



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 656 OF 2015

JOSEPH ISICHE SIKUKU.....1ST CLAIMANT

ELIUD ANGONG AKIFUDE.....2ND CLAIMANT

OREMBO EDWARD GODFREY SHITEMI.....3RD CLAIMANT

VS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 1st September 2015 and filed in court on 2nd September 2015, the Claimants sued the Respondent for wrongful and unfair dismissal. The Respondent filed a Response on 27th June 2016.

2. At the trial, the 1st Claimant, Joseph Isiche Sikuku testified on his own behalf and on behalf of his co-claimants. Rajab Yeri Kombe testified on behalf of the Respondent. The parties further filed written submissions.

The Claimants' Case

3. The Claimants state that they were employed by the Respondent on diverse dates between 22nd October 2014 and 27th January 2015, in the position of Heavy Commercial Driver. They were all dismissed on 24th July 2015, on allegations of absenteeism from work.

4. The Claimants further state that they were initially paid a daily rate of Kshs. 1,065 which was later reduced to Kshs. 504.

5. The Claimants' case is that their dismissal was wrongful and unfair, in that no proper reason was given and they were not given an opportunity to be heard. Their claim is as follows:

1st Claimant: Joseph Isiche Sikuku

- a) One month's salary in lieu of notice.....Kshs. 30,942.60
- b) Leave pay for 9 months.....18,744.20
- c) 12 months' salary in compensation.....371,311.20

2nd Claimant: Eliud Angong Akifude

- a) One month's salary in lieu of notice.....Kshs. 30,942.60
- b) Leave pay for 6 months.....12,496.05
- c) 12 months' salary in compensation.....371,311.20

3rd Claimant: Orembo Edward Godfrey Eshitemi

- a) One month's salary in lieu of notice.....Kshs. 30,942.60
- b) Leave pay for 9 months.....18,744.20
- c) 12 months' salary in compensation.....371,311.20

6. The Claimants also ask for costs plus interest.

The Respondent's Case

7. In its Response dated 27th June 2016 and filed in court on the same date, the Respondent denies unlawfully dismissing the Claimants. The Respondent states that the Claimants, who were lorry drivers failed to report to work without any lawful cause. The Respondent adds that the Claimants were served with notices to show cause and their services eventually terminated at the conclusion of the disciplinary proceedings.

8. Further, the Respondent states that the Claimants have no known claim in law and are non-suited by dint of Section 45(3) of the Employment Act.

Findings and Determination

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

- a) Whether the Claimants have made out a case of wrongful dismissal;
- b) Whether the Claimants are entitled to the remedies sought.

Wrongful Dismissal?

10. On 24th July 2015, the Respondent wrote to the Claimants as follows:

“Dear Sir,

RE: TERMINATION FROM EMPLOYMENT

It has been observed from the attendance records that you have been remaining absent from duty without any lawful cause which is in contravention to the Company Policy and regulations.

In this regard, the management regrets to inform you that you have been relieved of your duties in accordance with section 44(4) of the Employment act.

Yours faithfully

Hakika Transport Services Limited.

(Signed)

Yeri Kombe

HUMAN RESOURCE MANAGER”

11. According to these letters, the reason for the Claimants' dismissal was unauthorised absenteeism from duty. Such conduct, if proved would amount to gross misconduct leading to summary dismissal. The question before the Court is whether the accusations of absenteeism were proved.

12. It is now well settled that establishment of a valid reason for termination of employment as required under Section 43 of the Employment Act, 2007 is achieved at the shop floor, before the matter comes to court. In this regard, the employer must show that the affected employee was made aware of the grounds on which termination of employment was being considered.

13. The Respondent produced a record of disciplinary proceedings held on 23rd July 2015, a day before the Claimants were dismissed. In his testimony before the Court, the 1st Claimant, Joseph Isiche Sikuku stated that on 24th July 2015, upon instructions by their supervisor, he and his co-claimants went to the Human Resource Office. It is at this point when they were accused of absenteeism.

14. As held by this Court in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* the

procedural fairness requirements of Section 41 of the Employment Act dictate that an employee facing disciplinary action is entitled to clear prior information on the exact charges against them, together with adequate time to prepare and present their defence.

15. In the present case, there was no evidence that the Claimants even knew why they had been summoned to the Human Resource Office. They were not aware of the charges facing them and evidently, they had no time to prepare their defence.

16. The Court therefore finds and holds that the Respondent failed to meet the disciplinary threshold set in law and the termination of the Claimants' employment was substantively and procedurally unfair and they are entitled to compensation.

17. Both in its response and final submissions, the Respondent raises the length of the Claimants' employment, which lasted less than a year each, as a statutory bar to their claim. In pursuing this point, the Respondent relies on Section 45(3) of the Employment Act which appears to lock out employees who have not worked for at least 13 months from bringing an action for unfair termination of employment. The only thing I will say on this issue is that I am persuaded by the decision by **Lenaola J** (as he then was) in **Samuel G. Momanyi v Attorney General & another [2012] eKLR** where Section 45(3) was declared unconstitutional.

Remedies

18. That settled, I now award each of the Claimants two (2) months' salary in compensation for wrongful dismissal. In making this award, I have considered the Claimants' short stint in the Respondent's employment but also the Respondent's conduct in bringing their employment to an end.

19. I further award the Claimants one (1) month's salary in lieu of notice as well as prorata leave for the period worked.

20. In the end, I enter judgment in favour of the Claimants as follows:

1st Claimant: Joseph Isiche Sikuku

a) 2 months' salary in compensation.....	Kshs. 63,900
b) 1 month's salary in lieu of notice.....	31,950
c) Leave pay for 9 months (1,065x1.75x9).....	<u>16,744</u>
Total.....	112,594

2nd Claimant: Eliud Angong Akifude

a) 2 months' salary in compensation.....	Kshs. 63,900
b) 1 month's salary in lieu of notice.....	31,950
c) Leave pay for 6 months (1,065x1.75x6).....	<u>11,183</u>
Total.....	107,033

3rd Claimant: Orembo Edward Godfrey Eshitemi

a) 2 months' salary in compensation.....	Kshs. 63,900
b) 1 month's salary in lieu of notice.....	31,950
d) Leave pay for 9 months (1,065x1.75x9).....	<u>16,744</u>
Total.....	112,594

21. These amounts will attract interest at court rates from the date of judgment until payment in full.

22. The Claimants will have the costs of the case.

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2019

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JUDGE

Appearance:

Miss Mboku for the Claimants

Mr. Onyango for the Respondent