



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 658 OF 2015

PATTERSON MZEE MWAKIO.....CLAIMANT

VERSUS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Patterson Mzee Mwakio, the Claimant in this case was an employee of

Hakika Transport Services Limited. By his Memorandum of Claim dated 31st August 2015 and filed in court on 2nd September 2015, the Claimant claims that his employment was unlawfully terminated.

2. The Respondent filed a Response on 27th June 2016.

3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Rajab Yeri Kombe.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Heavy Commercial Driver from February 2005 until 23rd March 2015 when his employment was terminated. At the time of termination, the Claimant earned a daily wage of Kshs. 900.

5. The Claimant further states that on 23rd March 2015 at around 9.00 am, he received a telephone call from the Respondent's representative, asking him to go and see the Managing Director, Mr. Abdul.

6. The Claimant proceeded to Mr. Abdul's office where Mr. Abdul informed him that he no longer had a job, owing to the Claimant's decision to join

the Kenya Long Distance Truck Drivers and Allied Workers Union. Mr. Abdul asked the Claimant to see the Personnel Manager, who paid the Claimant Kshs. 30,328 as his dues for the month.

7. The Claimant's case is that his employment was unlawfully and unfairly terminated on 23rd March 2015, without justifiable cause and in violation of his right to be heard.

8. The Claimant states that he was not registered under a Pension Scheme or a Provident Fund and that was he not a member of the National Social Security Fund (NSSF). He therefore claims service pay.

9. The Claimant adds that throughout his employment with the Respondent, he was not allowed to go on annual leave and was forced to work 7 days a week, without a rest day.

10. The Claimant now seeks the following from the Respondent:

- a) One month's salary in notice pay.....Kshs. 27,627.00
- b) Payment in lieu of annual eave.....226,872.54
- c) Underpayment for 3 years.....152,193.60
- d) 12 months' salary in compensation.....331,531.20
- e) Service pay for 10 years @ 15 days' pay per year.....159,390.00
- f) Punitive damages
- g) Certificate of service
- h) Costs plus interest

The Respondent's Case

- 11. In its Response dated 27th June 2017 and filed in court on even date, the Respondent denies that the Claimant's employment was unlawfully terminated.
- 12. The Respondent states that the Claimant who was a Driver and had attained the statutory retirement age, was served with a letter of retirement. The Respondent adds that the Claimant was issued with a one month's notice and his final dues were duly paid at the end of the notice period.
- 13. The Respondent maintains that the Claimant was only entitled to retirement dues which were fully paid.
- 14. The Respondent goes on to state that the Claimant was a registered member of NSSF and all the statutory dues payable on his behalf were duly remitted. In addition, the Claimant enjoyed all statutory and contractual benefits due to him, including leave and health services.

Findings and Determination

- 15. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case of unlawful termination of employment;
 - b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

16. On 2nd March 2015, the Respondent wrote to the Claimant as follows:

“RE: NOTICE OF TERMINATION OF SERVICE ON ACCOUNT OF RETIREMENT

The Company is in the process of re-structuring its operations to survive the harsh business environment. This necessitates a reduction of its manpower with a view to reducing the Company's overhead cost.

In view of the above, the management regret to note that you are among the affected employees by this process.

This shall serve as a one-month notice of termination of service with effect from the above date.

We thank you for your service while with our company and wish you well in your future endeavor.

We shall process your final dues at the end of the notice period.

Yours faithfully,

HAKIKA TRANSPORT SERVICES LIMITED

(signed)

YERI KOMBE

PERSONNEL OFFICER”

17. The reference of this letter gives the reason for the termination of the Claimant’s employment as retirement and the Claimant himself testified before the Court that at the time he left employment, he had attained retirement age.

18. I therefore see no reason as to why the Claimant would now complain that his employment was unlawfully terminated. Further, the aforesaid letter gave the Claimant the requisite one-month notice. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Remedies

19. The Claimant also claims leave pay. In its Response dated 27th June 2016, the Respondent simply states that the Claimant enjoyed all statutory and contractual benefits due to him, including leave. The Respondent’s Human Resource Manager, Rajab Yeri Kombe testified that the Claimant used to go on leave. He however did not produce any leave records to support his testimony in this regard.

20. In the final submissions filed on behalf of the Respondent, a number of days on which the Claimant was said not to have been absent from work, were cited. The Court understood this as an attempt by the Respondent to demonstrate that the Claimant did not work every day and was therefore

not entitled to annual leave. The only thing I will say about this is that it amounts to introduction of new testimony in final submissions, when the Claimant has no chance to reply.

21. I therefore allow the claim for leave pay from 25th April 2006 being the employment date, shown on the Claimant’s Personal Details Form.

22. Having been a contributing member of NSSF, the Claimant is not entitled to service pay.

23. The claim for underpayment was not proved and no basis was established for the claim for punitive damages. These claims therefore fail and are dismissed.

24. Ultimately, I enter judgment in favour of the Claimant in the sum of **Kshs. 170,100** being leave pay for nine (9) years.

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

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

27. 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. Ganzala h/b for Mr. Mbuya for the Claimant

Mr. Onyango for the Respondent