



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 351 OF 2017

BETWEEN

JOHN KIMANI NGIO.....CLAIMANT

VERSUS

AUTO HAULIERS [K] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

C.O Tolo & Company Advocates for the Claimant

M.K. Mulei & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 3rd May 2017. He states, he was employed by the Respondent Transportation Company as a Long Distance Truck Driver, in February 2013. His salary was Kshs. 28,000 per month. His contract was terminated without notice or just cause by the Respondent, on 6th September 2013.

2. He was given off-duty days while the Truck assigned to him was at the garage. While away, he called the Respondent enquiring when he should return. He was told there was no returning. He was told he had been seen driving another Company's Truck while off-duty. All he had done was hitch a hike, from a fellow Truck Driver to Mombasa. The Claimant reported the dispute to the Labour Office. There was no settlement. He prays for Judgment against the Respondent as follows:-

- a) 1 month salary in lieu of notice at Kshs. 28,000.
- b) Leave allowance of 2 years at Kshs. 56,000.
- c) Public holidays at Kshs. 43,076.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 336,000.

Total...Kshs. 572,276

- e) Declaration that termination was unfair.
- f) Certificate of Service to issue.
- g) Costs.

h) Interest.

i) Any other suitable relief.

3. The Respondent filed its Statement of Response on 11th June 2017. It is the Respondent's position that the Claim is ill- advised and a nullity in law. The Claimant was absent from his workplace for a long period, without leave or lawful cause. He was heavily indebted to the Respondent at the time of disappearance from the workplace. When called upon to explain, he refused to explain. He was dismissed. The Claim has no merit. The Respondent asks the Court to dismiss the Claim with costs to the Respondent.

4. The Claimant gave evidence, and closed his case on 9th October 2018. The Respondent called its General Manager, Riayaz Abdulrehman, who gave evidence on 23rd July 2019, bringing the hearing to a close.

5. The Claimant told the Court he had returned from a journey. He took the Truck upon arrival to the garage for repairs. He took off-duty days. On returning, he was told by the Personnel Manager that he was no longer on the payroll. He was advised that his contract had lapsed. It is not true that the Claimant was involved with another Company. He was not paid the benefits claimed. He was not heard before termination. Cross-examined, he told the Court that he worked for 4 years. Between 4th August 2014 and 16th August 2014, the Claimant had his Truck's battery stolen while he was in Kampala. He quarreled with his boss, and did not work over this period. He did not have authority to be away. His salary did not include house allowance. He did not owe the Respondent any money on termination. Deduction for the lost battery had been made, and recovery completed. Personnel Manager informed the Claimant he was no longer on the payroll. Redirected, the Claimant told the Court he was absent without leave, but was recalled by the Respondent.

6. Riayaz confirmed that the Claimant was employed by the Respondent. He got Respondent's Truck battery stolen in Kampala in August 2014. He returned and asked for forgiveness. In August 2016, the Truck assigned to him had repairs. He requested for off-duty days. Riayaz called the Claimant while he was off-duty. The Claimant did not answer Riayaz's calls. The Respondent sent a notice to show cause to the Claimant through another Employee. He did not respond. In October 2016, the Claimant showed up at Respondent's Workshop. He asked the Accountant to pay his dues. After this the Respondent received a letter from the Labour Office, alleging that the Respondent had terminated Claimant's contract unfairly. Riayaz attended conciliation meeting. The Claimant did not and his Claim was rejected by the Labour Office. He owed the Respondent a loan of Kshs. 25,000. The Respondent was not able to deduct this before the Claimant left. The Respondent did not terminate Claimant's contract. He did not have pending leave. His house allowance was part of his monthly salary. The Respondent was not open for business on public holidays. Riayaz learnt that the Claimant was working elsewhere, hence the reluctance at responding to Respondent's calls.

7. On cross-examination, Riayaz told the Court that the Claimant was issued a written contract, which was not availed to the Court. The attendance register was not availed to the Court. No disciplinary action was taken after the Claimant absented himself. He was served with a notice to show cause. The Employee, who served him, was not available as a Witness. The Accountant was similarly not available to give evidence. There is no document showing that the Claim was rejected by the Labour Office. There is no Counterclaim made by the Respondent. There is no document showing Kshs. 28,000 paid to the Claimant monthly, was consolidated salary.

The Court Finds: -

8. The Claimant was employed by the Respondent Company as a Truck Driver, between February 2013 and September 2016. His last monthly salary was Kshs. 28,000. Parties do not agree if this was the basic or consolidated salary.

9. Parties agree that the Claimant returned from a journey, and was given some days off, while the Truck assigned to him was undergoing repair.

10. The Claimant states, while off-duty, he was advised by the Respondent upon enquiring when he should return, that there was no more work for him. He was suspected of working for another Company.

11. The Respondent's version is that the Claimant failed to return to work, after he took off-duty days, and was sighted driving another Company's Truck. Calls made to him went unanswered. The Respondent issued a notice to show cause to the Claimant through another Employee. There was no reply from the Claimant. He reappeared in October 2016, demanding payment of terminal dues from the Respondent.

12. The Court is inclined to uphold the version given by the Claimant. There are yawning gaps in Respondent's version: the attendance register was not produced; no disciplinary action was taken against the Claimant even after he reappeared to demand payment of terminal dues; and the Employee who allegedly served notice to show cause upon the Claimant, was not called as a Witness. There is no evidence from the Respondent showing that the Claimant refused to return to work.

13. The Respondent, in all likelihood barred the Claimant from returning to work, ostensibly because he had been sighted working for another Company. The Respondent did not investigate whether, by being seen in another Truck, the Claimant had changed his Employer, or was utilizing his off-duty days to benefit from Respondent's business rivals. He explained, he was merely given a lift by another Truck Driver, which the Court finds plausible. The Court takes judicial notice that Truck Drivers along Mombasa- Nairobi highway have a strong bond, and are familiar with each other, frequently to be found fraternizing or protecting each other from various forms of adversaries, in long convoys of Trucks, on the road or by the roadside, on this particular highway. It is not unusual that a Driver from one Trucking Company, is found in another Truck, other than the one assigned to him by his specific Employer. The explanation that the Claimant was offered a lift by a Driver from another Company was not ruled out, before the Respondent concluded that the Claimant was disloyal.

14. The Respondent therefore informed the Claimant there was no more work for him, terminating his contract, based on suspicion that he was involved with another Company.

15. Even after he availed himself, he was not subjected to a disciplinary hearing. He was not issued with a letter of termination. He was told simply that that there was no more work.

16. Termination defied the basic standards of fairness under Sections 41, 43, 45 and 47[5] of the Employment Act 2007.

17. The Claimant is granted 1 month gross salary in lieu of notice at Kshs. 32,200.

18. He had worked for the Respondent for 3 years, between 2013 and 2016. His contract was indeterminate. He was not a model Employee, having deserted employment for some time in the year 2014, after he lost a vehicle battery in Kampala. He asked for forgiveness and was taken back. Having deserted in 2014, there was a possibility he would desert again in the future. The Court cannot say that because the Claimant held an indeterminate contract, he would have continued working until retirement, had his contract not been terminated by the Respondent. Termination was in breach of fair procedure as well as the requirement for substantive justification. **He is granted equivalent of 5 months' gross salary in compensation for unfair termination at Kshs. 161,000.**

19. He prays for annual leave pay, wrongly pleaded as leave allowance, over a period of 2 years. He was away for considerable number of days in 2014, without the leave of the Respondent, or lawful cause. He is also shown to have applied for annual leave days on various occasions, through the Leave Application Forms, exhibited by the Respondent. He did not account for the days taken, in his Claim. The prayer for Leave Pay is declined.

20. There is no Itemized Pay Statement on record, issued by the Respondent to the Claimant, under Section 20 of the Employment Act, showing:

§ The gross amount of salary.

§ The amounts of any variable and any statutory deductions, and the purpose for which they are made.

§ Where different parts of net amount are paid in different ways, the amount and method of payment of each part-payment.

21. There is no contract exhibited by the Respondent, showing a provision which consolidates as part of the basic salary, an element intended to be used as rent, or which is otherwise intended to enable the Employee to provide himself with housing accommodation, in terms of Section 31 of the Employment Act. The Respondent did not tell the Court what part, in the salary alleged to be consolidated, represented house allowance. It is not sufficient to just say Kshs. 28,000 was consolidated. There must be a provision in the contract showing this, and the Respondent must be in a position to breakdown the consolidated salary for the understanding of the Court, showing what component is basic salary, and what stands for the housing element. There is no Pay Statement in any form, supplied to the Claimant by the Respondent, confirming that his salary was consolidated.

22. The Claimant would be entitled house allowance in arrears, computed at 15% of Kshs. 28,000, over the period February 2013 to August 2016. This would amount to about 42 months. The Claimant prays for 26 months, and considering he was away for a period in 2014, **the Court grants him the lesser period pleaded of 26 months, at Kshs. 109,200, in arrears of house allowance.**

23. For the same reasons the prayer for annual leave pay has been rejected, the prayer for holiday pay is rejected. The Claimant absented himself without leave or lawful cause. He should pay himself for any man hours rendered to the Respondent on public holidays, from the man hours the Respondent lost as a consequence of the Claimant's unauthorized leave. Furthermore, he was a Truck Driver, with flexible hours of work, and who according to the Respondent did not undertake any journeys on public holidays. The Respondent did not open on public holidays. The prayer is rejected.

24. Certificate of Service to issue.

25. Costs to the Claimant.

26. Interest is 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 termination was unfair.

b) The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 32,200; equivalent of 5 months' salary in compensation for unfair termination at Kshs. 161,000; arrears of house allowance at Kshs. 109,200 – total Kshs. 302,400.

c) Certificate of Service to issue.

d) Costs to the Claimant.

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

Dated and delivered at Mombasa this 5th day of December 2019.

James Rika

Judge