



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

CAUSE NUMBER 122 OF 2017

[Consolidated with No. 123, 124, 125 and 126 all of 2017]

BETWEEN

1. MWONA MWAIWE MWAONO [122/2017]

2. ALPHONSE KARISA NDEGE [123/2017]

3. HAMED KHALIFAN MBETTO [124/2017]

4. KARISA KITSAO NGAO [125/ 2017]

5. KILUNDA MUSYOKA MUNG'ATU [126/2017].....CLAIMANTS

VERSUS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Tolo & Company Associates, Advocates for the Claimants

Isaac Onyango & Company, Advocates for the Respondent

JUDGMENT

1. The Claimants filed separate Statements of Claim, on 14th February 2017. The Claims were consolidated, by an order of the Court recorded on 20th November 2018. Cause No. 122 of 2017 was designated as the mother file.

2. The Respondent filed its Memoranda of Appearance in all the files on 9th March 2017. There are documents indicated to have been filed by the Respondent, on 26th March 2016. The record does not contain Statements of Response.

3. Claimants No. 1, 3, and 4 gave evidence on 20th November 2018. No. 2 and 5 did so on 11th February 2019. Human Resource Manager, James Kombe, gave evidence for the Respondent on 19th July 2019, ending the hearing. The Claims were last mentioned on 19th September 2019, when the Parties confirmed the filing of their Submissions.

4. The Claimants state they were employed by the Respondent on various dates, as Drivers. They were with retired, with the exception of the 4th Claimant, on account of age, in October/ December 2016. Their prayers include:-

- 1 month salary in lieu of notice.
- Annual leave for the years worked.

- House allowance for the years worked.
- Refund of N.S.S.F deductions made but not remitted.
- Public holiday pay for the years worked.
- Underpayment of salary.
- Gratuity at the rate of 16 days' salary for each complete year of service.
- Compensation for unfair termination.
- Any further orders.

5. They seek in total, under the above heads, Kshs. 1,932,330, Kshs. 1,464,135, Kshs. 940,548, Kshs. 1,532,550, and Kshs. 1,720,455 respectively.

6. The Claimants confirmed in their oral evidence that they worked as Drivers for the Respondent. They were denied employment benefits claimed while in service, and on termination. They were summoned before Respondent's Staff Advisory Committee, and told they should leave on retirement. They were told that National Transport Authority had advised Truck Drivers should retire at about the age of 56 years. They were not shown any regulations supporting this retirement age. It was not in any contractual clause. The 4th Claimant left on disciplinary ground. He had been moved from the Operations Department to Breakdown Section. He worked at Breakdown for a few days. He was summoned by the Respondent on 11th September 2016 and informed he was insubordinate. He was dismissed on 15th September 2016.

7. Cross-examined, the Claimants told the Court they did not oppose retirement, but wished to be paid their rightful dues. They were underpaid salaries while in service. The 1st Claimant told the Court his pay slip for August 2016, shows he earned a salary of Kshs. 19,000, in the 1st fortnight. In the whole month of August 2016, it is shown he received Kshs. 41,000. The applicable legal notice stated he was entitled to a minimum of Kshs. 24,000. He was underpaid. He was paid Kshs. 32,000 on termination, in notice. The 3rd Claimant told the Court he was retired at 57 years. He agreed that for safety reasons, trucking industry requires younger Drivers. His pay depended on the number of trips he was able to make in a day. The 5th Claimant was 60 years on retirement. He was paid a salary of Kshs. 29,000 in the month of February 2016, which was in excess of the minimum wage applicable to his position. The 4th Claimant told the Court on cross-examination that he was told by his Supervisor to drive to the Port and tow a vehicle. It was alleged he declined instructions. He was called before a panel convened by the Respondent at Jomvu area. He was heard. Redirected, he explained that he was being asked to tow a vehicle whose Driver was intoxicated. He was not warned or suspended. He was not given a chance to appeal.

8. James Kombe told the Court that 4 Claimants reached the age of retirement. They were called before the Staff Advisory Committee and advised they had to leave on retirement. They were paid terminal benefits. They were not underpaid salaries. They were paid Kshs. 1,000 per trip from the Port to various Depots within Mombasa. They were paid a standing wage of Kshs. 600 per day. Daily rate factored in housing element. The 4th Claimant refused to work on the Breakdown as instructed, expressing his preference for trucking. His duties were not restricted to trucking.

9. Cross-examined, Kombe told the Court that all Claimants, except the 4th Claimant, retired on the ground of advanced years. The retired Claimants worked for as many as 7 to 20 years. The Respondent had a retirement policy. It was not available to the Court. 5th Claimant was 60 years, while the 3rd Claimant was 66 years. They were heard before the Staff Advisory Committee. They were paid 1 month salary in lieu. The 4th Claimant refused to work.

The Court Finds:-

10. The Claimants were employed by the Respondent for considerable number of years, as Truck Drivers. The 4th Claimant left employment in September 2016 on the allegation of insubordination, while others left in October/ December of the same year, on the ground that they had attained retirement age.

11. The Respondent was not able to produce any collective or individual contract, wage instrument, policy, or regulations indicating that the Claimants were subject to any mandatory retirement age. There is no mandatory retirement age applicable to the private sector. This is left for the Employers and Employees in the sector to regulate.

12. There was also no evidence of age availed to the Court, as would enable the Court to say that even barring the documents mentioned at paragraph 11 of this Judgment, the Respondent acted in all circumstances, reasonably by retiring the 4 Claimants.

13. In the absence of evidence establishing that there was a mandatory retirement age at the Respondent's workplace, and in the absence of evidence showing that the 4 Claimants had reached such retirement age, the Respondent cannot have shown valid reason for terminating the 4 Claimants' contracts, under Section 43 and 45 of the Employment Act. Termination of the 4 Claimants' respective contracts of employment was unfair for want of justification.

14. They were called before the Staff Advisory Committee and advised about retirement. They were given adequate opportunity to question the decision. The Respondent observed the minimum standards of procedural fairness. Termination on account of retirement in any event, does not call for hearing. All the Employer is required to show, is that mandatory retirement age is prescribed in the contract, and that the Employee has attained mandatory retirement age.

15. The 4th Claimant was faced with the employment offence of insubordination. He was asked to move temporarily to breakdown services, but declined, preferring to stay on as a Truck Driver. He alleged that he was being asked to tow a Driver who was intoxicated, which seems

to the Court to be an admission that he declined to tow the other vehicle as instructed. This amounted to insubordination. On procedure, the 4th Claimant told the Court that he was called before a disciplinary panel. He was heard. Redirected, he attempted to fault the procedure stating he was not heard on appeal. He did not produce any letter of appeal, or show that it was mandatory to hear him on appeal.

16. The Court is satisfied that the 4th Claimant's contract was terminated for valid reason, and procedure was fair.

17. All the Claimants were paid notice, regardless of the mode of their exit. They have not justified their prayer for notice pay.

18. They were paid a standing wage of Kshs. 610 daily, which would include the housing element. They were over and above, paid Kshs. 1,000 per trip made from the Port to various Inland Depots in Mombasa. Documents exhibited by the Respondent confirm the monthly salaries depended on the number of trips made. On more than one occasion, the monthly salary exceeded the minimum wage prescribed under the various legal notices. The structure of pay availed to the Claimants was unique to their industry, and did not result in underpayment of salaries. They earned as much as Kshs. 41,400 in a single month, under this pay structure. The prayer for underpayment is declined.

19. The records exhibited by the Respondent also refute the prayers for annual leave and public holiday pay. The Claimants were not required to work in continuity. Records show on many occasions, they made zero trips outside the Port. They had time to themselves. They were paid fortnightly, and the pay was varied, depending on the number of trips. The Court is not able to say that the Claimants worked from the start to the end of the month without breaks, or that they worked on all public holidays, throughout the years. They had flexibility on hours of work, as reflected in their fluctuating rates of pay shown in the pay slips.

20. Whereas Employees are entitled to refund of monies wrongly deducted from their monthly dues, under the Employment Act, the Court does not think statutory dues are meant, even if not remitted to the respective statutory bodies, to revert to Employees. They ought to be paid to the respective statutory bodies, and enforcement of remittance obligation pursued under the mechanisms given under the Acts of Parliament through which these statutory bodies are created. The Claimants have not shown why they should have back statutory dues meant to be in their accounts with the N.S.S.F. They should pursue remittance with the N.S.S.F.

21. No evidence was adduced establishing the prayers for gratuity. All Claimants were subscribed to N.S.S.F with contributions actively made. They submit that they should be paid gratuity owing to their long service and advanced years. They did not supply the Court with any material establishing that gratuity is payable on account of advanced years and long service.

22. In all, the Court is satisfied that the Claim by the 4th Claimant must fail in its entirety. The Claims by the 1st, 2nd, 3rd, and 5th Claimants are allowed in the following terms:-

a) It is declared that termination of the 1st, 2nd, 3rd and 5th Claimants' contracts was unfair.

b) The Respondent shall pay the particular Claimants equivalent of their last 4 months' salary each, in compensation for unfair termination.

c) No order on the costs.

Dated and delivered at Mombasa this 25th day of October, 2019.

James Rika

Judge