



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 583 OF 2015**

**DAVID WAIYAKI KAMARU .....CLAIMANT**

**VERSUS**

**AFRICA TRAVEL COMPANY LTD .....RESPONDENT**

**JUDGEMENT**

1. The Claimant pleaded that he was employed by the respondent as driver via a verbal contract on 8<sup>th</sup> July, 2003 up to 2008 thus a period of five years and subsequently promoted to workshop manager/supervisor, a position he held until his dismissal on 9<sup>th</sup> January, 2015.
2. The Claimant together with his colleagues filed a complaint with the District Labour Office on 25.04.2015 after their grievances were not considered by the respondent. The sub county Labour Office wrote to the respondent on 11<sup>th</sup> September, 2014 and 4<sup>th</sup> December, 2014 to respond to the Claimant's grievances but no response was received.
3. On 13<sup>th</sup> December 2014, the respondent requested the Claimant to take the balance of leave days for 2014 and resume duty on 9<sup>th</sup> January, 2015 but when he returned on the 9<sup>th</sup> the respondent terminated his services due to complaint letters from the Ministry of Labour.
4. The Claimant complained that for the period he worked he was underpaid.
5. The Claimant therefore claimed five months salary in lieu of notice, leave allowance, 12 months compensation for unfair dismissal, these allowance and severance pay.
6. In the response to claim filed under protest by Flight Kenya Service Limited it stated that the respondent did not have a registered office in Kenya and further that the offices at Magadi Road were offices belonging to Flight Centre Services and Acacia Camp which were independent of the respondent. Flight Centre further stated that it was an agent of the respondent registered in Kenya run independently with different directors. Flight Centre further stated that there was no workshop at their registered office.
7. The averments by the Flight Kenya Services prompted the Claimant to amend its statement of claim and substituted Flight Centre Services with Africa Centre Services.
8. The application for substituted was granted however the substituted party never entered appearance to the claim no filed a response. The matter subsequently proceeded ex parte for hearing.
9. At the trial the Claimant relied on his witness statement in which he stated that he was a trained mechanic and driver class "A". He further stated that in April, 2014 his fellow employees were approached by a workers Union to join the union. They notified the respondent of their intention and listed their grievances through a petition to the Labour Office and copied to the respondent. The management however decided to terminate their services.
10. He sought reason for termination of his service and was told since he had decided to join the Union his services would be terminated.
11. Although the respondent never filed a response to the amended claim, the Claimant's grievances as pleaded revolve around termination without notice or reason, underpayment, failure by the respondent to issue employment letters failure to issue pay slips, underpayment etc.
12. There is absolutely no mention of termination on account of Union activities yet the main content of the Claimant's witness statement which he urges the Court to rely on in support of his claim he states that his services were terminated because he and his colleagues were approached by a Union which again he did not name and when they informed the respondent Director Mr. Guraham, they were terminated and ordered to leave the respondent's premises.

13. It is a cardinal rule of pleadings that a party is bound by their pleadings. The evidence adduced must be consistent and in support of the averments in the pleadings. This has not been evidenced here.

14. The fact that a matter has proceeded undefended does not lessen the burden of proof cast by law on the person contemplating a favorable judgement from the Court.

15. In this particular case the Claimant has failed to discharge the said burden with the consequence that the claim is hereby dismissed with costs.

16. It is so ordered

**Dated at Nairobi this 13<sup>th</sup> day of March, 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 13<sup>th</sup> day of March, 2020**

**Byram Ongaya**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.