



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 364 OF 2013**

**PETER OENGA.....CLAIMANT**

**VERSUS**

**RWAKEN INVESTMENTS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that he was employed by the respondent as a driver from January, 2009 to December, 2011 at an agreed salary of Kshs 18,000/= per month but the respondent unilaterally reduced the salary to Kshs 17,498 and during the period the claimant was not issued with a letter of appointment. The claimant was based at Athi River and his work involved ferrying members of staff from Daystar University Athi River Campus.

2. The claimant's day started at 5 am in the morning and would end at 8 pm or beyond depending on work. The claimant was required to record the details of the trip made in a book which showed the time he reported to work and the time he finished daily.

3. While on his normal off, the respondent called the claimant and informed him that it had engaged another driver to replace him and that the respondent wanted to transfer the claimant to another company but was required to apply afresh for the job in the new company an option that was not acceptable to the claimant as he had worked for the respondent for 3 years. This to him amounted to dismissal without following the correct procedure.

4. During the employment the respondent denied the claimant his rightful dues in terms of overtime and that he never went on leave during the period he worked for the respondent. In response, the respondent admitted the claimant was employed as a driver as alleged but the agreed gross salary was Kshs 17,498/= which included Kshs 15,216/= as basic salary and Kshs 2,282 as house allowance. The claimant worked and received the salary without any complaint.

5. The respondent admitted the claimant would ferry members of staff from Daystar University Athi River but this involved only three trips daily. The respondent further stated that during his employment, the claimant consumed more fuel than was ordinarily possible for such short trips. The respondent therefore decided to transfer the claimant from Daystar University to another company where it offered same services. The claimant was informed of the pending transfer but he instead absconded duty without giving the respondent any notice or reason. According to the respondent therefore the claimant has never been dismissed but chose on his own to abscond duties.

6. At the hearing the claimant stated that he used to drive from Daystar Athi River to Daystar Valley Road and back. He used to carry staff and lecturer and would make three to four trips per day. He would report to work at 5 a.m. to pick staff in Athi River Area and would leave work around 7 p.m. or 8 p.m. depending on jam. He had a coordinator in the vehicle who was an employee of Daystar. He used to fill work ticket showing departure, mileage and time for return. The trips were approved by the coordinator from Daystar.

7. In 2011 he went for a funeral and was called by the respondent's director who told him to stay home until schools were open. When he reported to the office he was removed from Daystar and was told he would be driving a Matatu. When he saw the in-charge Matatu, he was told to apply for a job and could only drive if his application was successful.

8. He never applied for the job. He reiterated that he was paid kshs 15,216/= and not the agreed Kshs 18,000/= and that he never went on leave during the period he worked. It was further his evidence that he was never issued with a termination letter or notice. He denied consuming much fuel. The fueling was done by the coordinator and that he never used to carry the key to the tank. He denied ever being given cash to fuel.

9. In cross-examination the claimant stated that he would be on off at the school when schools close but some staff would continue working. Further, if he had personal commitments he could ask for offs. It was his evidence that his boss told him to see the manager to be allocated to drive a matatu but the manager Mr Kamwana told him to apply for a job and if successful he would be allocated a matatu to drive under a

fresh contract. He went back to his boss and wanted to know if he was dismissed so that he could be paid his terminal dues but the respondent denied dismissing him. The boss said he was transferred.

10. Respondent's second witness Mr Stanley Momanyi stated that he was employed by the respondent as transport manager and that he knew the claimant. He denied he could terminate the respondent's contract if he dismissed the claimant. According to him Daystar had a tender committee which awarded tenders and he had no control over them.

11. In cross-examination he stated that he learnt of the Claimant's dismissal when a new driver started dropping staff at Daystar. It was his evidence that the claimant used to drive a 41 seater and that extra trip would be paid higher and would be undertaken in consultation with the respondent. He further stated that he would know if the claimant worked the entire weekend. He denied knowledge of the claimant's redeployment from Daystar.

12. The respondent's witness Mr Jim Bosco Narugoragoya stated that he was the director of the respondent. He stated he hired the claimant when he got the Daystar contract. The claimant was to do two trips per day as per the contract and that his contract was to transport staff only. He did not approve extra trips for vehicles. He denied the claimant worked without off. According to him, he wanted the claimant to move to Nairobi to perform other duties since his vehicle used to consume a lot of fuel. He wanted the claimant to work elsewhere so that he could monitor fuel. He denied that the claimant used to work on Sundays and was underpaid.

13. In cross-examination he stated that the claimant was not issued with a letter of appointment. He further stated that there was a daystar staff in the bus on every trip and that the driver was under direct control of the Daystar management. The claimant never consulted him on the extra trips. He further stated that the fueling was done at designated petrol stations and that his representative used to keep the tank keys. He complained about the extra trips and was the reason he wanted to transfer the claimant to Nairobi but he refused. He denied sending the claimant to Kamwana. He denied issuing a transfer letter since it was the same company.

14. The burden of proof that an unfair termination of employment has occurred rests with the employee. The claimant herein has alleged that the respondent unfairly terminated his service. The reason he contended so was that the respondent's director while he was on his normal off called him and told him that he had engaged another driver to replace him and that he was to be transferred to another company however as a condition he had to apply afresh for the job. This in the claimant's view was not acceptable as he had worked for the respondent for three years. To the claimant, this amounted to dismissal without following the correct procedure.

15. This allegation was denied by the respondent who stated that it never asked the claimant to apply for a new job in a different company but informed the claimant that the reason for the transfer was to monitor fuel consumption of the vehicle the claimant was assigned to drive, since it had been noted that the consumption was too high compared to the distance covered. According to the respondent therefore, it did not dismiss the claimant but he rather refused the transfer and thereafter absconded work.

16. The claimant while insisting he was dismissed did not attach any dismissal letter together with the documents in support of his claim. The claimant's supporting documents were salary voucher for the month of October, 2011 (appendix 1) over 100 pages of the copy of the work ticket book he claimed used to log in his trips (appendix 2) schedule prepared by him showing overtime hours he worked (appendix 3) and the demand letters from his advocate (appendix 5).

17. In a letter dated 19<sup>th</sup> March, 2012 which was attached as one of the documents by the respondent, the claimant's counsel stated in part as follows:

*"We refer to your letter dated 8<sup>th</sup> March, 2012. As you are aware our client has worked with yourself for 3 years and when you told him you were transferring him to another company, your manager told him that he would have to apply afresh for the new job. This amounted to dismissal from the old job. If the company wished to terminate his services then it should have followed the correct procedure. This being the case, our client is not interested in working with yourselves anymore and our letter of 7<sup>th</sup> March, 2012 stands"*

18. The claimant alleged that he was asked by the respondent's manager to apply for a job in another company and would only be hired if his application was successful. He however in view of the fact that the respondent denied this fact, never disclosed the name of the company he claimed he was asked to apply afresh for a job. This could have rebutted the respondent's position that it merely transferred the claimant from driving Daystar University Staff to driving matatu in order to monitor the high fuel consumption which caused the respondent some concern.

19. To this extent, the court is not satisfied that the claimant has discharged the burden cast upon him by law that there was a termination of his contract of employment and that the reason for termination if at all, was invalid or unfair. The court will therefore not return a disposition of unfair termination and will instead dismiss the claim on this aspect.

20. There is a further claim concerning overtime which can be awarded independent of whether a termination is unfair or not. Overtime is work performed and is compensable if proved regardless of whether an employee succeeds in establishing a claim for unfair termination or not.

21. The claimant has based his claim for overtime on a copy of the work ticket book which he claimed he was required to log in all his trips when started and log out when completed. This document consists of over 100 pages and runs from 21<sup>st</sup> February, 2009 to 13<sup>th</sup> February, 2012, the document has column among others signature of the driver and the column for the person authorizing the journey. The document also has a column for arrival (log out) time for each journey. Whereas the departure and arrival /log out time were in most cases faithfully entered, the authorization of journey column was in nearly all cases not signed.

22. Further the claimant did not in most cases as well sign as the driver in the require column. No allegation was made by the claimant in his pleading. Oral evidence or at all that the respondent or the person responsible failed or refused to sign the column authorizing the journey. This therefore makes the document unreliable as the only document or evidence in proof of the claimant's claim for overtime. The court therefore disallows this head of claim as well.

23. In conclusion the court finds the entire claim without merit and dismisses the same with costs.

24. It is so ordered.

**Dated at Nairobi this 14<sup>th</sup> day of May, 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 14<sup>th</sup> day of May, 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**