



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.41 OF 2019**

**TIMOTHY SANGORE.....CLAIMANT**

**VERSUS**

**BIASHARA MASTERS SAWMILLS LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent on 26<sup>th</sup> November, 2018 as a driver of a van KCH 283S and used to ferry timber in its raw or processed at a weekly rate of Ksh.2,700.00 paid after every 2 weeks. The claimant earned such wage until 12<sup>th</sup> May, 2019 when his employment was terminated.

The claim is that there was unfair termination of employment on 12<sup>th</sup> May, 2019 when the claimant was involved in a self-involving road accident while driving vehicle allocated to him along Narok-Sekenani road in Narok County. The claimant informed the respondent of the accident and admission to Narok Referral Hospital and was directed to go home and recuperate and cooperate with the police in getting a police abstract for the accident and to enable the respondent follow up with compensation with the insurer.

The claimant attended as directed and went home as he had a plaster on his fractured leg.

On 14<sup>th</sup> June, 2019 the claimant went to the respondent premises to hand over the police abstract form and requested to be paid his dues wages but was informed that his employment had been terminated on 12<sup>th</sup> March, 2019 after the accident. Such termination of employment was unfair and contrary to section 41 of the Employment Act and in breach of fair labour practices and resulted in unfair redundancy.

The claim is that the work hours were 7.30am to 6.30pm for 6 days per week being 11 hours daily and for the overtime work there was no pay. The claimant was declared redundant unlawfully and without severance pays. There was no house allowance paid contrary to the wage orders. On public holidays the claimant was at work.

The claims are for the following dues;

- a) General damages for violation of fundamental human rights for discrimination;
- b) Severance pay on account of redundancy;
- c) Compensation under section 49 of the Employment Act;
- d) Notice pay ksh.24,351.32;
- e) Normal overtime Ksh.46,515.35;
- f) House allowance ksh.15,881.35;
- g) Underpayments ksh.51,875.75;
- h) Work during public holidays ksh.30,220.74;
- i) Severance pay ksh.5,853.71;

j) Annual leave ksh.8,195.19;

k) Certificate of service.

The claimant testified in support of his claim. He worked for 6 days each week from 7.30am until late up to 6.30pm and there was no time records kept by the respondent. There was no NSSF or NHIF registration. His last day at work was 12<sup>th</sup> May, 2019 when he had an accident and got injured and admitted in hospital and was later not allowed to attend work which resulted in unfair termination of employment and the claims made are due.

#### Defence

The respondent in defence admit there was employment and payment of the stated wages and job description and that the claimant was involved in an accident. He was required to cooperate with the police following the road traffic accident.

There was no discrimination against the claimant as alleged. On 12<sup>th</sup> May, 2019 he was involved in an accident and on 11<sup>th</sup> June, 2019 he travelled to Narok and on 14<sup>th</sup> June, 2019 he submitted the police abstract report and requested to be paid for owing wages while he was recuperating while his claim is that his employment was terminated on 12<sup>th</sup> March, 2019. The motor vehicle examination has confirmed the vehicle the claimant was sign did not have any mechanical defect.

The defence is also that the claimant sustained a fracture following traffic road accident and has not reported back to work since.

When the claimant worked overtime he as paid for his time. Work hours were 8am to 5pm and not as alleged. The respondent remained closed on public holidays and Sundays.

The claimant was not granted leave based on the fact that he was not working regularly hence section 28 of the Employment Act does not apply to him.

There was no redundancy for the claimant to claim severance pay.

The wage paid was based on the applicable daily wage of Ksh.450.00 or paid an hourly rate and the claim for a house allowance does not apply. Claims for underpayment do not arise.

The defence is also that employment as on and off on casual terms and based on availability of work and for which the claimant was paid a daily wage and at most working for 4 hours and as a casual employee there were no payment to NSSF and the claims made should be dismissed.

George Kamau the human resource manager of the respondent testified that the respondent company is situate in Njoro where the claimant was employed as a driver and allocated vehicle KCH 283S from 26<sup>th</sup> November, 2018 and paid a daily wage of ksh.450.00 as he was a casual employee. Such wage was paid after every two weeks.

There was an agreement with the claimant for a negotiated wage. There was no underpayment. Work hours were 8am to 5pm and no overtime work allowed. The claimant chose to report early and should not be paid as claimed. The nature of respondent necessities closure on Sunday and public holidays.

Mr Kamau also testified that the claimant was not dismissed from his employment. He decided not to report back to work and field suit. He had not covered a year to earn leave and claims for compensation have no basis. The allegations that he was sick have no basis. The allocated motor vehicle was extensively damaged and the respondent had no other vehicle to allocate to the claimant. Following the accident, the claimant was requested to assist the police with investigations but he opted to file the current suit.

At the close of the hearing both parties filed written submissions.

On the pleadings, the evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there are human rights violations and if so is general damages should be awarded;

Whether there was a redundancy and the remedies;

Whether there was unfair termination of employment;

Whether the remedies set out should issue.

The claim is that following an accident to the claimant while at work with the respondent he was hospitalised and following his disability and inability to attend work his employment was termination which was discrimination on his health status and on account of disability contrary to article 27 and 41 of the Constitution, 2010. The claimant submitted that in the case of **Anthony Kipkorir versus the Attorney General [2014] eKLR** for breach of constitutional rights the court awarded the petitioner damages. The claimant was injured while on duty and should be compensated in damages for the violation of his rights.

The concept of discrimination against any person is addressed under section 5 of the Employment Act, 2007 read together with Article 27 of the Constitution, 2010. Simply defined it is the act of subjecting a person to different treatment from the other on any ground including those outlined in Article 27 of the Constitution and as held in **John Harun Mwau versus Independent Electoral and Boundaries Commission & Another [2013] eKLR**.

Further, in **Willis versus The United Kingdom (2002) 34 EHRR 547** the European Court of Human Rights defined discrimination as:

*... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society.*

Closer home, Court of Appeal in **Barclays Bank of Kenya LTD & Another versus Gladys Muthoni & 20 Others [2018] eKLR** held as follows;

*... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured*

It is therefore not sufficient for one to cite that there has been discrimination. There must be an establishment as to differentiated treatment to a person or persons similarly situated on the given grounds for one to allege that there has been discrimination against them.

The claimant's basis is that following his accident he suffered injury and on this basis his employment was terminated. In employment and labour relations, section 30 and 43 of the Employment Act, 2007 allow an employee who is sick and requires medical attention to attend and have time off for such purpose subject to informing the employer within a reasonable time and upon return to work must submit a medical certificate to confirm the need to be absent from work for being sick and requiring medical attention.

Where the employee is thus absent from work due to illness and seeking medical attention, the duty is on such an employee to cause the employer to be informed and to produce the medical certificate. It is not sufficient that the employer is aware of the illness. Absence from work without permission and upon failure to produce the required certificate under section 34 of the Employment Act, 2007 is tantamount to being absent from work without good cause and subject to summary dismissal. This cannot comprise a good basis to claim discrimination against the claimant on account of being ill and having suffered a disability as the duty was upon him to obtain permission to be away and produce the required certificate.

In these proceedings, the claimant has failed to meet the threshold set under section 30 and 34 of the Employment Act, 2007. To claim under Article 27 and 41 that there was discrimination against him and that the respondent applied unfair labour practices because of his injury and disability has no foundation.

In this regard the claim that there was unfair termination of employment after the claimant got injured and has not produced the medical certification of any illness and from 12<sup>th</sup> May, 2019 he did not attend work cannot stand. Notice pay and compensation are not available to the claimant.

The claimant is also claiming severance pay. The matters herein do not define a redundancy to justify a claim in severance pay which can only lie under the provisions of section 40 of the Employment Act, 2007. Where the claimant was not registered with the NSSF or NHIF the remedy is not to claim in severance pay.

The claimant is claiming for overtime pay on the basis that he would report to work at 7.30am and leave at 6.30pm. Though the respondent did not file any work records on the time logs with regard to the claimant, the evidence of Mr Kamau that the claimant chose to report to work early at 7.30am so as to prepare for his day was not challenged in any material way. Where an employee chooses to be early to work, and which is a good practice and such being for the purpose of setting out for work early and to prepare for the day early even where the work hours are 8am to 5pm should not as of necessity claim in overtime pay. Such diligence taken into account should not be at the expense of the employer.

As noted above, the specific evidence by the respondent without challenge on the work hours, the claim for overtime pay is lost.

Both parties agree the claimant was employed as a driver in Njoro area and paid a daily wage accumulated and paid after every two weeks. He was paid a daily rate of ksh.450.00 for work for 5 days each week this being Kshs.9,000.00 for four (4) weeks.

For the period of employment, 26<sup>th</sup> November, 2018 to 12<sup>th</sup> May, 2019 the applicable wage orders Regulation of Wages (General) (Amendment) Order, 2018 in force on the 1st May, 2018 a driver of a medium sized vehicle had a minimum wage of **Ksh.18,881.20** per month and daily wage was ksh.921.90.

Where the claimant earned a daily wage of Ksh.450.00 even were there was agreement, to go below the allowed minimum wage is unlawful. What is due should be in accordance with the minimum wage or above such minimum and not below.

Whatever the reasons for the termination of employment, the underpayment of wages is not permissible. The claimant was employed

continuously and without a break from 26<sup>th</sup> November, 2018 to 12<sup>th</sup> May, 2019 when he failed to attend work. For the 5 full months at work (December, 2018 to April, 2019), the due wage per month is ksh.21, 175.15 which includes the house allowance all at Ksh.105,875 less the daily wage received at  $9000 \times 5 = 45,000.00$  total due in underpayment is Ksh.60,875 and for the 12 days worked in May, 2019 the underpayment per day is  $921.90 - 450 = 471 \times 12 = 5,652$ . Total unpaid in underpayments is ksh.66,528.00.

Section 28 of the Employment Act, 2007 allow leave to be prorated where an employee has not served for a full year with a provision for 1.75 days each month served. On the daily wage of ksh.921 for the 5 full months served the claimant earned 8.75 days of leave and on the wage due is entitled to ksh.8,059.00 in lieu of taking leave.

A certificate of service is due under section 51 of the Employment Act, 2007.

**Accordingly, judgement is hereby entered for the claimant for underpayments at ksh.66,528.00; leave pay ksh.8,059.00 and a Certificate of service shall issue. Each party shall bear own costs.**

**Delivered at Nakuru this 11<sup>th</sup> day of December, 2019.**

**M. MBAR?**

**JUDGE**

In the presence of: .....