



**REPUBLIC OF KENYA**

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

**CAUSE NO 678 OF 2016**

**GILBERT KATANA MKARE.....CLAIMANT**

**VS**

**HAKIKA TRANSPORT SERVICES LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is an employment dispute between Gilbert Katana Mkare and his former employer, Hakika Transport Services Ltd. The claim is documented by a Memorandum of Claim dated 15<sup>th</sup> September 2016 and filed in court on even date. The Respondent filed a Response on 19<sup>th</sup> January 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Rajab Yeri Kombe.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a truck driver from 14<sup>th</sup> June 2013 until 4<sup>th</sup> March 2015, when his employment was terminated. He earned a monthly salary of Kshs. 31,950.

4. The Claimant avers that his employment was terminated verbally without justifiable cause and in violation of due procedure. He therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 31,950
- b) Leave pay for 3 years.....40,470
- c) Service @ 15 days per completed year of service.....47,925
- d) Overtime for 3 years.....125,240
- e) Maximum compensation for unfair termination
- f) Certificate of service
- g) Costs plus interest

**The Respondent's Case**

5. In its Response dated 17<sup>th</sup> January 2017 and filed in court on 19<sup>th</sup> January 2017, the Respondent admits that the Claimant was in its employment until 4<sup>th</sup> March 2015, when he voluntarily resigned.

6. The Respondent states that the Claimant's resignation was in breach of Section 38(c) of the Employment Act to the extent that the Claimant did not give sufficient notice. The Respondent therefore raises a counterclaim in the sum of Kshs. 31,950 being one month's salary in lieu of notice.

7. The Respondent further states that the Claimant was a registered member of the National Social Security Fund (NSSF) and the Respondent remitted all statutory deductions payable on behalf of the Claimant.

8. In addition, the Claimant enjoyed all statutory and contractual benefits due to him, including annual leave. In any event, any leave and/or benefits not utilized by the Claimant were forfeited as a result of limitation of time.

### **Findings and Determination**

9. There are three (3) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has established a proper counterclaim against the Claimant.

### **Unlawful Termination?**

10. In his Memorandum of Claim dated 15<sup>th</sup> September 2016, the Claimant states that his employment was terminated verbally on 4<sup>th</sup> March 2015 without justifiable cause and in violation of due procedure. In his witness statement of even date and further statement dated 6<sup>th</sup> November 2017 the Claimant reiterates the contents of his Memorandum of Claim.

11. However, in his testimony before the Court, the Claimant stated that he resigned because from January 2016, his daily rate was reduced from Kshs. 1065 to Kshs. 400. He termed this as a unilateral adverse alteration of his terms of employment by the Respondent, thereby resulting in constructive dismissal.

12. In his resignation letter dated 4<sup>th</sup> April 2016, the Claimant states the following:

*“RE: RESIGNATION DUE TO HARASSMENT AND INTIMIDATION FROM*

*MY EMPLOYER*

*PLEASE ACCEPT THIS LETTER AS A FORMAL NOTIFICATION THAT IM LEAVING MY POSITION AS A TRUCK DRIVER IMMEDIATELY DUE TO THE SUFFERING I AM GOING THROUGH FROM MY EMPLOYER.*

*I WAS ATTACHED TO BAMBURI YARD PAID A SALARY OF SH 1065 PER DAY. ON JANUARY 2016 (sic) I WAS TRANSFERRED TO CHANGAMWE YARD PAID A SALARY OF SH 400 PER DAY.*

*KINDLY I AM ASKING THE MANAGEMENT TO PAY MY FINAL DUES i.e SERVICE, ANNUAL LEAVE, OFF DAYS, PUBLIC HOLIDAYS AND OVERTIME WORKED.*

*THANK YOU FOR THE OPPORTUNITIES YOU HAVE PROVIDE ME (sic) DURING MY TIME WITH THE COMPANY FOUR YEARS OF SERVICE.*

*YOURS SINCERELY*

*(Signed)*

*GILBERT M. MKARE”*

13. The Claimant did not offer any explanation for the sharp difference between his pleadings and testimony before the Court. In the final submissions filed on behalf of the Respondent on 10<sup>th</sup> December 2018, reference was made to the decision in **Galaxy Paints Company Limited v Falcon Guards Ltd [2000] 2 EA 385 (CAK)** where the Court of Appeal held that the issues for determination in a suit generally flow from the pleadings as filed in court.

14. Nowhere in his pleadings did the Claimant allude to the issue of constructive dismissal and even if the Court were to be persuaded to scan the contents of the resignation letter, still there was no evidence to prove constructive dismissal.

15. In the final submissions filed on behalf of the Claimant on 2<sup>nd</sup> November 2018, reference was made to the decision in **Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the Court of Appeal confirmed that constructive dismissal occurs when an employer’s behaviour is so intolerable that it makes it practically impossible for the employee to continue working. This was echoed by my sister **Mbaru J** in **Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR**.

16. The Claimant’s case is that by reducing his daily rate from Kshs. 1065 to Kshs. 400, the Respondent in effect repudiated the employment contract and thus forced him out of employment. The Respondent’s Human Resource Manager, Rajab Yeri Kombe told the Court that following the lapse of the Respondent’s contract with Bamburi Cement, where the Claimant was deployed, he was transferred to

Changamwe. While at Bamburi, the Claimant earned a guaranteed daily rate of Kshs. 1065 because he made at least one trip per day. Kombe further testified that the Bamburi pay plan was unsustainable at Changamwe.

17. From the record, the Claimant did not raise any issue regarding the terms of his transfer to Changamwe until his resignation four months down the line, in April 2016. More significantly, the Claimant started working for the Respondent's competitor and successor at Bamburi, R.K. Shanghani as early as June 2016. It seems to me therefore that the Claimant's decision to resign was informed by his desire to remain at Bamburi and he cannot therefore accuse the Respondent of constructive dismissal.

18. Overall, the Court finds and holds that the Claimant's claim for compensation for unfair termination is without basis. The same applies to the claim for notice pay. The Claimant admitted having exhausted his annual leave for 2016. The claim for leave pay is therefore unmeritorious and is also dismissed. Having been a contributing member of the NSSF, the Claimant is not entitled to service pay. The claim for overtime compensation was not proved and is dismissed.

#### **The Respondent's Counterclaim**

19. From the Claimant's resignation letter dated 4<sup>th</sup> April 2016, it is evident that the Claimant did not give notice to the Respondent. However, the Respondent having admitted that the Claimant was paid a daily rate based on trips made, cannot claim a fixed a monthly salary in notice pay. For this reason, the counterclaim fails and is dismissed.

20. Each party will bear their own costs.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ngonze for the Claimant

Mr. Onyango for the Respondent