



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO 653 OF 2015**

**FRANCIS KIOKO MWANIKI.....CLAIMANT**

**VS**

**HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Francis Kioko Mwaniki was an employee of Hakika Transport Services Limited working in the position of Heavy Commercial Driver. His claim before the Court is for compensation for unlawful termination of employment and payment of terminal dues.
2. The Claim is documented by a Memorandum of Claim dated 31<sup>st</sup> August 2015 and filed in court on 2<sup>nd</sup> September 2015. The Respondent’s defence is by way of Response and Counterclaim dated 27<sup>th</sup> June 2016, to which the Claimant responded on 21<sup>st</sup> July 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 July 2013 until April 2015. At the time of termination of his employment, he earned a daily rate of Kshs. 1,065.
5. The Claimant states that sometime in April 2015 he suffered an industrial accident in the course of duty. He requested that the requisite DOSH 1 form be completed for purposes of lodging a work injury claim. The Claimant avers that upon submitting the DOSH 1 form he was instructed by the Respondent’s Human Resource Manager, Yeri Kombe to cease reporting to work.
6. The Claimant accuses the Respondent of unlawfully terminating his employment with no reasonable cause and without giving him an opportunity to be heard.
7. The Claimant further claims that throughout his employment with the Respondent he was not allowed to take annual leave. He adds that he was not registered under a pension scheme or provident fund nor was he a member of the National Social Security Fund (NSSF). He therefore claims service pay.
8. The Claimant tabulates his claim as follows:

- a. One month’s salary in notice pay.....Kshs. 27,690.00
- b. Leave pay for 1.25 years.....27,956.25
- c. Service pay @ 15 days for every completed year.....15,975.00
- d. 12 months’ salary in compensation.....332,280.00
- e. Certificate of service

f. Costs plus interest

### **The Respondent's Case**

9. In its Response and Counterclaim dated 27<sup>th</sup> June 2016 and filed in court on even date, the Respondent denies unlawfully terminating the Claimant's employment.

10. The Respondent states that the Claimant failed to report to work sometime in May 2015, after causing a road traffic accident. The Claimant had not returned to work nor did he serve the Respondent with a resignation notice. The Respondent therefore counterclaims from the Claimant one month's salary in lieu of notice.

11. The Respondent avers that at the time of absencing himself from work, the Claimant had been paid all his dues. The Respondent states that the Claimant was a registered member of NSSF and that all his dues duly remitted. In addition, the Respondent claims that the Claimant enjoyed all statutory and contractual benefits due to him, including leave days.

### **Findings and Determination**

12. There are three (3) 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;
- c. Whether the Respondent has made out a proper counterclaim against the Claimant.

### **Unlawful Termination?**

13. In his Memorandum of Claim and his witness statement filed in court, the Claimant states that his employment was terminated after he submitted a work injury claim form (DOSH 1) to the Respondent's Human Resource Manager, Yeri Kombe.

14. Yeri Kombe denied terminating the Claimant's employment but admitted that the Claimant had been involved in a road traffic accident whereby he sustained injuries on his right leg. Kombe testified that he issued the Claimant with a DOSH 1 form, which was to be completed by the doctor and returned to the Respondent.

15. The Claimant told the Court that he presented the DOSH 1 form after one month and that during this period, the Respondent did not know where the Claimant was. Additionally, the Claimant did not produce any medical report on his fitness to resume work after sick off as required by the Respondent's Human Resource Manager.

16. It was not lost on the Court that the Claimant did not give the exact date he alleges to have been told to cease reporting to work. This is an important detail in determining whether he has proved a case of unlawful termination of employment.

17. Section 47(5) of the Employment Act provides as follows:

**(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

18. My reading of the foregoing provision is that an employee alleging unfair termination of employment or wrongful dismissal bears the first responsibility to lay before the Court the exact circumstances leading to the termination or dismissal.

19. In my view, an employee who cannot tell the date when the alleged termination occurred cannot be said to have discharged the evidential burden imposed by Section 47(5) of the Employment Act.

20. In light of this, I find and hold that the Claimant has failed to establish a case of unlawful termination of employment. The claims for compensation and notice pay are therefore without basis and are dismissed.

### **Other Claims**

21. The Claimant claims leave pay for his entire period of employment.

However, according to the employment records produced by the Respondent which the Claimant did not countermand, the Claimant did not work every day. Indeed, the Claimant himself told the Court that he was paid a daily wage for the days worked.

22. The Court was referred to the decision in *Mwona Mwaiwe Mwaono & 4 others v Hakika Transport Services Limited [2019] eKLR* where my brother, **Rika J** held that a pay structure by which employees were paid varied and fluctuating amounts depending on the number of trips made and days worked was unique to the industry and not compatible with annual leave as defined in law.

23. I am persuaded by the decision in *Mwona Mwaiwe Mwaono* (supra) to the extent that an employee on this unique pay structure cannot claim leave pay for the entire period of engagement. Such an employee could however sustain a claim for prorata leave pay based on the actual days worked. In the circumstances, the Claimant's claim for leave pay for the entire period is unsustainable and is disallowed.

24. The Claimant admitted that he was a contributing member of NSSF. He is therefore not entitled to service pay.

#### **The Respondent's Counterclaim**

25. The Respondent's counterclaim for one month's salary in lieu of notice is predicated on the allegation that the Claimant left employment without giving the requisite notice. However, following the finding that the Claimant did not work every day and that he was paid a daily wage based on the days worked, he cannot be held to account for one month's notice pay.

26. The Respondent's counterclaim therefore fails and is disallowed.

27. In the end, both the Claimant's claim and the Respondent's counterclaim are dismissed.

28. Each party will bear their own costs.

29. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 7<sup>TH</sup> 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 15<sup>th</sup> 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. Mbuya for the Claimant

Mr. Onyango for the Respondent