



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 346 OF 2018

BETWEEN

ISMAIL MGANA MWAZUMA.....CLAIMANT

VERSUS

MULTILIFT LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Gikera & Vadgama, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 23rd May 2018. He states, he was employed by the Respondent as a Crane Operator, on 1st June 2014. He was paid a daily trip allowance of Kshs. 700 while working in Mombasa County, and Kshs. 1,500 while in other Counties such as Kilifi, Marsabit and Turkana.

2. On 27th October 2017, he was required by the Respondent, to load a crane on the barge at COMARCO MOMBASA. The crane was headed to Lamu. The Respondent did not negotiate the rate payable to the Claimant and his Colleagues, prior to the loading of the crane. The Claimant wanted to be paid the rate applicable to Counties outside Mombasa, while the Respondent wished to retain the rate payable in Mombasa, while the Claimant worked in Lamu. The Respondent instructed the Claimant to proceed to Lamu on 28th October 2017, while the issue of applicable rate of allowance had not been determined. The Claimant was at the same time unwell and sought medical assistance from the Respondent. The Respondent declined and issued the Claimant a letter of suspension.

3. He was called to a disciplinary meeting on 13th November 2017. He was heard, and received a letter of termination dated 27th November 2017. Certificate of Service dated 30th December 2017, issued. He appealed against dismissal on 3rd December 2017. His appeal was ignored by the Respondent. He prays for Judgment against the Respondent for:-

- a. Declaration that termination was unfair.
- b. 1 month salary in lieu of notice at Kshs. 46,000.
- c. 12 months' salary in compensation for unfair termination at Kshs. 552,000.

Total...Kshs. 598,000.

- d. Costs and interest.

4. The Respondent filed its Statement of Response on 30th July 2018. It is not disputed that the Claimant was employed by the Respondent.

The Respondent's business entails being subcontracted by various Organizations, to undertake various works, in different places within the country. It allocates its Staff duties within the work sites.

5. The Respondent was subcontracted to work in Lamu. The Claimant was among the Staff assigned duty there, as a Crane Operator. It was agreed Employees would receive an allowance of Kshs. 700 per day. They were to be provided with accommodation and meals in Lamu. The Claimant refused to travel. He never said he was unwell. In his disciplinary statement, the Claimant gave his reason for not traveling, as the alleged reduction of allowance. He was suspended, heard and dismissed fairly. He was paid terminal dues at a net amount of Kshs. 68,682. The Respondent denies that the Court has jurisdiction, stating the Claim should be heard in the Magistrate's Court. It urges the Court to dismiss the Claim.

6. The Claimant, and Respondent's Human Resource and Administration Manager, Aisha Ibrahim Qumrudin, testified for respective Parties on 22nd October 2019, closing the hearing.

7. The Claimant adopted his Statements of Claim and Witness on record, in his oral evidence. He confirmed that he was advised the allowance in Lamu would be Kshs. 700 daily, as accommodation and food would be given separately. He felt the allowance was insufficient. His boss told him it would be discussed further. The Claimant was then suspended. There was no letter asking the Claimant to explain his position. Some Colleagues told the Claimant that the Respondent had changed the rate, prior to travel to Lamu, which caused the Claimant to write a letter appearing to change his stance. The Respondent had not visited Lamu in advance, to prepare the way for Employees. There was no camp in Lamu.

8. Cross-examined, the Claimant told the Court he is presently engaged by a Company called Mackenzie Limited. Allowances offered by the Respondent were in addition to the monthly salary. There were meetings before the date set for travel to Lamu, between the Parties. Employees were advised allowance would be Kshs. 700 daily. Lunch and accommodation would be provided. At Mombasa, the allowance was Kshs. 700, comprising Kshs. 500 in fare and Kshs. 200 in lunch. The cranes were loaded and Employees instructed to travel on 1st November 2017. The Claimant called Management, saying Lamu was not ready for the Employees. The Claimant did not travel to Lamu. He was aware of the arrangements made by the Respondent. The Respondent was exploring for gas. The Respondent was compelled to get another Crane Operator. The Claimant was called to a disciplinary hearing. He was accompanied by a Colleague, Juma Saidi. He was heard. He was in poor health. The Respondent had his medical records. He wrote grievance/disciplinary statement. He did not state he was in poor health and could not travel. He was paid Kshs. 68,000 on termination. There were Colleagues who travelled to Lamu as instructed. They were offered better allowances. The disciplinary action was against the Claimant alone. Redirected, the Claimant told the Court he was not given a written contract. He did not know how the work environment in Lamu was. He was already on suspension when he wrote the grievance/disciplinary statement.

9. Qumrudin told the Court that the Respondent hires out heavy lift equipment, operating within East Africa, mostly in Kenya. The Claimant was employed as Crane Operator. He was to work at whichever site he was assigned to. There were several other Crane Operators.

10. The Respondent was subcontracted to work in Pate Island in Lamu County. It held a meeting with all Staff on 21st October 2017. They were briefed on their roles and allowances in Lamu. They were offered allowance of Kshs. 700 per day, excluding the cost of food and accommodation. The allowance was in addition to normal monthly salary.

11. The Claimant was to deliver his crane to COMARCO ship for transportation to Lamu. He did so, then called the Respondent, on 28th October 2017, declining travel. Qumrudin called the Claimant and tried to persuade him to travel. She even called his Colleagues to persuade the Claimant. The Respondent was stranded. The Respondent gave the Claimant adequate time to reconsider his stance, from 21st October 2017, till the date of dismissal. Others complied and went to Lamu. The Claimant was taken through a fair disciplinary hearing. Hearing was initially set for 16th and 17th November 2017. The Claimant did not attend. He was called by Qumrudin. He said he did not have calling airtime and was not able to call the Respondent earlier to communicate his inability to attend hearing. He later came and asked for forgiveness. He also alleged he was unwell, but did not have medical records. The Respondent was convinced the Claimant was engaged in an act of gross misconduct, in the nature of insubordination. A decision was made to terminate on 27th November 2017. He was given a chance to appeal. He was paid terminal dues.

12. On cross-examination, Qumrudin told the Court that the Claimant refused to go to Lamu. She did not write to him, pleading with him to change his mind. She sought the intercession of other Employees. These Employees are not Witnesses in the proceedings herein. Nothing about Lamu needed to be disclosed to Employees. There was a medical facility there. The Respondent was in communication with its parent Company. The Claimant was previously sick, but not on 21st October 2017. The Respondent did not receive any appeal from the Claimant. Redirected, Qumrudin told the Court, the Claimant could travel to Lamu, even while under suspension.

The Court Finds:-

13. The Claimant was employed by the Respondent as a Crane Operator, from 1st June 2014, to 28th November 2017. His salary as of the date of termination, was Kshs. 46,000 monthly.

14. The Respondent is in the business of hiring out heavy lift equipment to Clients. It has operations in Kenya and the wider East Africa region. It is subcontracted to work in different parts of the region, and relevant to this dispute, was subcontracted to explore for gas in Pate Island, within Lamu County.

15. The Claimant alongside other Employees was required to move to Lamu, and discharge his role of crane operation there. Employees were advised they would receive an allowance of Kshs. 700 per day, which was the allowance earned, while in Mombasa. They were to be provided food and accommodation while in Lamu. They would continue to earn their monthly salary. The Claimant's salary was Kshs. 46,000 a month, which included house allowance.

16. The Claimant declined to travel. He loaded his crane on the ship that was to transport equipment to Lamu, at the COMARCO docking yard. He then called the Respondent and told the Respondent he would not travel, because the allowance was not satisfactory. Other Employees travelled. The Respondent was compelled to replace the Claimant.

17. He was suspended and taken through a disciplinary hearing. He was dismissed, and paid terminal dues at approximately Kshs. 68,000.

18. The Court is satisfied the Claimant was dismissed on valid ground, and fairly. He was involved in an act of insubordination, which amounts to gross misconduct, under Section 44 [4] [e] of the Employment Act 2007. He persisted in his refusal to travel, even after being implored to change his mind by Qumrudin and his Colleagues. It was strange for the Claimant's Advocate to ask Qumrudin on cross-examination, whether she wrote to the Claimant, imploring him to go to Lamu. Why should an Employer implore an Employee to obey instructions, little less do so, in writing? He complained about the allowance of Kshs. 700, and when he ran out excuses, floated the unsupported idea that he was too sick to travel. He gave no medical records in support at all. The Respondent was compelled to hire another Crane Operator.

19. It was held in *Dede Esi Annie Amanor-Wilks v. Action Aid International [2014] e-KLR*, that verbal and non-verbal insubordination is a valid ground for summary dismissal. Non-verbal insubordination includes constant and intentional refusal to obey a direct or implied order, reasonable in nature, given by and with proper authority. The Claimant constantly and intentionally stood his ground, declining the command of his Employer, to work at a site which was within his duty to work. He demanded to be paid an allowance at a rate which did not take into account that he was receiving food and accommodation at Lamu. Other Employees obeyed the instructions of the Employer. The Claimant had no business to ask the Respondent to provide proof of its pre-visit of Lamu. He ought to have obeyed the lawful instructions of his Employer.

20. Procedure was fair. The Claimant was suspended and given adequate opportunity to purge insubordination. The Respondent was reasonable, holding that even while on suspension, the Claimant was free to change his stance, and take the bus to Lamu. The Claimant was adamant, and declined to board the bus to Lamu. He was invited to the disciplinary hearing. He was even allowed a second chance, after he defaulted at first hearing, with the explanation that he did not have air-time to enable him communicate his inability to attend. He was heard in the company of a Colleague. He was allowed the chance to appeal. It is not clear if his appeal was received by the Respondent. All in all, the fundamentals of fair procedure, under Section 41 of the Employment Act, were availed to the Claimant in full measure.

21. The Respondent has not given reasons, why the Court should not exercise jurisdiction in this dispute. This objection was not amplified in the Submissions of the Respondent. It is rejected.

22. In the end, it is the Court's view that termination was fair on all aspects. The Claimant can only blame himself for loss of a job that afforded him a monthly salary of Kshs. 46,000, a loss which happened, because of his unreasonable pursuit of an allowance of Kshs. 1,500.

IT IS ORDERED:-

a. The Claim is declined.

b. No order on the costs.

Dated and delivered at Mombasa this 20th day of February 2020.

James Rika

Judge