



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 46 OF 2018

BETWEEN

DENIS WAMALWA SIFUNA CLAIMANT

VERSUS

AFRICAN LINE TERMINAL & LOGISTICS LTD....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

C.A. Odhiang' & Company Advocates for the Claimant.

Federation of Kenya Employers [FKE] for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 24th January 2018. He states he was employed by the Respondent, on 23rd September 2009 as a Clerk, at CFS department, within operations department. He was moved later to terminal operations department. He states, at the time of filing the Claim, he was still employed by the Respondent.

2. He has been receiving salary increment since the year 2009. In 2017 he did not receive salary increment. He was the only Employee, denied salary increment. From May 2017, the Respondent deducted from the Claimant's monthly salary, Kshs. 11,836, and Kshs. 22,331 on other occasion. The deductions continued even after filing of the Claim. The Claimant demanded stoppage of the deductions. The Respondent reacted by discriminating against the Claimant: he was denied salary increment; his work computer was taken away; and illegal deductions continued. He worked overtime. His Claim against the Respondent is for: -

- a. Refund of all monies illegally deducted.
- b. Damages for discrimination and harassment.
- c. Annual salary increment.
- d. Overtime worked.
- e. Damages for the wrongful and illegal deductions.

3. The Respondent filed its Statement of Response on 13th June 2019. Its position is that at the time of filing the Claim, the Claimant was employed as a Clerk in Respondent's operations department, stationed at the Port of Mombasa. He worked in this department with its Head, Henry Katama, and Operations Executive, Gideon Jefwa. The Claimant's role involved among others, ascertaining the total units/ containers arriving on the vessel, and thereby arrange for Casuals, and coordinate transfer of units/ containers from the vessel to the Container Freight Terminals [CFS]. Due to the negligence of the department served by the Claimant, the Respondent incurred losses often, owing to the late removal of units/ containers outside the grace period given by the KPA. The Claimant and his departmental colleagues met with the General

Manager on 9th March 2017. It was confirmed that going forward, the department staff would shoulder losses incurred by the Respondent, as a result of delay in moving containers/ units. The losses continued. The Respondent made deductions from all the 3 Employees in the Claimant's department. No salary increment could be made as a result of the continued losses. The Respondent did not take away computer assigned to the Claimant. There was no discrimination. The Claimant has always been advanced money by the Respondent, whenever he requested. The Claim has no merit. The Respondent prays that it is dismissed with costs.

4. The Claimant filed a Reply to the Statement of Response, on 19th February 2020, basically denying responsibility for losses incurred by the Respondent. He states, any losses occasioned to the Respondent was as a result of Respondent's own omission and failure to provide transport. No notice was given on deductions, and deductions, exceeded the amounts allegedly lost by the Respondent.

5. The Claimant gave evidence and closed his case on 11th March 2020, as did the Respondent, through its Finance Manager Ponveli Sandhavu Pratheesh.

6. The Claimant confirmed he was still in employment, at the time of giving evidence. He had worked for the Respondent for 11 years. His salary was deducted as pleaded. He was not handling the particular cargo. He only handled units, not containers. He was not concerned with the receipt of documents. He was denied salary increment. Deductions affected his ability to redress his loan obligations. He worked long hours without overtime pay.

7. Cross-examined, the Claimant told the Court he is still an Employee of the Respondent. He enjoys a cordial relationship with his Employer. He was an Operations Clerk. His department facilitated clearance of cargo from the Port. What is inside the container, is the unit. There was no loss incurred as a result of clearance of cargo. The Claimant did not attend Management meeting of 9th March 2017. The Claimant's departmental Head did not tell the Claimant that there was loss, and deductions would be made. The Claimant never used a shared computer. According to the contract, the Claimant did not merit overtime pay. He was harassed by Management. He was compelled to work without proper equipment. He had not quantified the amount of money which was deducted. The Claimant's bank did not advise him what his loan balance was. His salary was Kshs. 49,000 in 2018 and Kshs. 50,000 in 2019. He got increment in 2018 and 2019.

8. Redirected, the Claimant told the Court that Katama settled his dispute with the Respondent internally. The Claimant did not understand the consequence of executing the contract of employment. He worked excess hours. Salary deductions went on until he served court summons upon the Respondent.

9. Pratheesh confirmed that the Claimant worked for the Respondent as a Clerk, in operations department. He worked with Katama and Gideon Jefwa. If units were not cleared from the Port on time, KPA charged demurrage and costs. Management called a meeting with the Claimant's department. It was agreed that if there was loss, the staff in the department would cater for the loss. The Claimant was aware about the deliberations. He attended the meeting. Katama received details of the loss through e-mail. The Claimant was transferred to the yard, after sustained losses. He had his own computer at the yard. Katama explained to the Claimant about the losses. The Respondent did not harass the Claimant. Salary increment depends on business performance. The Respondent gave Employees salary increments in 2017, except to the Claimant and Katama, because of the loss occasioned through their department.

10. Cross-examined, Pratheesh told the Court that he joined the Respondent in 2014. He prepared financial reports. He did not oversee port operations. Deductions affected Katama, Jefwa and the Claimant. In the report, loss was attributed to "*no transport*" and to "*late receipt of documents*." Pratheesh told the Court that the Claimant was not negligent, but that Katama was. The 3 Employees in the department had to meet the loss. The Respondent wrote to KPA on 5th September 2017, attributing delay to heavy rains and traffic. KPA wrote to the Respondent on 13th September 2017, granting 60% waiver. This came after deductions had been made on Claimant's salary. The Claimant did not sign minutes of the meeting held on 9th March 2017. Other Employees received refunds. The Claimant refused to receive his.

11. On redirection, Pratheesh told the Court that the Parties attempted out-of-court settlement, an exercise which bore no fruit, due to Claimant's inflexibility. Operations department worked as a team. The Respondent did not unfairly pick on the Claimant for deductions.

The Court Finds: -

12. The Claimant was at the time this Claim was heard, still working for the Respondent as a Clerk, in the operations department. He worked with 2 others- Head of Department Katama, and Operations Executive Gideon Jefwa.

13. The Claimant and his colleagues in the department were charged with clearance of cargo from the Port to Container Freight Terminals. If cargo was not cleared from the Port within a given period, the KPA would charge demurrage and costs for late clearance. The Respondent felt it was sustaining losses, because the Claimant and his colleagues, failed to clear cargo within the specified period. There was a meeting held by Management on 9th March 2017. Whereas Katama and Jefwa are shown in the minutes to have been in attendance, the Claimant was not. It was resolved at the meeting that, "operations team shall bear additional expenses due to their non-performance."

14. After this, the Respondent states there was no improvement and it continued to sustain losses. This led to deductions on Claimant's salary. It led also to denial of salary increment to the Claimant. This was in 2017. Katama and Jefwa similarly had salary deductions and were denied salary increments.

15. Katama and Jefwa managed to resolve their dispute with the Respondent amicably. The Respondent states that the Claimant took a radical position, making it difficult for the matter to be resolved out of Court.

16. Section 19 [1] [b] of the Employment Act allows an Employer to deduct from the wages of his Employee, a reasonable amount for any damage done to, or loss of, any property lawfully in possession or custody of the Employer occasioned by the wilful default of the Employee.

17. The Court does not think demurrage and costs imposed on the Respondent as result of the operations department delay in clearance of cargo, was a loss which could be recovered by the Respondent under the above provision of the law.
18. The Respondent did not state specifically, which provision of the law or contractual clause, allowed it to deduct alleged losses from the Claimant's salary. The amounts deducted were not shown to be the equivalent of losses attributed to the Claimant. He was not even part of the meeting where the Respondent resolved to deduct. He was not issued a notice of deduction. The Respondent did not cite which provision of the law, under the Employment Act, it relied on in deducting certain sums of money from the Claimant's monthly salary.
19. The Finance Manager Pratheesh conceded that others were refunded the salary deductions, but that the Claimant declined refund. The Respondent tacitly admitted that deductions were not founded on the law and contract which regulated the Parties' relationship. It offered refunds.
20. The Court is satisfied that the Claimant, merits refund of deductions made upon his salary.
21. He has not pleaded the exact sum. Deduction was ongoing until he filed the Claim. The Respondent is in a position to tabulate the total deductions made, from the relevant payrolls and take remedial action.
22. Annual salary increment was given based on an Employee's performance. The various letters communicating increment, state in standard form that, "*the Management has reviewed your performance and decided to revise your salary.*" The letters also indicate that increment was highly confidential and its disclosure by the beneficiary to 3rd parties, " may lead to withdrawal and would also call for disciplinary action."
23. Annual increment was therefore given at the discretion of the Respondent, depending on its assessment of the Employee's performance. It was not automatic. It was not meant to be a collective benefit. It was given in confidence, to individual Employees. The Respondent's denial of the benefit to the Claimant was based on its view of his performance for the year 2017. Denial was not discriminatory, but grounded on the contract.
24. Whereas the Respondent did not have justification in deducting from the Claimant's salary to recover alleged loss, it was within its discretion to award the Claimant pay increment.
25. The Claimant has not shown that he was treated discriminatively, or that he was harassed by the Respondent. Annual increment was at the discretion of the Respondent. Salary deduction was not confined the Claimant, but applied to Claimant's colleagues in the operations department. The Court has concluded deduction was illegal and perhaps ill-advised, but it was not discriminatory. Others were refunded what was deducted, but the Claimant opted to have the Court determine the dispute. The Respondent states it was ready refund the Claimant salary deductions. Where is the ill, or discriminative treatment, to warrant damages?
26. On the prayer for overtime, the Claimant does not specify when he worked excess hours. He does not say how many hours. He does not give a specific amount of money attaching to excess hours worked. He blankly stated on cross-examination, " I am not entitled to overtime." The Court agrees entirely with this aspect of his evidence.

IN SUM, IT IS ORDERED: -

- a. The Respondent shall refund to the Claimant deductions made on his salary, dating back to May 2017.**
- b. In event Parties are not able to agree on the exact amount, they shall seek the assistance of the County Labour Officer who shall examine the relevant payroll records, and compute deductions.**
- c. No order on the costs.**

Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 15th day of December 2020.

James Rika

Judge