



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 338 OF 2018

TITUS MUTERU KIMATHI.....CLAIMANT

VS

TRANS-WAY (K) LOGISTICS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Titus Muteru Kimathi against his former employer, Trans-Way (K) Logistics Limited. The claim is by way of a Memorandum of Claim dated 18th May 2018 and filed in court on 21st May 2018. The Respondent filed a Memorandum of Response on 17th July 2018.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Operations Manager, Kevin Maingi.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Lorry Driver on 17th February 2017. He earned a monthly salary of Kshs. 35,000 as at the time of termination of his employment on 8th March 2018.

4. The Claimant further states that on 8th March 2018, he was accused of stealing coils. He was then issued with a certificate of service by the Human Resource Manager.

5. The Claimant’s case is that his employment was terminated without justifiable cause and in violation of due procedure. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 35,000
- b) Salary for 8 days in March 2018.....10,769
- c) Unpaid leave for 2017/2018.....35,000
- d) Unremitted NSSF dues.....5,200
- e) Refund of unlawful deductions.....21,000

- f) Balance of contract.....385,000
- g) 12 months' salary in compensation.....420,000
- h) Costs plus interest

The Respondent's Case

6. In its Memorandum of Response dated 16th July 2018 and filed in court on 17th July 2018, the Respondent states that on 2nd February 2018, while assigned Motor Vehicle Registration No KCB 913X, the Claimant returned less chains and locks and failed to give any plausible explanation for the shortfall.

7. The Respondent adds that prior to this incident, the Claimant had been issued with three (3) warning letters on account of misconduct and dishonest conduct.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

9. In his witness statement dated 16th July 2018 and filed in court on 17th July 2018, the Respondent's Operations Manager, Kevin Maingi states that the Claimant was summarily dismissed on 8th March 2018 on account misconduct; in particular, loss of locks and chains assigned to the Claimant for securing cargo. Maingi further accused the Claimant of habitual lateness and dishonesty.

10. All the accusations made against the Claimant amount to gross misconduct. There was however no evidence that any of the charges were served on the Claimant prior to the termination.

11. Moreover, in the Certificate of Service issued to the Claimant by the Respondent's Human Resource Manager, Nancy Ngeti on 8th March 2018, the Claimant is described as honest, obedient & trustworthy. This description is in at complete variance with the picture painted by the Respondent in its Response as well as by the testimony of the Operations Manager, Kevin Maingi.

12. In the result, I find and hold that the Respondent has failed to establish a valid reason for termination of the Claimant's employment as required under Section 43 of the Employment Act. In addition, the Respondent failed to adhere to the mandatory procedural fairness requirements set under Section 41 of the Act.

Remedies

13. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In making this award, I have considered the Claimant's length of service and his employment record. I have also taken into account the Respondent's conduct in the termination transaction.

14. From the evidence on record, the Claimant was paid one (1) month's salary in lieu of notice. The claim for notice pay is therefore spent.

15. In the absence of contradictory evidence, the claim for salary for eight (8) days in March 2018 is allowed.

16. The Claimant's further claims the sum of Kshs. 21,000 being money recovered from him on account of lost chains and locks. This recovery, which the Respondent admitted having effected, amounts to surcharge.

17. As held by this Court in *Kenya National Library Services v Beatrice N. Ayoti [2014] eKLR* surcharge against an employee is a disciplinary action to be undertaken within the confines of Section 41 of the Employment. The Claimant testified that he was not heard prior to the surcharge effected against him.

18. The Respondent did not contest the Claimant's testimony in this regard. What is more, no evidence was tendered to show that the cost of the lost locks and chains was in fact Kshs. 21,000. In the circumstances, I find and hold that the surcharge was unlawful and the Claimant is entitled to a refund.

19. The claim for leave pay for one (1) year was admitted and is payable.

20. Regarding the claim for unremitted National Social Security Fund (NSSF) dues the only thing to say is that any such dues would be payable to the statutory body and not the Claimant. No basis was laid for the claim for balance of contract which therefore fails and is dismissed.

21. Finally, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....	Kshs. 103,500
b) Salary for 8 days in March 2018 (34,500/30x8).....	9,200
c) Unlawful surcharge.....	21,000
d) Leave pay for 1 year (34,500/30x21).....	<u>24,150</u>
Total.....	157,850

22. This amount will attract interest at court rates from the date of judgment until payment in full.

23. The Claimant will have the costs of the case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY MARCH 2020

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JUDGE

Appearance:

Miss Mbithe for the Claimant

Mr. Mulei for the Respondent