



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 409 OF 2016

KENGO BAKARI MWANDOGO.....CLAIMANT

VS

KALUWORKS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. What is before me is a dispute arising from the Claimant’s employment with the Respondent. The claim is documented by a Memorandum of Claim filed in court on 31st May 2016. The Respondent filed a Memorandum of Reply on 19th November 2019.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its former Human Resource Manager, Hezrone Rachilo, Head of Department-Finishing Line, Wilson Kinga Muthoka and Security Officer, Joseph Milimu Ambani.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Forklift Driver from 7th February 2006 until 5th June 2013. At the time of termination, the Claimant earned a daily rate of Kshs. 410.
4. The Claimant claims that in 2013 and 2014, the Respondent forced all its workers, including himself, to execute a document showing that they held lower positions than those they actually held at the Respondent’s factory.
5. The Claimant further claims that the Respondent continued paying him on the basis of the lower position as opposed to the actual position the Claimant held. The Claimant adds that in spite of this, he worked diligently and with dedication.
6. The Claimant states that he was wrongfully summarily dismissed on allegations of distracting people as they did their duties.
7. The Claimant claims that there was no valid reason for the dismissal and that he was not allowed an opportunity to be heard. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 24,337.00
- b) Underpayment for the last 3 years of employment.....492,382.80
- c) Leave pay for 7 years, 3 months and 30 days.....144,086.17
- d) 12 months’ salary in compensation.....292,047.60
- e) Certificate of service
- f) Costs plus interest

The Respondent’s Case

8. In its Memorandum of Reply dated 15th November 2019 and filed in court on 19th November 2019, the Respondent states that it employed the Claimant as a Bailing Helper in the Finishing Department at its premises at Mariakani in Kilifi County from 6th February 2006

to 3rd May 2013.

9. The Respondent further states that it effected changes to the Claimant's position from Bailing Helper to Forklift Driver in the Finishing Department with effect from 4th May 2013 from which date the Claimant's daily wage was reviewed from Kshs. 232 to Kshs. 410 inclusive of housing.

10. The Respondent denies forcing the Claimant to execute a document showing that he held a lower position than the one he actually held at the Respondent's Factory.

11. The Respondent further denies paying the Claimant on the basis of a lower position.

12. The Respondent also denies that the Claimant's employment was unlawfully and unfairly terminated.

13. The Respondent claims that the Claimant had a history of being rude, uncooperative and an unsafe employee while executing his duties immediately after the changes to his position and wages were effected.

14. The Respondent further claims that the Claimant was disrespectful to his colleagues and only undertook tasks when instructed by his seniors and was less cooperative with his work colleagues.

15. The Respondent adds that the Claimant almost knocked a female colleague, Anna Kareba when he operated the Forklift carelessly and the Claimant swore to her that he cared less even if she died. The Claimant is said to have apologised after being spoken to by the Supervisor about this incident.

16. The Respondent avers that on 27th June 2013, the Claimant hit his colleague, Victor Onyango with the Forklift. On or about the said date the Claimant is alleged to have punctured lorry tyres belonging to the Respondent's customer at the Respondent's premises at Mariakani, Kilifi County.

17. According to the Respondent, investigations into the two incidents of 27th June 2013 revealed that they both occurred from the front and were therefore avoidable.

18. The Respondent states that the said incidents were discussed with the Claimant in the presence of his immediate supervisor and the findings and concerns communicated by the Respondent to the Claimant.

19. The Respondent therefore advised the Claimant that he would be reverted to his old position of Bailing Helper and that alternatively, the Respondent would institute disciplinary proceedings against the Claimant, with the possibility of his employment as a Forklift Driver being terminated.

20. The Respondent states that on 29th June 2013, after discussions, the Claimant was allowed by the Respondent to exit the factory with a view to him reporting to the Respondent with his decision after 3 days.

21. The Respondent claims that the Claimant failed, ignored, refused and/or neglected to revert to the Respondent and did not resume his duties at the end of the 3 days.

22. The Respondent denies terminating the Claimant's employment on 5th June 2013 and states that the Claimant is presumed to have terminated his employment on his own volition effective 29th June 2013 in that he failed to resume duty and report to the Respondent's premises since that date in spite of being aware that he was planned for shift duties as per the manpower plans.

23. The Respondent states that on 12th July 2013, it notified the County Labour Office in line with Section 78 of the Employment Act that the Claimant had continuously absented himself from work and had presumably terminated his employment with the Respondent.

Findings and Determination

24. There are two (2) 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.

Unlawful Termination?

25. In denying the Claimant's claim that his employment was unlawfully terminated, the Respondent accuses the Claimant of recklessness and rudeness.

26. The Respondent's witnesses, Hezrone Rachilo, Wilson Kinga Muthoka and Joseph Milimu Ambani testified that after being promoted from the position of Bailing Helper to Forklift Driver, the Claimant became an unsafe, an uncooperative and a rude employee.

27. The Respondent's witnesses further testified that following a series of accidents, the Claimant was given the option of either reverting to his former position of Bailing Helper or in the alternative face disciplinary proceedings.

28. The Claimant is said to have been given 3 days to consider his options and revert back to the Respondent, which he did not do. The Claimant was therefore deemed to have left employment on his own volition effective 29th June 2013.

29. The tale by the Respondent's witnesses was however not documented. Whether it was outright demotion from the position of Forklift Driver to that of Bailing Helper or some other disciplinary action, the Claimant was entitled to the procedural fairness requirements of Section 41 of the Employment Act.

30. The Respondent did not adduce any evidence to prove that the Claimant was subjected to any disciplinary process. Further, there was no letter demoting the Claimant to the position of Bailing Helper, which itself would have been a disciplinary action.

31. At the very least, the Claimant was entitled to due notice of the allegations levelled against him accompanied by adequate opportunity for him to respond at the shop floor.

32. What is more, the allegation that the Claimant himself failed to turn up for duty was unverified and unproved. I need to add that the Respondent's attempt to communicate to the Ministry of Labour did not absolve the Respondent from its obligation to the Claimant as its employee.

33. In the result, I find and hold that the Claimant has made out a case of unlawful termination of employment and he is entitled to compensation.

Remedies

34. I therefore award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service together with the Respondent's failure to follow the law in the termination transaction.

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

36. The claim for leave pay, being a continuing injury within the meaning of Section 90 of the Employment Act, ought to have been filed within twelve (12) months next after cessation. Reckoning the cessation date as the date of termination, this limb is statute barred.

37. The claim for underpayment was not proved and is dismissed.

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

a) 10 months' salary in compensation.....	Kshs. 123,000
b) 1 month's salary in lieu of notice.....	<u>12,300</u>
Total.....	135,300

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

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

41. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF 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

Miss Nasimiyu for the Respondent