



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 721 OF 2017

SHIDA CHAI KADENGE.....CLAIMANT

VS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Shida Chai Kadenge worked for Hakika Transport Services Limited between 10th December 2011 and 18th June 2015. By his claim as contained in a Memorandum of Claim dated 6th September 2017 and filed in court on even date he seeks compensation for unfair termination of employment. The Respondent filed a Response on 9th November 2017 to which the Claimant responded on 29th November 2017.

2. At the trial the Claimant testified on his own behalf and the Respondent called its Security Guard, Mohamed Omar Kombo and Human Resource Manager, Rajab Yeri Kombe. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Tailgate at a monthly salary of Kshs. 21,000 effective 10th December 2011. On 18th June 2015, the Claimant reported on duty as usual only to be issued with a termination letter of even date.

4. The Claimant avers that the termination of his employment was unlawful and unfair in that no justifiable reason was given and he was not afforded an opportunity to be heard. He claims the following:

- a) One month's salary in lieu of notice.....Kshs. 21,000
- b) Leave pay for 4 years.....84,000
- c) Service pay @ 15 days' pay per year.....42,000
- d) 12 months' salary in compensation.....252,000
- e) Overtime
- f) Certificate of service
- g) Costs plus interest

The Respondent's Case

5. In its Response dated 9th November 2017 and filed in court on even date, the Respondent admits having employed the Claimant but denies the allegations of unlawful and unfair termination.

6. The Respondent states that the Claimant, together with other employees of the Respondent, committed acts of gross misconduct by threatening to assault the Respondent's security guards.

7. The Respondent maintains that the termination of the Claimant's employment was lawful and procedural as the Claimant was formally

notified in writing of the allegations against him. He was given an opportunity to be heard after which he was served with a termination notice.

8. The Respondent adds that the Claimant was a registered member of the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) to which remittances on his account were duly made. The Respondent further states that the Claimant was availed all contractual and statutory benefits due to him.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant's employment was terminated by letter dated 18th June 2015 stating as follows:

"Dear Sir,

RE: TERMINATION FROM EMPLOYMENT

Pursuant to the disciplinary committee meeting held on 18th June 2015, the management regrets to inform you that the committee was not convinced of your innocence in the allegations that had been raised against you. You further continued propagating wild allegations against your Superiors. This is in contravention to section 44(4) d of the employment act.

In this regard, the management regrets to terminate your services for having failed in your contractual obligation.

Yours faithfully

Hakika Transport Services Limited

(Signed)

Yeri Kombe

HUMAN RESOURCE MANAGER"

11. Prior to the termination, the Claimant had been issued with a show cause letter dated 25th May 2015, on allegations of threatening the Respondent's security guards. This letter also served as an invitation to the Claimant to appear before the Staff Advisory Committee on 18th June 2015.

12. When a claimant states that their employment was unlawfully and unfairly terminated, the first question the Court must ask is whether the employer had a valid reason for the termination. This is the essence of Section 43 of the Employment Act. The beacons of what constitutes a valid reason for termination of employment have been well laid.

13. In addressing its mind to this issue in ***Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR*** the Court of Appeal adopted the 'range of reasonable responses' test by citing with approval the following excerpt from the Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair."

14. The 'range of reasonable responses test' accords with the standard of proof in internal disciplinary proceedings being, on balance of probability. In making an inquiring into an employer's decision to terminate employment, the Court does not ask what it would have done had it been in the employer's position; what the Court asks is whether on the whole, the employer acted reasonably and if the answer to that question is in the affirmative, the Court should not interfere with the employer's decision.

15. This is an important principle by which an employment court checks itself against taking away the employer's prerogative to keep

discipline at the work place and thus maintain industrial peace.

16. In the instant case, the Claimant was accused of threatening his employer's security guards. One of the guards, Mohamed Omar Kombo told the Court that on 23rd May 2015, he was on duty manning the gate, when the Claimant and other employees of the Respondent warned him and his colleagues, Abraham Mutegi and Francis Wambua against opening the gate on 2nd June 2015, when a strike was planned to take place.

17. Kombo's testimony was corroborated by the Respondent's Human Resource Manager, Rajab Yeri Kombe who was part of the Disciplinary Committee that heard the Claimant's case.

18. Applying the '*range of reasonable responses test*' it seems to me that the Respondent had a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. Further, from the evidence on record, the Claimant was availed due disciplinary procedure as established under Section 41 of the Act.

19. As a result, the Court finds and holds that the Claimant's claims for compensation and notice pay are without basis.

Other Remedies

20. In response to the claim for leave pay, the Respondent made a general statement that the Claimant utilized all his leave days. Under Sections 10 and 74 of the Employment Act, an employer is required to keep leave records. The Respondent did not produce any leave records to support its assertion under this head. The claim for leave pay therefore succeeds and is allowed.

21. Having been a registered member of the National Social Security Fund (NSSF), the Claimant is not entitled to service pay. The claim for overtime was not proved and is dismissed.

22. In the end, I enter judgment in favour of the Claimant as follows:

a) Leave pay for 3 years (21,000/30x21x3).....	Kshs. 44,100
b) Prorata leave for 5 months (21,000/30x1.75x5).....	<u>6,125</u>
Total.....	50,225

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant will have the costs of the case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

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JUDGE

Appearance:

Mr. Ngonze for the Claimant

Mr. Onyango for the Respondent