



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 465 OF 2017**

**MASTISA CHANG’OKA NDEME.....CLAIMANT**

**VS**

**MODERN COAST EXPRESS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

- 1. By his Memorandum of Claim dated 13<sup>th</sup> June 2017 and amended on 7<sup>th</sup> July 2017, the Claimant stakes a claim for unlawful termination against the Respondent. In its defence, the Respondent filed a Response on 16<sup>th</sup> August 2017 to which the Claimant responded on 23<sup>rd</sup> August 2017.
- 2. When the matter came up for hearing, the Respondent made no appearance in spite of due notice. The Court therefore heard the Claimant *ex parte*. However, in reaching its decision, the Court has taken into account, the Respondent’s Response on record.

**The Claimant’s Case**

- 3. The Claimant states that he was employed by the Respondent as a conductor from 2011 until 5<sup>th</sup> January 2015. He earned a monthly salary of Kshs. 12,000.
- 4. The Claimant narrates that sometime in June 2014, he supervised cleaning of one of the Respondent’s buses at a carwash in Nairobi. He then left to prepare himself at the booking office.
- 5. Upon asking the loaders why the bus had not arrived for boarding, the Claimant was told that it had been involved in an accident. The Claimant went to the carwash and confirmed that indeed the bus had been involved in an accident, causing a crack on the windscreen and damaging the lights.
- 6. A report was made at the Mombasa office and a decision made that the driver who caused the accident would be surcharged. However, upon receiving his salary for the month of July 2014, the Claimant realised that he had been surcharged, thus reducing his salary to Kshs. 5,566.
- 7. The deductions continued for seven (7) months until January 2015. The Claimant’s inquiries about the total amount of the surcharge went unanswered.
- 8. The Claimant worked for the Respondent until mid-January 2015, when he was sent on an unexplained two (2) weeks’ off. Upon resuming work early February 2015, the Claimant was stopped at the gate by the Respondent’s watchman who stated that he had been instructed not to allow the Claimant into the office.
- 9. The Claimant met a Mr. Khalid who referred him to the General Manager who in turn told the Claimant to go home and wait to be called. He was not called back and therefore concluded that his employment had been terminated.
- 10. The Claimant’s case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) Refund of salary unlawfully deducted.....Kshs.42,000
- b) 3 months’ pay in lieu of notice.....36,000

c) 12 months' salary in compensation.....144,000

d) Costs plus interest

### **The Respondent's Case**

11. In its Response dated 10<sup>th</sup> August 2017 and filed in court on 16<sup>th</sup> August 2017, the Respondent admits having employed the Claimant as a conductor at a consolidated monthly salary of Kshs. 12,148 effective 1<sup>st</sup> September 2012.

12. The Respondent however denies terminating the Claimant's employment and states that the Claimant deserted duty from 17<sup>th</sup> January 2015.

13. The Respondent states that the Claimant was responsible for supervising and ensuring that the Respondent's motor vehicle was properly maintained prior to boarding. This included but was not limited to supervising and ensuring that the motor vehicle was properly cleaned before departure and that the motor vehicle was brought back in good condition for boarding.

14. The Respondent avers that sometime in the month of June 2014, the Claimant negligently and deliberately allowed an unqualified driver who was not an employee of the Respondent to drive the Respondent's bus, contrary to the Respondent's company policies. The Claimant's careless and negligent action led to the said bus being involved in an accident thereby causing damage to the bus.

15. The Respondent asserts that the Claimant displayed wanton negligence and carelessness by abandoning his duties which involved supervision over the motor vehicle, as a result of which the windscreen and lights were heavily damaged. This exposed the Respondent to great loss and damage.

16. The Respondent states that a report was lodged at its Headquarters in Mombasa and a repairs estimate was undertaken to establish the cost of repairs arising from the accident. The Claimant was informed of the extent of the damage and was further advised that his salary would be deducted to cover the damage as a result of his negligence.

17. The Respondent avers that the Claimant wilfully accepted the deduction of his salary to meet the cost of repair as he was fully aware that the damage to the motor vehicle was a direct result of his negligence in performing his duties.

18. The Respondent further avers that the Claimant performed his duties poorly and negligently and was constantly late for work or absent but the Respondent decided not to terminate his employment. The Respondent asserts that the Claimant's immediate supervisor constantly issued him with verbal warnings which the Claimant did not take seriously.

19. The Respondent goes on to state that on 17<sup>th</sup> January 2015, the Claimant was issued with a show cause letter requiring him to show cause why disciplinary action should not be taken against him following results of internal investigations which negatively implicated him. The Respondent adds that the show cause letter also required the Claimant to attend a disciplinary hearing scheduled for 20<sup>th</sup> January 2015.

20. The Respondent claims that upon receipt of the show cause letter, the Claimant left its premises and had never shown up again to date. The Respondent states that the Claimant neither responded to the show cause letter nor appeared for the disciplinary proceedings as required.

21. The Respondent's case is that the Claimant was accorded an opportunity to attend a disciplinary hearing on 20<sup>th</sup> January 2015 as required by law, together with a colleague (if he so desired) in order to present his case before a Disciplinary Committee.

22. The Claimant however deliberately failed, refused and declined to appear for the disciplinary hearing on the aforementioned date and further deserted his duties from 17<sup>th</sup> January 2015, without leave or other lawful cause.

23. The Respondent avers that after unfruitful attempts to reach the Claimant, it wrote to the County Labour Office in Mombasa, notifying them that the Claimant had deserted his employment.

### **Findings and Determination**

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

a) Whether the Claimant has made out a case of unlawful termination;

b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

25. In denying the Claimant's claim that his employment was unlawfully terminated, the Respondent states that the Claimant deserted duty on 17<sup>th</sup> January 2015, after being issued with a show cause letter.

26. In support of its case, the Respondent filed a letter dated 17<sup>th</sup> January 2015 accusing the Claimant of allowing a non-staff member to drive the Respondent's motor vehicle, thus causing an accident.

27. The Claimant denied having received this letter and disowned the receipt signature on the face of the letter. The Respondent did not bother to appear in court to cross examine the Claimant on this assertion. Moreover, the Respondent itself did not call any witness to explain the circumstances under which the said letter was served on the Claimant.

28. Further, in a subsequent letter dated 5<sup>th</sup> February 2015, addressed to the Mombasa County Labour Officer, the Respondent states that the Claimant had disappeared after being issued with a show cause letter on 5<sup>th</sup> February 2015, on allegations of theft.

29. Yet in another letter dated 4<sup>th</sup> February 2015 addressed to the Claimant but with no forwarding address, the Respondent accuses the Claimant of failing to report for duty after receiving his January 15 salary. The Claimant denied receiving this letter as well.

30. What emerges from these letters is a choreography of falsification of documents to suit the Respondent's case. The Court was however neither impressed nor convinced. This is more so because the maker of these contradictory letters was not called to authenticate them.

31. As a result, the Respondent's defence that the Claimant deserted duty collapses, the corollary being a finding that the Claimant's employment was unlawfully and unfairly terminated. The Claimant is therefore entitled to compensation.

### **Remedies**

32. Pursuant to the foregoing, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in executing the termination. I further award the Claimant one (1) month's salary in lieu of notice.

33. The Claimant also claims refund of the money deducted from his salary to cover for the damage caused by the accident in issue. This being a surcharge, the Claimant was entitled to the due process requirements of Section 41 of the Employment Act (see *Kenya National Library Services Board v Beatrice N. Ayoti [2014] eKLR*).

34. At any rate, the Respondent did not disclose the total amount of surcharge nor its tabulation.

35. In the absence of any evidence of compliance with Section 41 in effecting the surcharge, the claim for refund succeeds and is allowed.

36. Finally, I enter judgment in favour of the Claimant as follows:

|   |                |
|---|----------------|
| a) 6 months' salary in compensation.....        | Kshs. 72,888   |
| b) 1 month's salary in lieu of notice.....      | 12,148         |
| c) Refund of unlawful surcharge ( 6,582x7)..... | <u>46,074</u>  |
| <b>Total.....</b>                               | <b>131,110</b> |

37. This amount will attract interest at court rates from the date of judgment until payment in full.

38. The Claimant will have the costs of the case.

39. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF DECEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mwainzi for the Claimant

No appearance for the Respondent