accept his offer to pay for the damage. In the assessment of the Respondent, the Claimant was not capable of paying. The Court has no reason to disagree with the Respondent on Claimant's ability to meet the cost of his misadventure. It was a fundamental breach of the Claimant's contract, to allocate to himself duty outside his role, and to discharge a role he was not competent to discharge. He endangered the lives of Co-Employees, and damaged his Employer's property.

14. Termination was based on valid ground under Sections 43 and 45 of the Employment Act.

15. Procedure was fair. The Claimant agreed he drove Bash Hauliers' Truck without authorization. He agreed he caused an accident and damage to two Trucks. There was nothing left for the Respondent to establish through an elaborate disciplinary hearing. It is said by the Respondent that even when the Claimant was asked to present himself for hearing, he did not turn up. The Court is satisfied that the Claimant was asked to explain himself through the letter to show cause, issued on 18th September 2017. He replied the following date, 19th September 2017, admitting everything. He did not leave a single issue for trial. He admitted everything. He was subsequently dismissed on 26th September 2017. The Court does not see any fault with the procedure. Summary dismissal was based on an offence which was unequivocally admitted. The Claimant proposed a form of punishment less severe than dismissal, in the name of payment for the damage through salary check-off. He did not fault the substance or procedure leading to dismissal. The Respondent was not bound to impose the less severe punishment desired by the Claimant. It was within the discretion of the Respondent to determine appropriate sanction. Summary dismissal was proportionate sanction, considering the nature of the Claimant's offence and the damage caused by that offence.

16. The prayer for compensation is declined.

17. The prayer for notice is declined.

18. The Respondent states, the Claimant did not clear, and was therefore not paid terminal dues. It is submitted that terminal benefits are paid when an Employee is unlawfully dismissed. The Respondent appears to acknowledge that there were terminal dues owed to the Claimant, but these could not be paid, because he did not clear; and two, he was lawfully dismissed.

19. There is nothing shown by way of law or contract, to validate this position held by the Respondent. There is nothing which would disentitle the Claimant from receiving accrued benefits. Section 18 [4] of the Employment Act states that where an Employee is summarily dismissed for lawful cause, the Employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of dismissal. The law does not state, that terminal benefits shall become accessible to the Employee, only after clearance. And in any event, what entailed clearance?

20. The Claimant prays for salary for September 2017 at Kshs. 20,800. The Respondent has not provided any document showing payment. The Claimant worked up to 26th September 2017. **He is allowed salary for 1 month at Kshs. 20,800.**

21. The Claimant prays for annual leave of 1 year. He submits at page 11 of the Closing Submissions that, during the "pendency of Claimant's employment, he did not proceed for leave." He worked for 7 years. He does not specify which 1 year he is referring to, in his prayer for annual leave. It has not been established that the Claimant is owed annual leave.

22. The Respondent said nothing in its Pleadings and Evidence, on the prayer for service pay. The Claimant worked for 7 complete years, between May 2010 and September 2017. There is no evidence that he was subscribed to any Social Security Plan, contemplated under Section 35 [6] of the Employment Act 2007. **He is granted service pay at 15 days' salary for each complete year of service, at Kshs. 84,000.**

23. **Certificate of Service to issue.**

24. **No order on the costs and interest.**

IN SUM, IT IS ORDERED:-

a. Termination was fair.

b. The Respondent shall pay to the Claimant, salary for 1 month at Kshs. 20,800 and service at Kshs. 84,000 -total Kshs. 104,800.

c. Certificate of Service to issue.

d. No order on the costs and interest.

Dated and delivered at Mombasa this 21st day of February 2020.

James Rika

Judge