



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 963 OF 2016

BETWEEN

LIVINGSTONE KINGI YAA.....CLAIMANT

VERSUS

UNIK DRIVING SCHOOL.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kariuki Gathuthi & Company Advocates for the Claimant

H.N. Njiru & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 16th December 2016. He states he was employed by the Respondent Company as a Driving Instructor, in the year 2009. The Respondent, without notice and just cause, terminated the Claimant's contract on 5th August 2016. The Claimant's last salary was Kshs. 15,000 monthly. He reported to work on 5th August 2016. He was told by the Respondent to leave, because he was not wearing the work uniform. He was not paid terminal dues. He was not availed his certificate of service. He prays for Judgment against the Respondent as follows:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. Annual leave over a period of 7 years at Kshs. 73,500.
- c. Salary for 5 days worked in August 2016 at Kshs. 2,500.
- d. Service pay at Kshs. 52,500.
- e. House allowance at Kshs. 2,250.
- f. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 180,000.
- g. Certificate of Service to issue.
- h. Costs.
- i. Interest.

j. Any other relief.

2. The Respondent filed its Statement of Response on 14th February 2017. It true is that the Claimant was employed by the Respondent as a Driving Instructor. He terminated his contract after he was instructed by the Respondent to report to work in proper work attire. The Respondent endeavoured to have the Claimant continue working. There was no reason to terminate his contract. He declined to continue working. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified on 2nd October 2018. The Respondent called 3 Witnesses – Supervisor Stephen Kebabe Manyisa, Mechanic Pius Mutuku Kilonzo, and Director Yusuf Mithwan. Manyisa and Mutuku testified on 2nd October 2018, while Mithwan testified on 19th February 2019 bringing the hearing to a close. The Cause was last mentioned on 22nd March 2019, when Parties confirmed filing of their Submissions.

4. The Claimant testified that he was employed on 10th May 2009. On 30th July 2016, Directors' Son, one Adam, called staff for a meeting. He informed them that the business was under new Management. They were required to apply for their jobs afresh. They demanded to be paid terminal dues before they could enter into fresh contracts. On 1st August 2016, Mithwan called the Claimant to his Office. He admonished the Claimant, alleging that the Claimant had talked too much at the meeting. The Claimant was advised to tread carefully, lest he finds himself jobless.

5. Employees were required to wear uniforms after some days. It was alleged by the Respondent that the Claimant had deliberately refused to wear uniform. The Claimant told his boss that his uniform on the particular date was dirty. The boss told the Claimant, "kwenda maisha!" (Kiswahili for - get lost for good). The Claimant was advised to go back later and collect his terminal dues. He was never paid. He instructed his Advocates to make demand before instigation of the Cause. The Respondent called the Claimant and asked him to withdraw instructions from his Advocates and return to work. The Claimant did not take up the offer because he apprehended the Respondent would find another reason to dismiss him. The Claimant told the Court that the Respondent, contrary to the N.S.S.F Statement of Accounts on record, did not remit contributions. The Claimant was not paid house allowance.

6. On cross-examination, the Claimant told the Court he was working under a written contract. He was not employed twice, at different times, by the Respondent. Employees were issued shirts with Respondent's emblem. 2 shirts were supplied to each Employee. It was not possible to wash the uniform daily, because soap was unaffordable. It is not true that the Claimant refused to wear the uniform. The uniform was important, as it distinguished Instructors from Learners. Kebabe was an Instructor. The Claimant did not know Kebabe to be an Instructor. He never gave instructions to the Claimant. The Claimant was not summoned to explain why he declined to wear the uniform. He was aware about his role as an Instructor. The Claimant did not say he could leave the Respondent and secure employment elsewhere. He did not throw the uniform at his boss. He was never paid cash in lieu of annual leave. He did not leave employment of his own volition. He was aware about a new Driving School which opened business at around the time Claimant left employment.

7. Kebabe testified that he works as a Supervisor for the Respondent. He was employed in 1995, and became Supervisor in 2014. The Claimant worked as an Instructor. He had at one point left the Respondent for a competitor, Rocky Driving School. He returned to the Respondent when Rocky closed. The Claimant was a good Instructor, but prone to defying instructions. The Respondent supplied staff with 2 shirts and 4 t-shirts. The Claimant wore his inconsistently. On the material day, Pius Mutuku, the Mechanic, found the Claimant without his uniform. Mutuku alerted Kebabe, who confirmed that the Claimant did not have his uniform. The Claimant explained that his uniform was dirty. He was carrying a pair in a paper bag. Kebabe asked the Claimant to go and change into his uniform. The Claimant threw the uniform at Kebabe and left. He did not return to work. The Respondent provided housing to staff at its houses in Bombolulu, Mombasa. The Respondent did not dismiss the Claimant, and is ready to have him back, even today. On cross-examination, Kebabe told the Court that the Claimant left to work for Rocky Driving School for about 2 years. The Respondent accepted him, because he was a good Instructor. The Respondent enforced its requirement for the staff to wear uniforms, strictly from 2015. There was no change in Management. Management is today as it was at the time the Claimant left. Kebabe did not give evidence to aid his Employer, and to protect his own job.

8. Mutuku told the Court his role included keeping custody of all car keys. He would distribute the keys to Driving Instructors. The Instructors had to be attired, to be given the keys. On 5th August 2016, the Claimant reported at Respondent's Coast Car Park, without uniform. Mutuku declined to give him the car key. The Claimant went to see the boss. Mutuku did not see the Claimant after this. Mutuku lived in a house which was provided to him by the Respondent. Employees went on annual leave, or were paid cash in lieu of leave. Instructors would return the keys to Mutuku at the end of the day, Mutuku told the Court on cross-examination. The Claimant told Mutuku he did not wish to work on the material day, and instead, wished to see the boss. The Witness was not able to tell if every Employee lived in company residences. He did not have a document showing the Claimant went on annual leave, or received annual leave pay. All other staff wore uniforms.

9. Director Mithwan confirmed he had issued instructions that all Driving Instructors wear uniforms. The Claimant refused to do so. He said his uniform was dirty. Mithwan asked the Claimant to go and change. The Claimant went and returned with a paper bag containing 2 pairs of uniform. He gave the paper bag to Mithwan and said he did not wish to continue working. The Claimant left and did not report back. Mithwan attempted to reach the Claimant and return him to work, as the Claimant was a superb Instructor. The Claimant did not answer Mithwan's calls. Employees were allowed to take annual leave or receive pay in lieu of leave. The Respondent would be glad to have the Claimant back. Cross-examined, Mithwan told the Court he shares directorship of the Respondent with Mohammed and Fizul. He is involved in day-to-day operations. The Claimant was not issued a written contract. The Claimant acted the way he did because he probably had secured another job. He did not give notice to the Respondent. There is no document on record confirming that the Claimant was provided with accommodation by the Respondent. Mithwan affirmed on redirection that the Claimant had earlier left the Respondent for a competitor, returned and was taken in by the Respondent.

The Court Finds:-

10. It is accepted by the Parties that the Claimant worked for the Respondent as a Driving Instructor, between the years 2009 and 2016.

11. His last salary was Kshs. 15,000 monthly.

12. The evidence of Kebabe, Mutuku and Mithwan persuades the Court that the Claimant left employment of his volition on 5th August 2016.

13. The Claimant testified that the Employees were called by the Respondent and told there was a new Management. They asked to be paid their terminal dues before they could enter into fresh contracts with the new Management. The Claimant was alleged to have been the loudest at the meeting, and was subsequently warned by the Respondent that he could be dismissed, if he did not tone down.

15. This evidence has no relevance to the circumstances surrounding Claimant's departure from the Respondent. It is diversionary evidence, aimed at misleading the Court that the Respondent victimized the Claimant, after he was quite vocal in agitating for terminal benefits. There is no evidence that the Claimant was victimized. There is no evidence that a new Management was put in place. There is no evidence that Employees were required to sign new contracts. Employees who gave evidence for the Respondent did not mention anything about new Management and requirement for Employees to sign new contracts. Nothing was asked about this to Respondent's Witnesses on their cross-examination.

16. The truthful, and convincing evidence, is that the Claimant, alongside other Driving Instructors, had been told to adorn work attire. They had been provided 2 shirts and 4 t-shirts. The attire was important to Respondent's business, and distinguished the Instructors from their Learners. The Claimant alone opted to report to work without his attire, alleging it was dirty. He explained default in his evidence, saying he was not able to have clean uniform because soap was unaffordable. If he had 4 shirts and 4 t-shirts, the Court does not see how he could fail to keep clean uniform and wear it throughout the 6 days of work. He simply did not wish to play by the rules, probably because he had secured another job elsewhere, as he had in the past with Rocky Driving School.

17. The Claimant's contract was not terminated by the Respondent. He has even been told by the Respondent, that the Respondent is ready to have him back. He was told this from the inception of this dispute. He declined to go back, giving flimsy reason that the Respondent could still find another ground to terminate his contract, after he reported back. Even if the Court were to find that the Respondent terminated Claimant's contract and was at fault initially, the offer to have the Claimant back, would be sufficient remedy for the wrongdoing. The Claimant did not give a convincing reason, why he did not return to work when recalled. The Respondent cannot be called upon to justify termination in such a case, or be found liable in notice pay and compensation for unfair termination. The prayers for notice pay and compensation for unfair termination are declined.

18. The Respondent paid to the Claimant Kshs. 8,400 and advised he would be told how the rest of his annual leave would be utilized. There is no evidence from the Respondent showing that the Claimant went on leave, or was paid any other amount in annual leave for the period he worked. It was not clear from the evidence given by Kebabe, how long the Claimant was away working for Rocky, before returning to the Respondent. ***In the absence of documents contradicting the Claimant on his claim for annual leave, the Court shall allow his prayer for annual leave pay, over a period of 7 years, at Kshs. 84,807, less Kshs, 8,400 paid = Kshs. 76,407.***

19. There is no evidence from the Claimant, to support his prayer for service pay. He did not show that his N.S.S.F account was dormant, to justify service pay.

20. His prayer for a sum of Kshs. 2,250 in house allowance lacks support. How did he work out an amount of Kshs. 2,250 in house allowance? What period is the prayer based on? There was evidence from the Respondent that it offers accommodation to its staff at Bombolulu. The Claimant did not show that he was denied accommodation or housing allowance by the Respondent. The amount of Kshs. 2,250 pleaded as house allowance is not based on a specific period.

21. **Certificate of Service to issue.**

22. **No order on the costs.**

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

IN SUM, IT IS ORDERED: -

a. The Respondent shall pay to the Claimant pay in lieu of annual leave at Kshs. 76,407.

b. Certificate of Service to issue.

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 14th day of June 2019.

James Rika

Judge