



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 807 OF 2017

BETWEEN

PATRICK NJOGU MWANGI.....CLAIMANT

VERSUS

DANROS KENYA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kagwima Karanja & Company Advocates for the Claimant

Munga Kibanga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant states he was employed by the Respondent Company as a Driver. He was employed in August 2010. He was assigned a consignment of wheat, to deliver to UNGA limited at Nairobi, from Mombasa. He weighed the loaded lorry at the weighbridge at UNGA. He then weighed the empty sacks. He waited, as was the routine, for the empty sacks to be offloaded by UNGA Employees, before he commenced his journey back to Mombasa. The UNGA Employees indicated to the Claimant they had completed offloading.

2. He was about to leave when he was stopped by an Officer from UNGA who demanded to have Claimant's lorry inspected. Upon inspection, some empty sacks were found in the lorry, to Claimant's surprise. When he drove back to Mombasa, he was advised by the Manager at Mombasa that he had to go back to UNGA at Nairobi, and record a statement about the incident. He went back and recorded statement. On 10th August 2016, he reported back at Mombasa. He was told by his Manager he could not have his job back, until UNGA cleared him. He waited. In December 2016, he went back to work to ask whether he had been cleared by UNGA. He was handed a letter of summary dismissal. He was paid Kshs. 33,000 as terminal dues. There was no explanation. He was not heard. No valid reason justifying dismissal was given. He asks the Court to find termination was unfair, and grant to him the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 32,000.
- b) Annual leave pay over a period of 6 years worked, at Kshs. 192,000.
- c) Overtime of 6 years at Kshs. 3,456,000.
- d) Public holidays pay at for 6 years at Kshs. 70,400.
- e) House allowance for 6 years at Kshs. 345,600.
- f) Unpaid rest days at Kshs. 8, 079.

g) 12 months' salary in compensation for unfair termination at Kshs. 614,400.

Total... Kshs. 5,094,400

h) Costs.

i) Interest.

3. The Respondent filed its Statement of Response on 10th November 2017. Its position is that the Claimant was employed by the Respondent on 13th August 2010 as a Driver. He resigned on 3rd April 2014. He was reemployed on 7th May 2014, leaving on 21st November 2016. He was summarily dismissed after being implicated in theft of empty bags. Dismissal was fair and in accordance with the Employment Act 2007. He was paid terminal dues. He acknowledged payment and was issued Certificate of Service. His salary of Kshs. 32,000 was consolidated. He is owed nothing by the Respondent. His Claim is grossly exaggerated and a classic path towards unjust enrichment, the Respondent states. The Respondent prays the Court to dismiss the Claim with costs.

4. Hearing was scheduled for 3rd October 2018. The Court was told by Counsel holding brief for the Counsel for the Respondent, that Counsel for the Respondent was unwell. The information was relayed to Counsel holding brief, by a Clerk to Respondent's Counsel. No medical evidence was availed. Counsel for the Claimant was not told about his Colleague's ailment. Application for adjournment was declined. The Claimant gave his evidence and rested his case. It was ordered that the Respondent's case is closed. Parties were directed to file their Closing Submissions, which they confirmed as filed, at the last mention on 18th December 2018.

5. The Claimant, in his oral evidence, restated the contents of his Pleadings. He retold about the particulars, terms and conditions of employment; the circumstances surrounding his summary dismissal; and urged the Court to find termination was unfair, warranting compensation. In addition, he testified that he merits terminal dues as tabulated in his Claim. He was not an Employee of UNGA Limited. The Respondent had no reason to tie down his employment to the findings of UNGA Limited. The Claimant adopted his Witness Statement and Documents filed with the Statement of Claim, as his evidence.

The Court Finds:-

6. There is no dispute that the Claimant was employed by the Respondent, as a Driver in August 2010. It is agreed he was summarily dismissed by the Respondent, through a letter dated 21st November 2016. The effective date was given to be 5th November 2016. It is alleged by the Respondent that the Claimant resigned on 3rd April 2014 and was reemployed on 7th May 2014.

7. The break in service, if any was negligible. It was a short break of about 1 month. There is no evidence in any case, availed to the Court by the Respondent, establishing that the Claimant resigned and was reemployed. It is fair to conclude that the Claimant worked for a period of approximately 6 years.

8. " *The Claim is grossly exaggerated, and a classic path towards unjust enrichment,*" states the Respondent in its Statement of Response. It is worth exploring the veracity of this statement, before looking at other aspects of the Claim. Is the Claim exaggerated, and aimed at unjust enrichment?

9. The bulk of the Claim is on overtime pay. The Claimant seeks overtime pay of Kshs. 3,456,000. His salary in a month was Kshs. 32,000. In one year, it was Kshs. 384,000. In 6 years, assuming the Claimant earned Kshs. 32,000 from 2010, his total salary would be Kshs. 2,304,000.

10. How would he be entitled to overtime pay more than his entire salary over the period of 6 years worked? Obviously the Claim is exaggerated and a classic path to unjust enrichment, as stated by the Respondent.

11. When a prayer is grossly exaggerated, it affects credibility of the Claimant. The Court has no obligation to look into such a prayer further. It is aimed at an improper motive; it is misleading; and does not assist the Court in achieving its principal objective under the Employment and Labour Relations Court Act. The prayer for overtime is rejected at the outset.

12. The salary paid to the Claimant, going by the salary scale of a Truck Driver under the Wage Orders for respective years, seems to have included house allowance. In October and November 2012 the Claimant for instance earned a gross pay of Kshs. 48,540 and Kshs. 43,540 respectively. There was an element of bonus, which going by the pay slips was paid almost monthly, at a rate almost similar to the monthly salary. To ask for 15% of Kshs. 32,000 from the year 2010, in alleged arrears of house allowance appears to be unpersuasive and exaggerated, although mildly exaggerated, in comparison to the prayer for overtime pay. The prayer is rejected.

13. The prayers for annual leave, public holidays and rest days are likewise unpersuasive. They are not supported in the Pleadings, Documents, Evidence and Submissions of the Claimant. The Record of Journeys exhibited by the Claimant does not support the view that he drove nonstop, 30 days in a month and 365 days a year. He did not work on 10th January 2011; 15th and 16th January 2011; 18th January 2011; 20th January 2011; and 23rd January 2011. The next date he is shown to have resumed duty from 24th January 2011, is 2nd February 2011. This is just a record for January 2011. The Claimant, like other Truck Drivers in the industry, did not work throughout, nonstop. Why does not the Claimant exhibit Record of Journeys showing which holiday or rest days he worked? The prayers for annual leave; public holidays; and rest days are overstated. They are rejected.

14. The remaining prayers are on compensation for unfair termination and notice pay. The Claimant was alleged to have been involved in attempted theft of empty bags. He was assigned a consignment of wheat flour to deliver from Respondent's Mombasa premises, to UNGA

Limited at Nairobi. He was caught ferrying the empty bags after the wheat flour was offloaded. He was caught while on his way back. He was surprised that empty bags were found in the lorry.

15. The letter of summary dismissal states that the Claimant was found carrying empty sacks, without the authorization of UNGA or the Respondent. The Claimant does not deny that he was carrying empty bags, which were not supposed to be in his lorry. His surprise is that he did not know how they happened to be there. He casts aspersions on the Employees of UNGA, suggesting they must have loaded the empty sacks as the Claimant was leaving for Mombasa.

16. Why would the UNGA Employees load the sacks in a vehicle leaving for Mombasa, which the Court understood was in complete control of the Claimant? Assuming the Employees, intended to steal the sacks, would they do it using the Claimant's lorry, without the Claimant's knowledge? The empty sacks in the Claimant's lorry were there with the knowledge of the Claimant.

17. There was valid reason justifying termination under Section 43 and 45 of the Employment Act.

18. The Respondent was justified in summarily dismissing the Claimant under Section 44 [4] of the Employment Act, which is erroneously cited by the Respondent, in the letter of summary dismissal, as '*Section c, e, f and g.*' The prayer for notice pay has no merit.

19. The procedure appears to have been defective. The Claimant was asked by the Respondent to return to UNGA in Nairobi and record a statement. He did so. He returned to Mombasa and was asked to wait for word from UNGA. He waited for some time. In the end he was just told he could not continue working because of his role in attempted theft. He was not asked to show cause by the Respondent. He was not charged after recording his statement with UNGA. There was no disciplinary hearing at Mombasa. Procedural guarantees and protections availed under Sections 41 and 45 of the Employment Act were disregarded. Termination was unfair on account of procedure.

20. Taking into consideration the role played by the Claimant in circumstances leading to termination; and considering that the Claimant had served for about 2 years, 5 months; ***the Court grants him equivalent of 3 months' salary in compensation for unfair termination, at Kshs. 96,000.***

21. ***No order on the costs.***

22. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM IT IS ORDERED: -

a) Termination was based on valid reason, but flawed on procedure.

b) The Respondent shall pay to the Claimant equivalent of 3 months' salary in compensation for unfair termination at Kshs. 96,000.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 22nd day of March 2019.

James Rika

Judge