



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 733 OF 2017**

**PRATASIO NDWIGA KATHURI.....CLAIMANT**

**VS**

**HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Pratasio Ndwiga Kathuri, the Claimant in this case was an employee of Hakika Transport Services Limited, the Respondent herein. He brought this claim following the termination of his employment on 23<sup>rd</sup> February 2016.
2. The claim is as contained in a Memorandum of Claim dated 8<sup>th</sup> September 2017 and filed in court on 11<sup>th</sup> September 2017. The Respondent filed a Response on 9<sup>th</sup> November 2017 to which the Claimant responded on 29<sup>th</sup> November 2017.
3. The matter came up for hearing on 8<sup>th</sup> October 2018 when the Claimant testified on his own behalf. The Respondent called its Human Resource Manager, Rajab Yeri Kombe. The parties subsequently filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent as a truck driver from 2<sup>nd</sup> January 1997 until 23<sup>rd</sup> February 2016 when his employment was terminated. He earned a monthly salary of Kshs. 29,070.
5. The Claimant avers that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 29,070
- b) Leave pay for 19 years.....422,633
- c) Service pay @ 15 days’ pay per completed year.....276,165

- d) 12 months' salary in compensation.....348,840
- e) Overtime worked for 19 years.....4,920,930
- f) Public holidays worked for 19 years.....720,000
- g) Certificate of service
- h) Costs plus interest

**The Respondent's Case**

6. In its Response dated 9<sup>th</sup> November 2017 and filed in court on even date, the Respondent admits having employed the Claimant but denies the claim for unlawful termination. The Respondent avers that the termination of the Claimant's employment was lawful and procedural as the Claimant was informed personally in writing of the allegations against him and was invited to a disciplinary hearing.

7. The Respondent adds that after considering the Claimant's explanation, the Disciplinary Committee decided that the Claimant had engaged in acts of gross misconduct and recommended termination of his employment.

8. The Respondent further states that the management considered the proceedings and recommendations of the Disciplinary Committee and upon reviewing the Claimant's employment records which showed that he had attained the mandatory retirement age, resolved that the Claimant be sent on retirement. The Respondent avers that during the disciplinary hearing, the Claimant had complained of exhaustion.

9. According to the Respondent, the Claimant was duly served with a notice of termination on account of retirement. The Respondent states that the Claimant was a registered member of the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) where all the dues were duly remitted. Further, the Claimant enjoyed all statutory and contractual benefits due to him.

**Findings and Determination**

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

**Unlawful Termination?**

11. On 23<sup>rd</sup> February 2016, the Respondent wrote to the Claimant as follows:

**“RE: NOTICE OF TERMINATION OF SERVICE ON ACCOUNT OF RETIREMENT**

*The Company is in the process of re-structuring its operation to survive the harsh business environment. This necessitates a reduction of its manpower with a view to reducing the Company's overhead cost.*

*In view of the above, the management regret to note that you are among the affected employees by this process.*

*This shall serve as a one-month notice of termination of service with effect from the above date.*

*We thank you for your service while with our company and wish you well in your future endeavor.*

*We shall process your final dues at the end of the notice period.*

*Yours faithfully*

**HAKIKA TRANSPORT SERVICES LIMITED**

*(Signed)*

**ABDULHAKIM ABEID**

**MANAGING DIRECTOR**

12. Although the aforesaid letter is referenced '*Termination of Service on Account of Retirement*' its body refers to reduction of manpower necessitated by a harsh economic environment. Further, in its Response, the Respondent alludes to some misconduct on the part of the Claimant. What then was the actual reason for the termination of the Claimant's employment?

13. The Respondent's Human Resource Manager, Rajab Yeri Kombe testified that work had indeed reduced and the Respondent's management made the decision to retire employees who had reached the retirement age of 60 years. Kombe further testified that the Claimant was a habitual absentee and that prior to being issued with the termination letter, he had missed work for 4 days. The Claimant was therefore subjected to disciplinary proceedings on account of unauthorised absenteeism but the management decided to retire him instead.

14. The Claimant himself admitted that at the time he was issued with the retirement notice, he had attained retirement age. Taking all factors into account and in spite of the apparent mixed signals given by the Respondent, it is evident that the Claimant's employment came to an end on account of retirement. It follows therefore that no case of unfair termination has been proved. The claim for compensation is therefore without basis and is dismissed. As the Claimant was given due notice, he is not entitled to notice pay.

#### **Other Remedies**

15. The Claimant states that during his entire period of employment, he never went on leave. He therefore claims leave pay for 19 years. If it is indeed true that the Claimant never went on leave, his claim thereon would fall under continuing injury within the meaning of Section 90 of the Employment Act and ought to have been brought within one year of cessation.

16. Reckoning the date of cessation as the date of termination of employment, the claim for leave pay is statute barred by dint of Section 90 of the Employment Act. This claim therefore fails and is dismissed. Having been a contributing member of the National Social Security Fund, the Claimant is not entitled to service pay. The claims for overtime and public holidays were not proved and are dismissed.

17. In the end, the Claimant's entire claim fails and is dismissed.

18. Each party will bear their own costs.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF APRIL 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ngonze for the Claimant

Mr. Onyango for the Respondent