



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 83 OF 2018

SILAS JOHN SINGILA.....CLAIMANT

VS

EXON INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 12th February 2018 and filed in court on 21st February 2018, the Claimant seeks compensation for unfair termination of employment and payment of terminal dues.

2. The Respondent filed a Response on 8th March 2018 but chose not to call any witness at the trial. The Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Driver from August 2016 until 29th September 2017, when his employment was terminated. He was not issued with a written contract of employment.

4. The Claimant pleads his monthly salary at Kshs. 33,544.35. He claims that he was not allowed to take annual leave and was allowed only one week off for the whole year.

5. The Claimant avers that when he joined the Respondent, he was allocated a faulty truck with mechanical problems. He adds that the truck was taken to the garage after he complained but when it came back it still had a problem with brakes. Upon insistence by the Respondent, the Claimant used the truck which caused an accident sometime in October 2016.

6. The Claimant states that he kept on complaining about the faulty truck but the Respondent ignored his complaints and told the Claimant to continue working or leave employment. This led to another accident on 8th February 2017 around Taru area. A report of the accident was made at Taru Police Station.

7. The Respondent did not repair the truck and on 22nd September 2017, the Claimant was instructed to travel to Arusha. The Claimant was involved in another accident on the same day whereby he sustained injuries and the truck was written off.

8. The Claimant avers that on 29th September 2017, he received a letter terminating his services on account of poor performance based on the various accidents he had been involved in.

9. The Claimant claims that the Respondent was well aware that the truck had mechanical problems all through but the Claimant was forced to use it in that state.

10. The Claimant further claims that on various occasions, the Respondent deducted money from his salary stating that he had misused fuel, which deductions were disguised in the payslips as staff loan. The Claimant states that he did not get any loan from the Respondent at any one point.

11. The Claimant avers that the Respondent deducted monies for National Social Security Fund (NSSF) which were not remitted.

12. The Claimant submits that the Respondent terminated his employment without justifiable cause and in violation of due procedure.

13. The Claimant also accuses the Respondent of withholding his terminal dues.

14. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice.....Kshs. 33,544.35
- a) Unlawful deductions (Feb, March, April, Aug & Sept 2017).....84,292.00
- b) Leave days for one year.....23,481.00
- c) Unlawful NSSF deductions for 13 months.....2,600.00
- d) 12 months' salary in compensation.....402,449.55
- e) Certificate of service
- f) Costs plus interest

The Respondent's Case

15. In its Response dated 7th March 2018 and filed in court on 8th March 2018, the Respondent denies having employed the Claimant as a Driver from August 2016 until 29th September 2017.

16. The Respondent further denies that the Claimant earned a monthly salary of Kshs. 33,544.35.

17. The Respondent denies the Claimant's entire claim as pleaded in the Memorandum of Claim and states that if at all the Claimant was summarily dismissed as alleged, then the dismissal was effected fairly and within the law.

18. The Respondent denies the Claimant's averment that he was not allowed to proceed on leave.

19. The Respondent denies the Claimant's allegation that he was assigned a faulty truck with mechanical problems.

20. The Respondent maintains that the Claimant drove carelessly and recklessly in the circumstances.

21. The Respondent admits issuing the Claimant with a termination letter on account of poor performance based on accidents in which the Claimant had been involved.

22. The Respondent however denies being aware that the truck assigned to the Claimant had mechanical fault and further denies that the Claimant was forced to use it.

23. The Respondent denies that the Claimant's employment was terminated unlawfully without justifiable cause or unfairly in violation of due procedure.

Findings and Determination

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

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

Unlawful Termination?

25. The Claimant produced a letter dated 29th September 2017 addressed to him by the Respondent as follows:

"Dear Silas

RE: TERMINATION ON ACCOUNT OF POOR PERFORMANCE

This is to inform you that you have been terminated and your service no longer required at Exon Investments Ltd (sic).

You are assigned a truck on 7th Oct, 2016 (sic) and on 11th Oct, 2016 you were involved in an accident with KBV 674U at the yard damaging the windscreen and the grill! This was your first accident and to be fair the management decided not to raise a charge in this instance. Again on 31st Dec, 2016, at 9.30am you were involved in another accident at Meli Kubwa with a truck belonging to

Wild Safaries whereby you caused a damage worth Kshs. 37,734.95/=. The Company felt that you had to be charged the amount of repair.

Yet again as if this was not enough, on 8th Feb, 2017, you were involved in another accident whereby you smashed the headlights of your vehicle and this the Company had to charge you again!

Surprisingly enough, you were yet again involved in another grisly accident that costed the Company a colossal amount of money which

is yet to be established. Mr. Silas, you have proved to the management beyond any reasonable doubt that you cannot be entrusted with the company vehicle any longer.

We have no other alternative than to dispense with your service as per Section 44 (c & e) of the Employment Act, 2007. However, taking into account your service with the Organization on humanitarian grounds we have deemed it fit to terminate you as per the caption of the law. Handover all company property to the relevant authority and proceed on to take you dues.

Yours faithfully,

FOR: EXON INVESTMENTS LIMITED

(signed)

ATEET JETHA

MANAGING DIRECTOR”

25. According to this letter, the Claimant’s employment was terminated on account of poor performance arising from at least three road traffic accidents in which the Claimant was involved.

27. While admitting that he had indeed been involved in these accidents, the Claimant told the Court that he had been forced to keep driving a mechanically faulty truck. He added that upon complaining about the faulty truck he was told to either continue working or leave employment.

28. The Claimant takes the position that there was no valid reason for the termination of his employment.

29. The employer’s duty to justify the reason for terminating the employment of an employee is imposed by Section 43 of the Employment Act which provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

30. Jurisprudence emerging on this provision is to the effect that the duty placed on an employer is to demonstrate a reason that would cause a reasonable employer to terminate employment.

31. This is what is commonly known as the ‘reasonable responses test’ enunciated in the persuasive decision in ***Nampak Corrugated Wadeville v Khoza [1998] ZALAC 24*** in the following terms:

“ The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”

32. The Claimant did not provide any written complaints addressed to the Respondent on the faulty truck. It would appear therefore that his complaints were verbal. Whatever the case, assuming that the Claimant had raised concerns about the mechanical state of his truck, which were ignored by his employer, he ought to have walked away.

33. I say so for two reasons; one, the Claimant was a trained driver with a mind of his own and not a robot; two, in the Claimant’s line of work, the consequence of error was extremely grave. To my mind, a driver who knowingly takes a faulty motor vehicle on the road and thereby causes not one but three accidents cannot turn around and say that there was no justifiable cause for the termination of his employment.

34. Applying the ‘reasonable responses test’, I find and hold that the Respondent had a valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act.

35. The next question is whether in effecting the termination, the Respondent observed the procedural fairness requirements set under Section 41 of the Act.

36. From the evidence on record, the Claimant was not subjected to any disciplinary process prior to the termination of his employment. The only conclusion to draw therefore is that the termination was procedurally unfair and the Claimant is entitled to some compensation on this account.

Remedies

37. I therefore award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service plus the finding that there was a valid reason for the termination.

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

39. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

40. The Claimant filed his payslips showing deductions on account of staff loans in the months of February, March, April, August and September 2017. The Claimant denied taking any loan from the Respondent and the Respondent did not adduce any evidence to justify the deductions. The claim for unlawful deductions is therefore allowed.

41. Regarding the claim for unremitted NSSF deductions, the only thing to say is that any such dues would be payable to the statutory body not to the Claimant.

42. In the end, I enter judgment in favour of the Claimant in the following terms:

a) 3 months' salary in compensation.....	Kshs.100,633.05
b) 1 month's salary in lieu of notice.....	33,544.35
c) Leave pay for 1 year (33,544.35/30x21).....	23,481.05
d) Unlawful deductions.....	<u>83,292.00</u>
Total.....	240,950.45

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

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

45. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 14TH 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:

Miss Kitoo for the Claimant

Mr. Ngaine for the Respondent