



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 629 OF 2017**

**CONSTANT ODHIAMBO.....CLAIMANT**

**VS**

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

**JUDGMENT**

**Introduction**

1. The Claimant, Constant Odhiambo states his cause of action in a Memorandum of Claim dated 31<sup>st</sup> July 2017 and filed in court on 3<sup>rd</sup> August 2017.
2. The Respondent filed a Response on 20<sup>th</sup> December 2017 to which the Claimant responded on 28<sup>th</sup> February 2018.
3. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Transport Manager, Richard Okwiri and Human Resource Manager, Rajab Yeri Kombe.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent as a Truck Driver from May 2011 until 27<sup>th</sup> April 2015. He claims that he was paid various amounts in monthly salary ranging from Kshs. 25,000 to 35,000 depending on the number of trips made.
5. The Claimant avers that his working conditions were not good for the following reasons:
  - a) The Claimant was not allowed to take annual leave and was not compensated in lieu contrary to Section 28 of the Employment Act;
  - b) The Respondent failed to issue the Claimant with a written employment contract contrary to Section 9 of the Employment Act;
  - c) No itemised pay statement was issued to the Claimant for the duration of his employment contrary to Section 20 of the Employment Act.
6. The Claimant avers that on 27<sup>th</sup> April 2015, he reported to work but was informed by his Supervisor, Richard Okwiri that his services were no longer needed. No reason was given for the termination of his employment.
7. The Claimant’s case is that the termination of his employment was unlawful and unfair in that there was no valid reason for it and he was not allowed prior opportunity to be heard.
8. It is the Claimant’s further case that he was not paid his terminal dues and was not issued with a certificate of service.
9. The Claimant therefore claims the following from the Respondent:
  - a) One month’s salary in lieu of notice.....Kshs. 35,000
  - b) Accumulated leave days for 4 years & 8 months.....98,000
  - c) Service pay @ 15 days’ pay per completed year.....70,000

d) 12 months' salary in compensation.....420,000

e) Costs plus interest

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

10. In its Response dated 19<sup>th</sup> December 2017 and filed in court on 20<sup>th</sup> December 2017, the Respondent denies the allegations of unfair termination made by the Claimant.

11. The Respondent states that the Claimant's services were duly terminated after the Claimant, together with other employees, participated in an illegal strike and engaged in gross misconduct even after the Respondent promising to put in place corrective measures to address their grievances that were aired in a grievance meeting held between the management and the employees, including the Claimant.

12. The Respondent further states that the Claimant was invited to a disciplinary hearing on 22<sup>nd</sup> April 2015, after which he was summarily dismissed on 27<sup>th</sup> April 2015.

13. The Respondent cites the following particulars of gross misconduct by the Claimant:

- a) Occasioning stoppage of work on 21<sup>st</sup> April 2015, without any valid reason;
- b) Manning the gates thereby obstructing clients from accessing the empty container storage depot to drop and pick containers, resulting in delay to various shipping lines;
- c) Blocking the main entrance to the Depot thereby paralyzing the Respondent's operations;
- d) Threatening and stopping other employees from carrying out their duties against their own will;
- e) Disregarding and refusing to obey lawful instructions to attend daily safety meetings prior to commencement of work, hence being in insubordination to the management; and
- f) Using abusive and insulting language towards his colleagues, including those senior to him.

14. The Respondent maintains that the Claimant was a registered member of the National Social Security Fund (NSSF) and the National Hospital Insurance Fund (NHIF) and avers that it remitted all statutory deductions payable on behalf of the Claimant.

15. The Respondent adds that the Claimant enjoyed all statutory and contractual benefits due to him such as leave days and health services.

16. According to the Respondent, the Claimant was paid all accrued dues.

### **Findings and Determination**

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

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

18. The Claimant's dismissal was communicated by a brief letter dated 27<sup>th</sup> April 2015, which is reproduced here below:

**"RE: TERMINATION OF YOUR SERVICES**

*THIS IS TO INFORM YOU THAT YOUR SERVICES ARE NO LONGER REQUIRED BY THE COMPANY WITH EFFECT FROM 27<sup>TH</sup> APRIL 2015.*

*WE WISH YOU SUCCESS IN YOUR FUTURE ENDEAVOUR.*

*YOURS FAITHFULLY*

*(signed)*

*YERI KOMBE*

PERSONNEL OFFICER “

19. This letter does not disclose any reason for termination of the Claimant’s employment. However, in a previous letter dated 21<sup>st</sup> April 2015, the Respondent accused the Claimant of organising an unlawful strike by obstructing the gate thus causing stoppage of work resulting to serious losses to the Company.

20. The letter of 21<sup>st</sup> April 2015 invited the Claimant to show cause why disciplinary action should not be taken against him. The Claimant was required to respond by close of business on the same day and subsequently appear before the Staff Advisory Committee the next day on 22<sup>nd</sup> April 2015 at 10.00 am.

21. The Claimant told the Court that he did not receive the letter dated 21<sup>st</sup> April 2015 and there was no evidence on record to prove that it was served on him.

22. Moreover, a reading of the minutes of a disciplinary meeting held on 22<sup>nd</sup> April 2015 filed by the Respondent reveals that the Claimant and his seven (7) colleagues were subjected to a joint disciplinary forum.

23. There is everything wrong with the procedure adopted by the Respondent in dealing with the Claimant’s case:

- a) First, even assuming that the show cause letter dated 21<sup>st</sup> April 2015 was actually served on the Claimant, to require him to respond on the same day was unreasonable;
- b) Second, the show cause letter also served as an invitation to the Claimant to appear for a personal hearing the following day, 22<sup>nd</sup> April 2015, leaving no room for him to prepare his defence;
- c) Third, going by the record filed by the Respondent, the meeting of 22<sup>nd</sup> April 2015, which was attended by at least five other drivers was at best a general question and answer session between the Disciplinary Committee on the one hand and the affected employees on the other;
- d) Fourth, the Claimant was not given any opportunity to respond to any particular charges at the shop floor;
- e) Fifth, the decision to dismiss the Claimant was not supported by the proceedings of the meeting of 22<sup>nd</sup> April 2015.

24. Overall, the Court finds and holds that the allegations of gross misconduct made against the Claimant were not proved and his dismissal was wrongful and unfair.

**Remedies**

25. As a result, I award the Claimant six (6) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service coupled with the Respondent’s unlawful conduct in dismissing the Claimant.

26. I also award the Claimant one (1) month’s salary in lieu of notice.

27. In the absence of leave records to show that the Claimant utilised his annual leave days, the claim thereon succeeds and is allowed.

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

29. Finally, I enter judgment in favour of the Claimant as a follows:

a) 6 months’ salary in compensation.....	Kshs. 54,000
b) 1 month’s salary in lieu of notice.....	18,000
c) Leave pay for 4 years (600x21x4).....	<u>50,400</u>
<b>Total.....</b>	<b>122,400</b>

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

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

32. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

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

Mr. Onyango for the Respondent