



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 378 OF 2018

ABDULRAHIM MOHAMED ABDULRAHIM.....CLAIMANT

- VERSUS -

MODERN COAST EXPRESS LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th March, 2019)

JUDGMENT

The claimant filed the statement of claim on 21.03.2018 through Ndemo Mokaya & Company Advocates. He prayed for judgment against the respondent for:

1. Salary in lieu of notice.
2. Unpaid salary for 19 days worked in February 2018.
3. Gratuity under Regulation of Wages Order 1998.
4. 3 years' unpaid leave.
5. 4 days off duty per month.
6. Illegal deductions of diesel, loan and contributions since the date of payment up to 19.02.2018.
7. General damages for wrongful and unfair termination.
8. Costs of the suit to be provided for.
9. Interest on (a) and (b) above at Court rates from the time of termination of services until payment in full.

Despite service the respondent failed to enter appearance, to file a defence or to attend at the hearing.

The claimant testified to support his case. The Court has considered the material on record and the main issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1. The claimant testified that he was employed by the respondent in 2015 as a driver at a monthly salary of Kshs.33, 545.00 as per the exhibited payslip. The Court has considered that evidence and returns that the parties were in a contract of service.
2. The claimant testified that he worked until 19.02.2018 when he was wrongfully and unlawfully terminated from employment. He testified that on that day he was summoned at the office and told that in view of the Standard Gauge Railway (SGR) he would be moved from driving buses to driving trucks. He rejected the deployment. He was told to see the human resource manager. He then received the termination letter. The termination letter was dated 13.02.2018 and received by the claimant on 19.02.2018. The letter referred to previous incident as per the records on the claimant's personnel file on carrying unauthorised passengers on board which was against the Company's set rules. The letter further stated that the claimant had been trained on the respondent's operating procedures as a driver including on use of vehicles, vehicle maintenance, the do's and don'ts and the recent incident was a clear breach of the standard operating procedures. His conduct was found wanting because he had breached agreements reached at during

the work induction. The letter stated that the claimant was therefore dismissed from duty on grounds of gross misconduct effective 20.02.2018 and he would be paid all wages up to 20.02.2018. In absence of any other evidence on record, the Court returns that the termination was unfair for want of due notice and a hearing under section 41 of the Employment Act, 2009. The Court further finds that the claimant was terminated on account of rejecting a redeployment to drive the trucks and not due to matters in the letter of termination and which appears to have been drawn on 13.02.2018 and delivered on 19.02.2018. Thus the Court finds that the reason in the termination letter was not genuine as per section 43 of the Act. The court has considered the claimant's own evidence that upon redeployment to drive trucks, he rejected the same. The pleading was that he was employed as a driver. The Court returns that the deployment was within the agreed job description and the rejection substantially contributed to the dismissal which the Court puts at 25%. The Court has also considered the period served and that the claimant desired to continue in employment. He is awarded 9 months' salaries at Kshs.33, 545.00 making **Kshs. 301, 905.00** in compensation for unfair termination under section 49 of the Act.

3. The termination was without due notice and the claimant is awarded **Kshs. 33, 545.00** under section 35 of the Act in lieu of the termination notice.

4. The claimant worked for 19 days in February 2018 and is awarded **Kshs.21, 245.16**.

5. The claimant was a member and contributor to NSSF and in absence of a specific submission to justify gratuity, the same is barred under section 35 of the Act. It will fail. There was no NSSF statement to establish that the NSSF was not remitted as alleged and submitted for the claimant.

6. The claimant testified that he was not given annual leave throughout the 3 years' service. The amount claimed was not specifically pleaded and the submission for award of Kshs.25, 000.00 was clearly at variance with the pleadings. The prayer will fail as unjustified due to want of specific amounts in pleadings and inconsistencies in the claimant's case.

7. The refund for fuel deductions were not specifically established and pleaded as the particulars of the deductions and amounts involved were not stated in the statement of claim. The prayer will therefore fail.

8. The 4 days off duty lacked particularised amount in the pleading. It was in the nature of special or liquidated damages. The same will therefore fail for want of proper pleadings and further for submissions that were inconsistent with the material on record as to the claimant's monthly pay and daily rate thereof.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The respondent to pay the claimant a sum of **Kshs. 356, 695.16** by 01.06.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

2. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 29th March, 2019**.

BYRAM ONGAYA

JUDGE