



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 262 OF 2015

BETWEEN

MOHAMED MUSA MZENGA.....CLAIMANT

VERSUS

SHIVA CARRIERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Wandai Matheka & Company Advocates for the Claimant

Respondent unrepresented

JUDGMENT

1. The Claimant filed his Statement of Claim on 23rd April 2015. He avers, he was employed by the Respondent as a Heavy Commercial Driver, on 21st July 2014. He was summarily dismissed by the Respondent on 17th January 2015. He complains that he was not heard before dismissal, and there was no valid reason to justify dismissal. His salary was Kshs. 25,382, paid monthly.

2. In the course of employment, he was charged for a traffic offence, and convicted in Mombasa Chief Magistrate's Court Traffic Case No. 6644 of 2014. He was imprisoned for 2 days, and was released on paying a fine of Kshs. 23,500. Throughout this ordeal, the Respondent abandoned the Claimant.

3. He prays for Judgment against the Respondent for:-

- a. 1-month salary in lieu of notice at Kshs. 25,382.
- b. Annual leave pay at Kshs. 25,382.
- c. Compensation for the remaining contractual period of 7 months, at Kshs. 177,674.
- d. 12 months' salary in compensation for unfair termination at Kshs. 304,584.
- e. Compensation for fine paid in TR 6644 of 2014 at Kshs. 23,571.

Total... Kshs. 581,975.

f. Declaration that termination was unfair.

- g. Certificate of Service to issue.
- h. Costs.
- i. Interest.
- j. Any other suitable relief.

4. The Respondent filed its Statement of Response on 19th June 2015. It is not disputed that the Claimant was employed by the Respondent, as a Heavy Commercial Driver. He was assigned 3 Trucks, and would be sent on duty to Nairobi from Mombasa. He was given sufficient diesel. However, in all trips he undertook, he would ask for extra diesel. The Respondent is a stranger to traffic proceedings and to conviction of the Claimant. The Respondent denies liability under such proceedings. The Claimant was heard on improper use of diesel, before termination. The Respondent does not owe him anything. Termination was fair. The Respondent asks the Court to dismiss the Claim with costs.

5. The Claimant gave evidence in the presence of his Advocate, and the Advocate for the Respondent, on 19th June 2017 and 13th November 2017, when he rested his case. Respondent's Witness, Diesel Department Manager Harpuneet Singh, gave evidence on the same date, 19th June 2017. The Advocate for the Respondent then informed the Court that the Respondent intended to call one more Witness. On 17th September 2018, the Court was told that Respondent's last Witness was unwell, and hearing was adjourned. Hearing rescheduled for 19th June 2019, did not take place as Respondent's last Witness was still unavailable. The Advocates for the Respondent applied to cease acting for the Respondent. The prayer was granted on 14th November 2019, and Respondent's last Witness scheduled to be heard 22nd October 2020. There was no attendance on the part of the Respondent, and the Court marked proceedings as closed.

6. The Claimant adopted the contents of his Statement of Claim, as summarized above, in his oral evidence before the Court. He was employed on a 1- year contract. On 17th January 2015, Mr. Yusuf asked the Claimant for the ignition keys to the Truck the Claimant has been assigned to. The Claimant used to transport cargo between Mombasa and Nairobi. Yusuf told him that the Respondent did not wish to see the Claimant at the workplace again.

7. In December 2014, the Claimant ran out of diesel in the middle of the road. He was arrested for obstructing traffic, charged and convicted. He was fined Kshs. 23,571. He called Yusuf while under arrest. He did not receive any assistance from the Respondent. The Claimant's family paid the fine. Dismissal was not preceded by any hearing or notice. There was no disciplinary hearing at any time, as alleged by the Respondent. The Claimant worked for 6 months. He had 6 months left in his contract.

8. Cross-examined, the Claimant told the Court he was employed as a Truck Driver. He was charged with a traffic offence. He was convicted and fined. He signed a Job Description form. He was bound to obey traffic law. He breached this requirement. It is not true that the Claimant siphoned fuel on 5 different occasions. He was not given a letter of termination. He was not invited to collect terminal dues. Redirected, the Claimant reiterated that there was no disciplinary hearing, and he never saw a letter of termination.

9. Harpuneet Singh told the Court that the Claimant repeatedly reported shortage of fuel. The Claimant received verbal and written warnings. He received and signed diesel shortage report. The Respondent convened a disciplinary hearing, as captured in the minutes of 3rd February 2015. Ali Faki accompanied the Claimant. The Claimant attended the meeting and was fairly heard. Cross-examined, Harpuneet told the Court that deduction on account of diesel shortage was effected against the Claimant's salary. It resulted in nil salary. He did not sign the final dues tabulation. Harpuneet attended the disciplinary hearing. The Claimant did not sign the disciplinary hearing minutes. Redirected, Harpuneet told the Court he did not know about the traffic case. Claimant's final dues were in the negative. He accepted that there was diesel shortage.

The Court Finds: -

10. The Claimant was employed by the Respondent as a Heavy Commercial Driver, for a period of 1 year, commencing 21st July 2014. The first 3 months were probationary. He states he was summarily dismissed on or about 17th January 2015. He was advised by Respondent's Officer, one Yusuf, to surrender the ignition keys, and not return to work.

11. The Respondent gives a different date of termination. According to the Respondent, the Claimant was involved in fuel siphoning while on different trips to Nairobi from Mombasa. The Respondent convened a disciplinary hearing on 3rd February 2015. The Claimant attended and was heard in the presence of his colleague, Ali Faki. A decision was made to summarily dismiss him. The letter of summary dismissal is dated 3rd February 2015.

12. The Court is persuaded that the Claimant was summarily dismissed on 3rd February 2015, as shown in the letter of summary dismissal on record. There is evidence also, that the letter was preceded by a disciplinary hearing, captured in the minutes exhibited by the Respondent, of the same date, 3rd February 2015. The Claimant was in attendance and was heard. He was presented with specific charges of fuel siphoning. Other than the disciplinary proceedings, which the Claimant states never took place, there is on record a series of Diesel Shortage Reports, which the Claimant signed, acknowledging that there was shortage of diesel. He conceded the employment offence, over which he was charged, and eventually dismissed.

13. In the view of the Court, the Claimant was summarily dismissed fairly, after being accorded a hearing, on 3rd February 2015. There was ample evidence to support the charge of fuel siphoning. Dismissal was fair. There was valid ground to justify the decision. Procedure was fair. The Respondent observed minimum standards of fairness, under Sections 41, 43, and 45 of the Employment Act 2007. Termination was fair.

14. The Claimant is not entitled to compensation for unfair termination, equivalent of his 12 months' salary. He does not merit anticipatory salary for the remaining period of 6 months, in his contract. He was offered pro-rata annual leave pay, notice and salary for days worked, which offset against his liability to the Respondent, left him liable to the Respondent to the tune of Kshs. 3,436.

15. Certificate of Service is merited under Section 51 of the Employment Act.

16. No order on the costs.

IN SUM, IT IS ORDERED: -

a. The Respondent shall release to the Claimant his Certificate of Service forthwith.

b. No order on the costs.

Dated and delivered at Mombasa this 5th day of November, 2020.

James Rika

Judge