



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 668 OF 2016

BETWEEN

MWANDUKA MUNGUTI.....CLAIMANT

VERSUS

A TO Z TRANSPORTERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company, Advocates for the Claimant

Azmina H. Amarshi Advocate for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 14th September 2016. He states, he was employed by the Respondent on 5th May 2013, as a Heavy Commercial Truck Driver, earning a monthly salary of Kshs. 29,220.
2. He states, he was assigned an old Truck, registration KAS 030 to deliver consignment from Mombasa to Nairobi. On his way back, between a place called Makindu, and another place called Mbui Nzao, the Truck's middle axial got dislodged. The middle tyres rolled off, and got lost. The Claimant realized he had lost the tyres, upon reaching Mbui Nzao.
3. On reaching Mombasa, the Respondent made an unreasonable demand upon the Claimant, asking the Claimant to return the original tyres which were lost, if he wished to continue working.
4. The Claimant was not able to meet this unreasonable demand, and on 20th June 2016, he was dismissed by the Respondent.
5. He states, no notice and valid reason was given to justify the decision. He prays for Judgment against the Respondent in the following terms:-
 - a) Notice at Kshs. 29,220.
 - b) Salary of 20 days worked in June 2016 at Kshs. 22,462.
 - c) Service pay at 15 days' salary for 2 years and 1 month at Kshs. 34,839.
 - d) Overtime pay from 5th January 2015 to 15th July 2015 at Kshs. 800 daily, totaling Kshs. 32,000.
 - e) 12 months' salary in compensation for unfair termination at Kshs. 350,161.

f) Refund of Kshs. 2,000 incurred in repairing tyres on 31st May 2014.

Total...Kshs. 451,161.

g) Costs.

h) Certificate of Service to issue.

6. The Respondent filed its Statement of Response on 29th September 2016. It is conceded that the Claimant was employed by the Respondent. He was dismissed on account of gross misconduct. He committed, or was reasonably suspected of having committed, a criminal offence against, or to the detriment, of the Respondent. He was given notification and hearing on 20th June 2016. He was fairly dismissed. He is not entitled to compensation and terminal benefits sought.

7. The Claimant confirmed in his oral evidence, given on 20th September 2017, his terms and conditions of employment, restating also, the circumstances leading to his dismissal. He called Respondent's Foreman, Hassan Kombo, and informed him the tyres had come off. Hassan advised the Claimant to look for the tyres. He later, at daybreak, was advised by Hassan to fix the axle and travel to Mombasa. It cost the Claimant about Kshs. 2,000 to fix this. On his way back he encountered another Truck belonging to the Respondent, with a similar problem.

8. He was given some days off on arriving at Mombasa, to attend to his Child who was unwell. He was called while away and told by the Respondent he must return Respondent's tyres. He was given 2 days to comply. If he did not, he would be dismissed.

9. He returned to Mbui Nzao to find the tyres. He was confronted by young men there, who threatened to beat the Claimant. They told him he must come with a letter from the Police, allowing him to search for the tyres in anyone's house. He reported to the Police at Makindu, who offered no assistance. He went back to Mombasa without the tyres. He was given a computation of terminal dues by the Respondent, and dismissed. He was offered a cheque of Kshs. 25,000. He rejected the cheque. Termination was unfair.

10. There was no letter to show cause why the Claimant should not be disciplined, issued to the Claimant. A fellow Driver called Mwangi attended disciplinary hearing. Others including Onyango from the Workshop, Aboubacar a Clerk, Shop Steward, were present. Human Resource Officer Lewis and the Foreman were also present.

11. The Claimant gave further evidence on 20th July 2019. He denied that he was a member of any Trade Union.

12. Cross-examined, the Claimant told the Court, he worked for the Respondent for 3 years. He was a Driver elsewhere from 2004, and was experienced. He noticed 2 tyres were missing at Mbui Nzao. There was no security at the point where they were lost. When he stopped, he called the Foreman. It was around 3 a.m. when the tyres got lost. When he attempted to look for the tyres, some intruders threatened to steal from the Truck. The Foreman advised the Claimant to call him the following day, because the place the Claimant had stalled was insecure.

13. The Foreman advised the Claimant the following day, to look for a Mechanic to fix the axle. The Foreman sent money for repair to the Claimant. Mwangi, a Driver of the Respondent found the Claimant at the spot while repair was going on. It is not true as alleged by Mwangi, that he found persons who did not look like Mechanics, in the company of the Claimant. Mwangi did not ask the Claimant why he had stopped. The Claimant did not discuss about the lost tyres with Driver Mwangi. Mwangi was in a hurry, transporting his own cargo.

14. It is not true that the Claimant had a conversation on the incident with Mwangi, and told Mwangi not to disclose the conversation for fear of dismissal. The Truck was inspected after offloading. It is not true that it was concluded that the tyres were systematically removed, and did not fall off accidentally, as stated by the Claimant. The Claimant was not present when inspection was carried out. He went back looking for the tyres at Mbui Nzao. The locals confronted him, saying the Claimant had no right to go into their farms. The Claimant sought the assistance of the Police. He did not receive assistance. Redirected, the Claimant told the Court that the tyres were not methodically unfastened. There was no letter inviting the Claimant to a disciplinary hearing. Mwangi did not represent the Claimant at the meeting.

15. The Respondent called its Supervisor Muhammed Hussein Kana who testified on 10th June 2019. It was indicated that the Respondent would call 3 more Witnesses. They were scheduled to be heard on 9th July 2019. The Advocate for the Respondent sent another Advocate to Court on 9th July 2019, seeking to adjourn the hearing, on the ground that she was attending a music concert in Nakuru. The Court declined adjournment and closed the hearing. The matter was last mentioned on 20th September 2019 when the Parties confirmed filing of Submissions.

16. Kana told the Court he worked as a Supervisor. The Claimant was a Truck Driver. On 11th June 2016, the Truck driven by the Claimant was inspected. It was found that the lost tyres did not just fall off; they were systematically unfastened. If they had fallen off on their own, the point from which they fell would have been damaged. Nothing was broken. Everything was systematically opened. All other Drivers at the Workshop held this view. The Claimant just disappeared after the incident.

17. Cross-examined, Kana told the Court he studied up to Form 4. He did not have any training in motor vehicle mechanics. The tyres came off. The axle remained in place. They could not fall off without interference. Kana did not have a job card with respect to the incident, explaining the circumstances in which the incident took place. The Respondent suffered loss of the tyres. No photos were taken from the incident. It was not due to Respondent's incompetence that the tyres were lost. Kana did not know if the Claimant was paid terminal dues. Redirected, Kana testified that the job card was retained for internal records. Photos were not taken because the Respondent did not anticipate it would be sued.

The Court Finds:-

18. The Claimant was employed by the Respondent, a transportation business, as a Heavy Commercial Truck Driver on 5th May 2013. He was issued a letter of confirmation a year later, effective 1st April 2014.

19. In its Advocate's letter dated 26th July 2016, in response to demand letter from Claimant's Advocates, the Respondent concedes the Claimant was summarily dismissed by the Respondent. This was after a 3 day ultimatum issued to the Claimant to return lost tyres to the Respondent, expired. The date of summary dismissal is given by both Parties as 20th June 2016.

20. The Claimant was on a return journey when he lost 2 tyres along Mombasa- Nairobi highway, between Makindu and Mbui Nzao. Parties differ on how the loss occurred.

21. The Claimant states that the middle axial got dislodged and the tyres unfastened, rolling off to some unknown destination along the highway.

22. He made efforts to recover the tyres, but was prevented from doing so by adverse security situation. He realized the tyres were missing while at Mbui Nzao, in the early hours of 11th June 2016.

23. He called the Foreman at daybreak, who advised the Claimant to have the axle repaired, and the Claimant to proceed with his journey.

24. While at Mbui Nzao repairing the Truck, the Claimant was found there by a colleague called Mwangi, who was on his own journey along the highway, transporting cargo. It is conceded there was some sort of conversation between the 2, but strangely, the Claimant told the Court that Mwangi did not enquire why the Claimant had stopped, and the 2 Drivers did not talk about the lost tyres.

25. This is where the Claimant went wrong in his narrative, and blew the lid off his activities at Mbui Nzao. Is it believable that Mwangi did not discuss the loss of tyres with the Claimant? The Court does not think so.

26. The Claimant was hiding something. He was not truthful in his account about how the tyres got lost. The narrative told by the Claimant became weakened further, by the inspection carried out at Respondent's Workshop, once the Claimant was in Mombasa. It was the view of Respondent's Mechanics and other knowledgeable Drivers, that the tyres were systematically unfastened.

27. It was not possible for the Claimant to recover the tyres on the night they were unfastened, or in his subsequent forays into Mbui Nzao. He was aware the tyres did not just fall off, but were systematically removed. Why they were removed was for the Claimant to say. It also bears mention, that the act of the Claimant in taking time off, ostensibly to attend to his ailing Child in his rural home, immediately he returned to Mombasa, casts doubt in the mind of the Court, on the veracity of the Claimant's explanation that the tyres fell off innocently and got lost, without any human intervention. This temporary withdrawal, from the workplace to the rural home, was not consistent with the conduct of an innocent man.

28. The Respondent had reasonable and sufficient grounds to suspect that the Claimant had committed a criminal offence against, or to the substantial detriment of the Respondent, or the Respondent's property. There was valid ground to warrant summary dismissal under Section 44 [4] [g] and valid reason to justify termination of the Claimant's contract, under Sections 43 and 45 of the Employment Act 2007.

29. On procedure the Claimant disclosed he was heard in the presence of the Shop Steward. He told the Court, Mwangi was not his representative of choice at the disciplinary hearing. The Claimant distanced himself from the Shop Steward, asserting that he was not a member of their Union. He was not invited to the disciplinary hearing.

30. The Court does not see any significant departure from the minimum statutory standards of fairness under Sections 41 and 45 of the Employment Act. The contract which the Claimant signed on 1st April 2014, indicates at clause 3, that the CBA in place applied to the Claimant. While there is no evidence that he paid subscription fees to any Union, he was a beneficiary under the CBA. He was unionisable, if not unionized, and the Shop Steward attended the disciplinary hearing by dint of the Claimant being a beneficiary under the CBA. The Shop Steward was not a stranger in the room, but a representative of unionisable and unionized Employees, at the workplace. The Claimant did not in any case protest the presence of the Shop Steward, or demand to have another representative, other than the Shop Steward. The Claimant was aware of the specific allegations against him at the time he attended the hearing. Having attended, it is futile to argue that he was not invited to attend.

31. The Claimant has not shown that he did excess hours at any time, to merit overtime pay. He did not bring his prayer for overtime within clause 3 of his contract. The Respondent has shown an employment offence was committed, which would justify summary dismissal. The prayer for notice pay has no merit. Termination was fair and compensation is not merited. The Claimant submits that he served the Respondent diligently, for more than 2 years and is therefore entitled to service pay of 2 years and 1 month. The pay slips on record show the Claimant was actively subscribed to the N.S.S.F. N.S.S.F Statements show active subscription for 2014-2016. The prayer for service pay is not backed by evidence.

32. It is common ground that the Claimant worked up to 20th June 2016. ***He merits salary for 20 days worked, which the Court allows at Kshs. 22, 476.***

33. ***Certificate of Service to issue.***

34. ***No order on the costs.***

35. ***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 salary for 20 days worked in June 2016, at Kshs. 22,476.*
- 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 11th day of October 2019

James Rika

Judge