



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 376 OF 2018

JOSHUA OTIEGO APIYO.....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 2016 as a driver at a monthly salary of Kshs.31, 772.00 as per the exhibited payslips. 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 19.02.2018 he took the motor vehicle to yard and after packing he was summoned by the Human Resource Manager (HRM) who handed him a letter of summary dismissal dated 13.02.2018. It was alleged that he had carried unauthorised persons on the assigned bus. He asked the HRM about the particulars of the alleged unauthorised passengers and she alleged the date in issue was sometimes in December 2017. The claimant protested that there was a manager and a conductor to check the manifest. The HRM then advised the claimant to write a letter and he wrote the letter dated 13.02.2018 in which he denied ever carrying unauthorised passengers because in December 2017 the bus had been full throughout per the manifest. The claimant's letter further stated that his family members had travelled on 04.01.2017 and he had paid for all the 5 seats and respondent's receipts issued in that regard. He pledged that he loved the company and desired to continue in employment to take care of his family. He delivered his letter on 20.02.2018.

3) 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 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.

4) 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 finds that the reason in the letter of summary dismissal was not genuine as per section 43 of the Act and the respondent has failed to discharge the burden of proving that the allegations were true as at the time of dismissal. The Court has also considered the period served and that the claimant desired to continue in employment. He is awarded 12 months' salaries at Kshs.33, 545.00 making **Kshs. 402, 540.00** in compensation for unfair termination under section 49 of the Act.

5) 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.

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

7) 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.

8) 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.45, 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. It is not justified how the amount in the submissions was computed and arrived at.

9) 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 payslips on record show varying deductions for diesel but the particulars were not specifically pleaded and the amount subject of the claim computed and proved as required. The prayer will therefore fail.

10) 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. 457, 330.00** 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