



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 154 OF 2018

NASSORO MOHAMED MWANYULE.....CLAIMANT

VS

ABRY LOGISTICS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a test case whose outcome will apply in the related *Cause No 155 of 2018*. The claim is by way of a Memorandum of Claim dated 22nd March 2018 and filed in court on the same date.
2. The Respondent filed a Statement of Response on 14th May 2019.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Director, Amer Salim Amer. Both parties further filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Driver from May 2015 until 7th October 2017, when his employment was terminated verbally.
5. The Claimant claims that the termination of his employment was without any justifiable cause and in violation of due procedure. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 25,000
- b) 12 month’s salary in compensation.....300,000
- c) Certificate of service
- d) Costs plus interest

The Respondent’s Case

6. In its Statement of Response dated 14th May 2019 and filed in court on even date, the Respondent admits having employed the Claimant as a Driver.
7. The Respondent however denies that the termination of the Claimant’s employment was unjustifiable or unfair.
8. The Respondent states that the Claimant left employment unceremoniously without taking his certificate of service which had been prepared.

9. The Respondent further states that the Claimant was paid all his dues, including one month's salary in lieu of notice.

10. The Respondent's case is that the termination of the Claimant's employment was lawful and fair.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. In his testimony before the Court, the Claimant stated that prior to the termination of his employment on 7th October 2017, he and his turn boy Mwinyi Hamadi Abdulrahman, had been assigned truck registration number KCF 372H to ferry goods to Kampala.

13. The Claimant testified that the truck developed mechanical problems around Tsavo National Park. He drove it to Mtito Andei from where he called the Respondent's Manager Ahmed Salim. The truck was repaired but according to the Claimant the problems persisted on the journey to Kampala.

14. The Claimant further told the Court that upon returning to Mombasa from Kampala, he and his turn boy were notified by Ahmed Salim that their employment had been terminated.

15. On his part, the Respondent's Director, Amer Salim Amer testified that he received a telephone call from the Claimant on 7th September 2017, reporting that the truck had developed mechanical problems. Amer sent a technician by the name Mohamed to Mtito Andei on 8th September 2017, who reported that the truck had no fault.

16. Amer then went to Mtito Andei himself on 9th September 2017 together with the Technician; they checked the truck and found it had no issues. Amer therefore instructed the Claimant to proceed to Kampala. The Claimant arrived in Kampala on 12th September 2017 and left on 13th September 2017, arriving in Mombasa on 16th September 2017.

17. Amer went on to testify that on 16th October 2017, he told another Driver, Mohamed Gona to tell the Claimant the truck was okay and he should therefore resume duty. The following day, 17th October 2017 Amer terminated the Claimant's employment because the Claimant was insisting that the truck was faulty yet it was okay.

18. The question before the Court is whether this was a valid reason for termination of employment as defined in Section 43 of the Employment Act. If indeed the truck was not faulty, the Claimant would be guilty of neglecting to do his work but if it was faulty, the Claimant, as a professional driver, would be justified in refusing to take it on the road.

19. The mechanical soundness of the truck was therefore a critical issue and the Court was unable to understand why the Respondent did not file the report prepared by the technician who inspected the truck and declared it roadworthy.

20. Even more, Amer admitted before the Court that the report by the technician was not shown to the Claimant nor was the Claimant or his turn boy subjected to any disciplinary process. Additionally, neither the technician nor Mohamed Gona who is said to have been sent to tell the Claimant to resume work were called as witnesses before the Court.

21. The allegations against the Claimant and his turn boy were therefore unproved and the ensuing termination was substantively and procedurally unfair.

Remedies

22. As a result, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service plus the Respondent's conduct in the termination transaction.

23. I further award the Claimant one (1) month's salary in lieu of notice.

24. Cumulatively, I enter judgment in favour of the Claimant as follows:

- a) 6 months' salary in compensation.....Kshs.150,000
- b) 1 month's salary in lieu of notice.....25,000

Total.....175,000

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

26. The Claimant is also entitled to a certificate of service plus costs of the case.

27. By consent of the parties recorded on 27th January 2020, this judgment will apply to ***Cause No 155 of 2018: Mwinyi Hamadi Abdulrahman v Abry Logistics Limited.***

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF MAY 2020

LINNET NDOLO JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Mr. Omuya for the Claimant

Mr. Khalid for the Respondent