



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 673 OF 2015**

**CLARENCE WANJALA WAFULA.....CLAIMANT**

**VS**

**FOCUS CONTAINER FREIGHT STATION....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim brought by a Memorandum of Claim dated 1<sup>st</sup> September 2015 and filed in court on 2<sup>nd</sup> September 2015 is for unfair termination. The Respondent filed a Response on 5<sup>th</sup> July 2016.
2. The matter was initially heard by my brother, **Makau J** who took the Claimant's testimony. When the parties appeared before me on 26<sup>th</sup> July 2018, I heard the Respondent's witness, Amina Abdi Gedi.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> March 2013 as a heavy commercial truck driver. He was paid a monthly salary of Kshs. 10,000 which rose to Kshs. 25,000 as at the time he left employment. He was not issued with a written contract of employment.
4. The Claimant avers that in January 2015, he was instructed by the Respondent's Supervisor, one Mr. Maalim to start working for the Respondent's sister company. He therefore stopped working for the Respondent. Upon reporting to the sister company, the Claimant was forced to sign a one year contract effectively terminating his relationship with the Respondent.
5. The Claimant further avers that five months later, the Respondent's sister company terminated his employment without giving any reason. The Claimant therefore maintains that by sending him to its sister company, the Respondent's intention was to lay him off without compensating him for the period he had worked for the Respondent.
6. The Claimant pleads that throughout his employment with the Respondent, he never went on leave and was forced to work for 7 days per week without a rest day. Additionally, he was not registered with any pension or social security fund.
7. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice.....Kshs. 28,750.00
- b) All unclaimed rest days.....106,153.92
- c) Unpaid travel allowance.....8,052.00
- d) Unclaimed gazetted public holidays.....19,903.86
- e) Unpaid overtime.....464,423.40
- f) Unpaid house allowance.....82,500.00

- g) Leave pay for 1 year and 10 months.....42,494.74
- h) Service pay.....24,282.70
- i) 12 months' salary in compensation.....345,000.00
- j) Punitive damages
- k) Certificate of service
- l) Costs plus interest

**The Respondent's Case**

- 8. In its Response dated 5<sup>th</sup> July 2016 and filed in court on even date the Respondent denies having employed the Claimant as a heavy commercial truck driver. The Respondent states that it provides clearing services only.
- 9. The Respondent denies instructing the Claimant to start working for its sister company from January 2015. The Respondent further denies terminating the Claimant's employment.
- 10. The Respondent denies the Claimant's entire claim and states that there has never been any employment relationship between the parties herein.

**Findings and Determination**

- 11. The first issue for determination in this case is whether there was an employment relationship between the parties capable of enforcement by this Court. The Respondent denied the existence of any such relationship and produced employment records without the Claimant's name.
- 12. The Claimant on the other hand produced a copy of Port Users Control Pass issued to him on 1<sup>st</sup> March 2013 with an expiry date of 28<sup>th</sup> February 2015. This document, which the Respondent did not contest, shows the Claimant's occupation as driver for Focus CFS, the Respondent herein. To my mind, this is adequate evidence that the Claimant was indeed an employee of the Respondent.
- 13. The next question is whether the Claimant has made out a case of unlawful termination of employment. Section 47(5) of the Employment Act, 2007 states as follows:

***(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

- 14. It follows therefore that not every termination of employment is unlawful or unfair. The Claimant himself told the Court that in January 2015, he was instructed by the Respondent's Supervisor, one Mr. Maalim to move to a sister company by the name *Logistics Solutions Limited*. There was no evidence that the Claimant's terms and conditions of employment were lowered in any way nor did the Claimant offer official protest to the transfer of services.
- 15. It seems to me that there was a seamless transfer of services and no case for unlawful or unfair termination has been established. The claims for compensation and notice pay are therefore without basis and are dismissed.
- 16. The third question has to do with accrued dues. Under this head, the Claimant claims house allowance. Section 31(1) and (2) of the Employment Act provides that:

***31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

17. The Respondent did not provide any evidence to show that the monthly salary paid to the Claimant was inclusive of house allowance. I therefore allow the claim thereon at 15% of the basic salary and adopt the resultant figure of Kshs. 28,750 as the Claimant's monthly salary for purposes of this claim.

18. In the absence of leave records to counter the claim for leave pay, the same succeeds and is allowed. Similarly, there was no evidence that the Respondent paid National Social Security Fund (NSSF) dues on behalf of the Claimant. The claim for service pay therefore also succeeds and is allowed.

19. The claims for rest days, travel allowance, public holidays, overtime and punitive damages were not proved and are dismissed.

20. Ultimately, I enter judgment in favour of the Claimant as follows:

- a) House allowance for 21 months.....Kshs. 78,750
- b) Leave pay for 1 year (28,750/30x21).....20,125
- c) Prorata leave for 9 months (28,750/30x1.75x9).....15,094
- d) Service pay for 1 completed year of service.....14,375

**Total.....128,344**

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

22. The Claimant will have the costs of the case. He is also entitled to a certificate of service.

23. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mboku h/b Mr. Mbuya for the Claimant

Mr. Oduor for the Respondent