



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.2369 OF 2016

TRANSPORT WORKERS UNION.....CLAIMANT

-VERSUS-

GREATRIFT EXPRESS SHUTTLE.....RESPONDENT

JUDGEMENT

1. The Claimant is a trade union registered to represent unionisable employees in the transport sector. She brought this suit on 23.11.2016 and amended the claim on 12.5.2017. The suit is brought on behalf of 18 former employees (grievants) of the respondent who were allegedly dismissed by the respondent's Director on 13.11.2016. Therefore the claimants seeks the following reliefs:

- a) That the, 18 employees be reinstated back to their employment without loss of benefits that is a monthly salary of Kshs. 21,384.42/- per month per employee from th date of termination (12th November, 2016) till the date of reinstatement.
- b) That, the Respondent be ordered to adjust the employee's salary(ies) from Kshs. 10,000/- to Kshs. 17,003/- in line with the Ministry of Labour Wages Regulations effective from 1st May, 2015 and as Gazetted from time to time
- c) That, the Respondent be ordered to provide its employees with a minimum safari allowance of Kshs. 1700/- per day. Breakfast- 250/- lunch 300/- dinner-Kshs. 350/- and Accommodation- Kshs. 800/-).
- d) That, the Respondent employees be provided with weekly rest days and each be paid for overtime for any extra hour worked above the Labour Law stipulations of 45 hours per week.
- e) That, the Respondent be restrained from threatening and intimidating the unionized employees from their rights to belong to the claimant Union.
- f) That, the Respondent implements the signed check off with section 45 and 50 of the Labour Relations Act – 2007 by deducting and remitting the required monthly union dues from the claimant union members.
- g) A declaration that the termination of the 18 grievant/employees by the Respondent on 12/11/2016 was unfair and unlawful and therefore issue an order compelling the respondent to pay the 18 grievants terminal benefits as follows:

2. The Respondent filed defence on 18.1.2017 admitting that the grievants were her employees but denied that she dismissed them unfairly. She further averred that the grievants went on an unprotected strike after 4 of their colleagues were arrested for criminal offences against her forcing her to drop the charges. Thereafter, however, the grievants continued with the strike and eventually voluntarily resigned from their employment. She therefore prayed for the suit to be dismissed with costs.

3. Both parties tendered evidence during the hearing and thereafter filed written submissions.

Claimant's case

4. Mr. Peter Njoroge Mburu testified on behalf of all the other grievants. He contended that he was employed by the respondent as a driver of a 11 seater van just like the other grievants and he was also a member of the claimant union. His salary was Kshs. 10,000 per month but his net after statutory deductions was Kshs. 9,500. He contended that the first salary was withheld by the employer until the date of termination.

5. He further testified that the vehicles were fuelled on designated petrol stations.

6. He further testified that the terms and conditions of service were not good to the drivers but whenever they raised the matter, the employer

threatened them via sms that they would be fired. He contended that there was no accommodation allowance provided to them whenever they travelled away from their residence and as such they were forced to sleep in the vans. He further stated that although the agreement was for a driver to do one trip per day, the drivers were made to do more than one trip per day with no overtime pay.

7. He further testified that when the drivers could not take it any more, they requested for a meeting with the respondent but the respondent failed to attend on the scheduled day. As a result the driver failed to go to work. waiting for the meeting. He said that Mr. Chemweno met them and they agreed to resume work the following day. However, the respondent came the following day and he brought police officers and asked the drivers to surrender the vans keys and they complied. Thereafter, the vehicles were assigned to other drivers who were brought by the respondents and the 18 grievants were arrested and taken to Railways Police Station and their driving licences taken away.

8. He further testified that after being held in police custody for a few hours they were released and went to report to the claimant union. He contended that although their driving licenses were released to them, the respondent has not cleared them with the National Transport and Safety Authority (NTSA) and as such the grievants cannot get employed elsewhere.

9. On cross-examination he contended that they were unfairly dismissed because they were just told to surrender the company property and thereafter arrested. He however admitted that the drivers requested for a meeting with the Director of the company and on that day, they downed their tools but remained peaceful. He contended that after 2 days the Director came with police and using a list of his drivers, called out the names of those who would resume work and repossessed keys from the grievants, who were then arrested.

10. He contended that they downed their tools because some vehicles had higher consumption of fuel then others yet they were all given 63 litres of fuel from Eldoret to Nairobi and back. He further contended that the union guided them to go on strike by telling them to speak with the director first. However, they downed their tools until the Director came to meet them. He admitted they never served any strike notice before downing their tools. He admitted that the Director saw the strike in the television.

11. He reiterated that his salary was Kshs. 10,000 per month and admitted that they were also being paid Kshs.700 per trip being Kshs. 200 parking fees, and Kshs. 300 for lodging. He further admitted that there was also a stop over at Nakuru where they ate food. He contended that they used to make 14 trips per week from Eldoret to Nairobi and back and denied that Kshs. 300 per night was enough to cater for his lodging.

12. He contended that when the Director saw the strike on the TV, he came with police who helped him to repossess the keys from the grievants. He admitted that Armon Ruto and Jacob Mwangi (grievant 12 and 16 respectively) withdrew from the case. He denied that some drivers were coerced to join the strike and contended that the Director knew that the grievants' salaries were being underpaid.

13. Finally, he contended that they were not dismissed through fair procedure because they were not served with any show cause letter or accorded any disciplinary hearing. He therefore prayed for the reliefs sought contending that they were only paid salary for the days worked.

Defence Case

14. James Mwatha Nderitu is a Director of the respondent and he testified as Rw1. He admitted that the claimants were formerly employed by the respondent as drivers. He contended that the company has a system of raising grievants through managers and contended that the manager never reported to him any grievances from the grievants.

15. He further testified that around April 2016 there were many breakdowns of his vehicles and an investigation revealed that the breakdowns were caused by contaminated fuel. He lodged a complaint with Oil Libya at Eldoret where the vehicles were supposed to be fuelled and learned that the contaminated fuel was not from Oil Libya. As a result, he warned all his drivers including the grievants from using contaminated fuels.

16. He further testified that on 9.11.2016, four drivers were arrested in Eldoret using contaminated fuel and as a result, the drivers in Nairobi downed their tools calling for the release of their colleagues. He then called Mr. Chemweno in Nairobi who went to talk to the drivers but they refused to resume work. He then asked the OCS Eldoret Police Station to release the arrested drivers in order to avoid further losses to the company due to the strike.

17. He further testified that the drivers still refused to call off the strike, and he travelled to Nairobi from Eldoret on 11.11.2016 to talk to them in the company of Mr. Chemweno who owns one of the vehicles' but they were shouted down by the grievants who told them to come back after one week. As a result, he went to report the matter at Kamukunji Police Station and the police rounded them and took the keys from the drivers and told them to return after one week for talks.

18. He further testified that before leaving, he asked whether there were drivers who were interested in resuming work and some agreed but the grievants became rowdy and refused to work. He denied that he had a list of drivers who were to continue working at the exclusion of the grievants. He also denied that he dismissed the grievants and contended that they went away to file this suit.

19. He contended that his drivers were earning between Kshs. 10,000 and 15,000 plus trip allowance and food. H contended that the parking fees was paid from the fare collected from the passengers. He contended that the allowances given was sufficient for accommodation because the company had negotiated the lodging fee. He further contended that each driver had two rest days per week. He denied that the grievants union membership and averred that the respondent's workers are not members of any trade union. He contended that the claimant union only wrote to the company after the strike and when he enquired from the employees they denied any union membership.

20. He admitted that all the grievants were employed vide oral contracts and they were all driving 11 seater vans of 3000 cc. He contended that the company was using the 2013 and 2014 wage order but he denied knowledge whether the vans were medium size vehicle under the Wage Orders. He contended that the company was remitting NSSF for the grievants.

21. He admitted that when the grievants became rowdy after surrendering the keys, they were arrested and released the same day. He contended that Jacob Mwangi and Armon Ruto are still working for the respondent. He produced Motor Vehicle inspection reports dated 9.11.2016 which he contended that it was the evidence of the use of contaminated fuel by his drivers.

22. Finally, he admitted that the claimants were not paid terminal dues or issued with Certificate of Service after they left work. However, he contended that they were paid salary for the days worked.

23. Mr. Samuel Kariuki Kabuti, a driver in the respondents company testified as RW2. He stated that whenever there is a grievance by employees, they report to the manager. He further testified that some company drivers fuelled their assigned vehicles with contaminated fuel which caused mechanical breakdowns and they were arrested by police after the directors lodged a complaint.

24. As a result of the arrest the other drivers went on strike from 9th to 11th November 2016. He stated that he was present at the bus park when the drivers downed their tools. He stated that the ringleaders of the strike threatened the other drivers and restricted them from removing vehicles from the parking and even fought those who dared.

25. He further testified that Mr. Chemweno a Director of the respondent went to speak to the striking drivers but they never resumed work. He contended that some drivers took the keys but others refused to pick the keys to resume work and as such they voluntarily resigned. He therefore, denied that they were dismissed.

26. On cross-examination, RW2 contended that the salaries for drivers depends on years of service. He contended that he has worked for four years and his salary is Kshs. 15,000 per month. He further contended that the salary is paid subject to statutory deductions, that is NSSF and NHIF. He further stated that a driver receives Kshs. 700 per trip for accommodation and food. He further stated that Kshs. 500 was paid as overtime for every extra journey.

Issues for determination

27. There is no dispute that the grievants were employed by the respondent and in mid November they went on strike and parties thereafter separated. The issues for determination are:

- (a) Whether the grievants resigned or they were dismissed by the respondent.
- (b) If the answer to the (a) above is dismissal, whether it was unfair and unlawful
- (c) Whether claimants are entitled to the reliefs sought.

Resignation or dismissal

28. The claimants admitted that they went on strike in November 2016 without prior strike notice being served on the employer. The strike was therefore unprotected within the meaning of section 76 of the Labour Relations Act which provides that a person may participate in a strike or lock out if

“(c) Seven days written notice of the strike or lock out has been given to the other parties and the Minister by the authorized representative

(i) of the trade union, in the case of a strike.”

29. In addition to the above admission by the grievants that they unlawfully withdrew their labour the evidence by Rw1 and Rw2 that the grievants refused to resume work even after RW1 travelled from Eldoret to talk to them has not been rebutted by the grievants. I, therefore, must find and hold that the claimant has not proved that the grievants were dismissed by the respondent. However, I am satisfied that the respondent has proved on a balance of probability that the grievants went into an unlawful strike and thereafter voluntarily resigned from their employment.

Unfair and Unlawful termination.

29. In view of the foregoing finding, the court will not waste time in answering the question whether the grievant services were unfairly terminated.

Reliefs

30. In view of the finding that the claimants voluntarily resigned, I decline to grant the prayer for reinstatement. Accordingly, prayer b-f are dismissed because they are dependent on reinstatement being ordered. I further find and hold that the grievants are not entitled to salary in lieu of notice and compensation for unfair termination for the reason that they did not prove that they were unfairly dismissed as required under section 47 (5) of the Employment Act.

31. Likewise, the claim for service pay is dismissed because the grievants admitted that they were deducted Kshs. 200 per month for NSSF. The respondent's evidence that she remitted NSSF for the grievants every month has not been rebutted using NSSF statements. The claim for safari allowance is dismissed the grievants admitted that they were paid.

32. The claim for salary for 2016 and leave lacks particulars and evidence and it is dismissed.

33. However, the claim for under payment is granted. The claimants were all driving public service vans of 3000 cc. Under the General Wage Order for 2013 and 2015, there were only two categories of drivers that is Heavy Commercial vehicle driver and Medium size vehicle. I take the grievants to be falling under the medium size vehicles. There is no dispute that they were earning Kshs. 10,000 per month basic salary plus trip allowances.

34. The claimants joined the respondent in 2014, 2015 and 2016. Consequently, the applicable Wage Orders are the ones published in 2013 to 2016. The claimant relied on 2013 and 2015 Wage Orders to assess their salary under payments. The minimum wage for medium size vehicle driver under the 2013 Order was Kshs. 16,602.25 plus house allowance at 15% per month or Kshs. 799.05 per day. My calculation of the monthly pay under the 2013 Wage Order for all the grievants was Kshs. 19,093.15 equalling to underpayment of Kshs. 9,093.15 per month.

35. Under the 2015 Wage Order the grievants salary was Kshs. 18,595.20 plus 15% House allowance per month and daily wage of Kshs. 894.90. It follows that under the 2015 Wage Order the grievants salary was Kshs. 21,384.42 equalling to monthly under payment of Kshs. 11,384.42. Therefore, I proceed to award the grievants their salary underpayment in arrears under the said Wage Order as follows:-

David Nduati

From 1.8.2014 to 30.4.2015

(Kshs. 9,092.15x9) = Kshs. 81,838.35

From 1.5.2015 to 12.11.2016

19 months x 11,384 = Kshs. 216,296

Kshs. 298,134.35

He however prayed for Kshs. 278,781.80 and that is what I award him.

Jackson Karari

From 1.11.2014 to 30.4.2015

(6 months x Ksh. 9,092.15) = kshs. 54,558.90

From 1.5.2015 to 12.11.2016

(19 months x 11384.48) = Kshs. 216,305.12

Kshs. 270,864.02

Cyrus Wachira

From 1.8.2014 to 30.4.2015

(9 months x Kshs. 9,092.15) = Kshs. 81,838.15

From 1.5.2015 to 12.11.2016

(19 months x Kshs. 11384.48) = Kshs. 216,305.12

Kshs. 298,134.35

John Konye Kimani

From 1.8.2014 to 30.4.2015

(9 months x 9,092.15) = Kshs. 81,838.15

From 1.5.2015 to 12.11.2016

(19 months x 11384.48) = Kshs. 216,305.12

Kshs. 298134.35

Peter Mwangi

From 27.3.2016 to 12.11.2016

(9 months x 11,384.48) = Kshs. 102,460.32

Jacob Mwangi

This grievant withdrew his claim

John Gitau

From 1.8.2014 to 30.4.2015

(9 months x 9,092.15) = Kshs. 81,838.15

(19 months x 11,384.48) = Kshs. 216,305.12

Kshs. 298,134.35

However, he prayed for **Kshs. 278,781.80** and that is what I award him.

George Muturi

From 2.5.2015 to 12.11.2016

(19 months x 11,384.48) = Kshs.216,305.12

However, he prayed for **Kshs. 195,590.44** and I award the same.

Ken Chirchir

From 1.5.2016 to 12.11.2016

(6 months x 11,384.42) = Kshs. 68,306.52

However, he prayed for **Kshs. 59,422.10** and I award him that sum.

Peter Njoroge

From 1.12.2014 to 30.4.2015

(5 months x 9,092.15)= Kshs. 45,460.75

From 1.5.2015 to 12.11.2016

(19 months x 11,384.48) = Kshs. 216,305.12

Kshs. 261,765.87

Nahashon Kienje

From 15.2.2016 to 12.11.2016

(10 months x 11,384.48) = Kshs. 113,844.80

However he prayed for Kshs. 95,075.36 and that is what he is awarded.

Amon Ruto

This grievant withdrew his claim

Francis Njoroge

From 24.4.2014 to 30.4.2015

(12 months x 9,092.15) = Kshs. 109,105.80

But claimant claimed Kshs. 100,013.65

From 1.5.2015 to 12.11.2016

(19 months x 11,384.40) = Kshs. 216,305.12

Kshs. 316,318.77

Daniel Wainaina

From 1.5.2013 to 30 x 2015

(24 months x 9,095.15) = Kshs. 218,211.60

From 1.5.2015 to 12.11.2016

(19 months x 11,384.48) = Kshs. 216,305.12

Kshs. 434,516.72

Paul Ngacha

From 1.8.2014 to 30.4.2015

(9 months x 9,092.15) = Kshs. 81,838.15

From 1.5.2015 to 12.11.2016

(19 months x 11,384.48) = Kshs. 216,305.12

Kshs. 298,134.35

However, I award Kshs. 278,781.80 as prayed.

John Bari Karuri

From 15.2.2016 to 12.11.2016

(10 months x 11,384.48) = Kshs.. 113,844.80

However, I award Kshs. **106,959.78** as prayed

Karl Kanyi Muriithi

From 1.9.2014 to 30.4.2015

(8 months x 9,092.15)=Kshs. 72,737.20

From 1.5.2015 to 12.11.2016

(19 months x 11,384.48) = Kshs. 216,305.12

Kshs. 289,042.32

However, I award him **Kshs. 284,590.06** as prayed.

Conclusion and disposition.

36. I have found that the claimant did not prove that the grievants were unfairly dismissed. The Claimant has however proved that the grievants are entitled to the claim for salary underpayment. Therefore, I enter judgement for the claimant directing the respondent to forthwith pay the sums awarded to the respective grievants above, less statutory deductions. The claimant will have costs plus interest at court rate from the date of filing the suit.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE