



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 624 OF 2017

BETWEEN

JEFWA KAZUNGU NDIRO.....CLAIMANT

VERSUS

GLOBAL TEA & COMMODITIES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

C.O Tolo & Company Advocates, for the Claimant.

Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 7th August 2017. He avers, he was employed by the Respondent as a Driver in July 2008, on a monthly salary of Kshs. 28,990. He was assigned a smaller vehicle on 21st September 2014. Later the same day, he was advised by the Human Resource Manager to go home, until he was recalled by the Human Resource Manager. He waited for long without recall. When he attempted to return, he was locked out by the Security Guard at the gate. He considered his contract to have been terminated unfairly by the Respondent.

2. He never went on annual leave. He was not paid house allowance. N.S.S.F contributions were never remitted for 2 years.

3. He prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 28,990.
- b) Leave allowance over a period of 6 years at Kshs. 173,940.
- c) House allowance for 6 years at Kshs. 326,137.
- d) Service pay for the period between July 2008 and April 2011, at Kshs. 33,450.
- e) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 347,880.

Total...Kshs. 910,397

f) Costs.

g) Interest.

- h) Declaration that termination was unfair.
- i) Certificate of Service to issue.
- j) Any other suitable relief.

4. The Respondent filed its Statement of Response on 20th November 2017. Its position is that the Claimant was employed by the Respondent as a Driver, on casual basis, earning Kshs. 1,261 daily, which was paid weekly. He was assigned duty on 21st September 2014. He drove dangerously and nearly caused injuries to his colleagues. The Director instructed the Human Resource Manager to investigate. The Claimant was instructed to avail himself for investigation on 22nd September 2014. He did not do so, although he was at work both on 22nd and 23rd September 2014. The Respondent did not terminate Claimant's contract. He utilized his annual leave. His daily rate included housing element. He was a contributor to the N.S.S.F and not entitled to service pay. He left employment of his own volition and does not merit compensation and notice pay.

5. Parties gave their respective evidence and closed the hearing on 22nd July 2019. The Claimant gave evidence as did Respondent's Group Human Resource Manager Ochieng' Moses Opiyo. The Cause was last mentioned in Court on 23rd September 2019 when Parties confirmed the filing of their Closing Submissions.

6. The Claimant adopted as his evidence, his Statement of Witness and Documents on record. He restated his employment history, terms and conditions of employment with the Respondent. He narrated the events leading to termination. The Respondent had his cell phone number. It did not call him, and invite him to any disciplinary hearing. He was not notified on termination. He never went on annual leave. He was not paid house allowance. He was not subscribed to the N.S.S.F.

7. Cross-examined, he stated that he was asked to leave the place of work by the Respondent, on 21st September 2014. He did not drive recklessly. He was asked to return the car key. He did not go back after 21st September 2014. He was paid weekly. N.S.S.F contribution was not made from 2008. He could not remember which year he was registered with the N.S.S.F. Records show it was in the year 2011. He does not plead refund of unremitted N.S.S.F contributions. On redirection, the Claimant told the Court he was asked by the Human Resource Manager to hand over the car key on 21st September 2014. He was advised there was no more work.

8. Opiyo denied that he terminated Claimant's contract. 20th September 2014 was a Saturday. Opiyo did not work on this date, because he subscribes to the Seventh Day Adventist faith, and spent Saturday in worship. The Director called Opiyo informing him that the Claimant had driven the Canter Van assigned to him recklessly, knocking another Employee. Opiyo left the Church and went to the workplace. He summoned the Claimant who gave his side of the story. Opiyo advised the Claimant to report to the office on Monday, 22nd September 2014. He did not report. Biometric log shows he clocked in on 22nd September 2014, but did not avail himself to the Human Resource Manager. He is similarly shown to have been present on 23rd September 2014. He was paid on both occasions. After this he never reported for duty. He was employed by the Respondent on 1st March 2011 and registered with the N.S.S.F on 10th April 2011. His first contribution was remitted in May 2011. Opiyo later learnt that the Claimant was employed by another Company called Cargill Limited as a Driver.

9. Cross-examined, Opiyo told the Court he was employed in March 2013. The Claimant was employed in 2011. There was no letter of employment issued the Claimant. He left voluntarily. Opiyo was not able to reach the Claimant after he left. The Claimant's new Employer did not allow Opiyo to reach the Claimant. It was not possible to hold a disciplinary hearing. The Respondent intended to warn the Claimant if he had answered the summons, on 22nd September 2014. Opiyo did not have Claimant's leave records. Daily rate included housing element. He clocked in on 22nd and 23rd September 2014. Payment was processed automatically, based on the biometric register. Redirected, Opiyo told the Court that the Claimant was paid a consolidated rate.

The Court Finds:-

10. The Claimant was employed by the Respondent as a Driver. He states he was employed in July 2008. The Respondent states he was employed on 1st March 2011.

11. The oral evidence by the Claimant on the date of employment was discounted by a document exhibited by both Parties. This is the N.S.S.F Provisional Member's Statement of Account. The date of employment is indicated in black and white, as 1st March 2011.

12. The Respondent has satisfied the Court, as required under Section 10 [7] of the Employment Act, through documentary evidence, that the Claimant was employed on 1st March 2011. The oral statement by the Claimant, that he was employed in July 2008 cannot stand. It is notable that in his Statement of Claim, Witness Statement, and Evidence in Court, the Claimant did not specify the actual date of employment, stating broadly that he was employed in July 2008. The Court adopts 1st March 2011 as the date of employment.

13. Consequently, the prayer for service pay, based on the period July 2008 to April 2011, must be rejected from the outset.

14. The Claimant was not employed as a Casual as pleaded by the Respondent. Appendix 2 of the Respondent's documents is a payroll. The payroll has a semi-title, indicating – "Payroll: Permanent Employee Attendance Log." The document relates to the year 2014. The Respondent exhibits another document, appendix 2, under the title "Casual Employees' Weekly Payment List." The document is not signed by the Claimant and is obviously contradicted by the payroll in its description of the Claimant's employment status. The Court is satisfied that the Claimant was a regular Employee, who worked from 2011 to 2014 for the Respondent. His normal rate of pay is shown in the payroll at Kshs. 1,062 daily. There is no evidence to support his assertion that he earned Kshs. 1,115 daily. The amount of Kshs. 1,261 mentioned by the Respondent included variable overtime pay. The correct daily rate was Kshs. 1,062.

15. The explanation by the Respondent that it did not terminate Claimant's contract was not believable. If he was summoned to the Human Resource Manager's Office on 22nd September 2014, and clocked in on this date, why did the Respondent not get hold of the Employee and take him through a disciplinary process? It was the position of Opiyo that the Claimant was at the workplace on 22nd and 23rd September 2014. Opiyo told the Court he could not have a disciplinary hearing, because the Claimant was somehow kept from the reach of the Respondent by his purported new Employer.

16. Opiyo told the Court that the Respondent intended to warn the Claimant if he had answered the summons. Why did the Respondent not write a warning letter and advise the Claimant to continue working, if dismissal was not contemplated?

17. The Respondent alluded to an employment offence- that the Claimant drove recklessly, nearly knocking down his colleagues. There was no letter to show cause, issued to the Claimant. There was no disciplinary hearing. There is no written communication to the Claimant from the Respondent, relating to investigation or disciplinary proceedings. There is no evidence that the Claimant simply fled, and went to work for another company. The Claimant was emphatic that he did not leave employment voluntarily. The Respondent had his cell phone number but did not call the Claimant. He was asked to leave by the Human Resource Manager and would be recalled in the future. He was not recalled. When he went to enquire on his employment status, he was locked out by the Security Guard at the gate. The Claimant's version of events leading to his departure, sounds more persuasive than Opiyo's. There is no evidence the Claimant fled and that the Respondent was prevented from reaching the Claimant, by Claimant's new Employer. There is no evidence showing there was such an Employer.

18. The Respondent did not prove reason or reasons informing its decision to terminate Claimant's contract, as demanded by Sections 43 and 45 of the Employment Act. The Claimant was not given the benefit of a hearing for the alleged employment offence of negligent driving and/or desertion. Termination was flawed on account of valid reason and the manner of its execution. It did not meet the minimum statutory standards of fairness under Sections 41, 43 and 45 of the Employment Act.

19. At paragraph 7 [2] of the Statement of Response, the Respondent undertook to produce documents upon trial, showing that the Claimant utilized his annual leave. Cross-examined, Opiyo told the Court he did not have Claimant's annual leave records. The Claimant told the Court he never went on leave. ***The Court grants his prayer for annual leave pay [not leave allowance] for the period 2011 to 2014, at the statutory minimum of 21 days, resulting is 63 days' salary at Kshs. 66,906.***

20. Having been on a daily rate of Kshs. 1,062, the Claimant is not entitled to house allowance in arrears as claimed. Daily rates of pay include the housing element.

21. ***The Claimant is granted 1 month salary in lieu of notice at Kshs. 1,062 x 26 working days = Kshs. 27,612.***

22. He served the Respondent for about 3 years. His employment record prior to September 2014 was not faulted. He did not author or significantly contribute to the events leading to termination of employment. The Respondent stated it intended to issue him a warning letter and allow him to continue working. It is fair to assume the Claimant would have gone on working in the foreseeable future. Being a Driver, in a busy port and trucking City of Mombasa, it can fairly be assumed too that he was not unlikely to find a comparable job in the labour market. It was alleged by Opiyo, an allegation that the Court has concluded was not established, that the Claimant found another job with Cargill Limited. ***The Claimant is granted equivalent of 6 ½ months' salary in compensation for unfair termination, amounting to Kshs. 179,478.***

23. ***The Respondent shall release Claimant's Certificate of Service to him forthwith.***

24. ***Costs to the Claimant.***

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

IN SUM, IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: annual leave at Kshs. 66,906; notice at Kshs. 27,612; and equivalent of 6½ months' salary in compensation for unfair termination at Kshs.179,478- total Kshs. 273,996.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 29th day of November 2019.

James Rika

Judge