



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 137 OF 2018

BENARD MUTHOKA WAMBUA.....CLAIMANT

VS

BAHARI FORWARDERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Benard Muthoka Wambua against his former employer, Bahari Forwarders Ltd.
2. The claim is documented by a Statement of Claim dated 15th March 2018 and filed in court on 15th March 2018. The Respondent filed a Response on 3rd July 2018 to which the Claimant responded on 24th July 2018.
3. At the trial the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Shadrack Muthangya. The parties also filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Heavy Commercial Driver initially on temporary employment contract, from 6th March 2010 until 7th June 2012, when he was employed on permanent basis.
5. The Claimant worked for the Respondent until 4th November 2017, when he was dismissed. He was issued with a summary dismissal letter dated 6th November 2017 and a certificate of service dated 7th November 2016. Prior to his dismissal, the Claimant earned a monthly salary of Kshs. 43,000.
6. The Claimant claims that his dismissal was wrongful and unfair. He adds that he worked for 15 hours, 7 days a week including public holidays, without overtime compensation.
7. The Claimant’s claim is as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 43,000.00
- b) 4 days’ pay for the month of November 2017.....16,572.92
- c) 7 hours unpaid daily overtime (Monday –Saturday).....2,831,875.00
- d) 8 hours unpaid overtime for Sundays.....1,004,062.50
- e) 75 unpaid public holidays.....377,968.75
- f) 59 days accrued leave pay.....87,482.76
- g) 12 months’ salary in compensation.....516,000.00
- h) Costs plus interest

The Respondent's Case

8. In its Response dated 3rd July 2018 and filed in court on the same date, the Respondent admits that the Claimant was its employee but denies the allegations of wrongful dismissal made by the Claimant.
9. The Respondent states that the Claimant was intercepted while transporting unauthorised goods using the Respondent's motor vehicle contrary to company rules and regulations, which action the Claimant admitted prompting his dismissal. The Respondent adds that prior to the dismissal, the Claimant was afforded a fair hearing.
10. The Respondent pleads the Claimant's monthly salary as Kshs. 34,000. Regarding the claim for overtime compensation, the Respondent states that the Claimant worked within the hours permitted by law and he was paid mileage allowances to cater for contingencies associated with his work as a Long Distance Heavy Commercial Driver.
11. The Respondent avers that the Claimant took all his leave days and was paid his terminal dues.

Findings and Determination

12. There are two (2) issues for determination in this case:
- Whether the Claimant's dismissal was lawful and fair;
 - Whether the Claimant is entitled to the remedies sought.

The Dismissal

13. The Claimant was summarily dismissed by letter dated 6th November 2017 stating as follows:

"Dear Mr. Benard,

Re: Summary Dismissal Letter-Loading unauthorised cargo to Company truck with an intention to transport same

On 1st November, 2017 at about 11am, you were intercepted by management agent one, Mr. Mohammed while loading three (3) big plastic water storage tanks, sheets and ridges to truck KBF 792E/ZC 5025 within Mlolongo area with undoubted intention to transport same to unknown destination.

On 3rd November 2017 after being tasked to explain what transpired you recorded a statement with HR Office sighting (sic) that the said tanks were yours and you were to transport them to Machakos junction from where your friend's vehicle would pick them from (sic) and transport same to your home in Mwingi.

It is very disheartening that you decided to use company truck to do private business without having obtained express authority from the company while as a driver it is well known to you that you are not authorised to transport unauthorised goods at any given time. Your actions therefore are a violation of clear company policies/instructions. Same is a gross misconduct as per provisions of Employment Act 2007 sec. 44(e).

Further you were issued with a show cause letter on 4th November 2017 but you declined to acknowledge receipt by way of signing on it and totally turned a blind eye on its contents. Moreover you said that you were not willing to state anything else since you had already recorded a statement and that same was enough. Notwithstanding a disciplinary meeting was conducted in the course of that day and you were advised of inviting (sic) your own representative but you refused to do so claiming that your issues were your own and not for public. As in such (sic) the meeting proceeded with the following in attendance; you (Benard Wambua), Ms Lucy (HRO) and Mr. Shadrack (HRM) representative. During the meeting you indicated that you did not find it wrong in carrying your personal items/property in the truck and even if it was wrong, it was the first time you had done it.

Based on the foregoing and the weight of the matter at hand you are hereby dismissed from your position as a Driver with effect from 4th November 2017.

You will be paid your dues at the end of the current month i.e. November 2017 as hereunder:

- 1. 4 days worked in November 2017.*
- 2. Cash in lieu of accrued leave of 55 days.*
- 3. Less any pending deductions.*

Kindly surrender all the company property in your possession before exiting the company premises to the undersigned.

Yours faithfully

For: Bahari Forwarders Ltd

(Signed)

Shadrack Muthangya

Human Resources Manager

(Signed)

Saleem Chandbhai

Fleet Manager

14. It is not in dispute that the Claimant's dismissal was on account of ferrying unauthorised goods in the Respondent's truck which was under his command. In his written statement at the shop floor, the Claimant admitted having loaded three water tanks onto the Respondent's truck. He states that the said tanks were for his personal use. He however did not adduce any evidence to show that he was authorised to carry his own goods on the Respondent's truck.

15. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. In interpreting this provision, courts have consistently held that the burden placed on an employer by Section 43 is to show a reason that would cause a reasonable employer to terminate employment.

16. This principle, which is commonly known as the '*reasonable responses test*' was affirmed by the Court of Appeal in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR**.

17. Applying the *reasonable responses test* to the present case, it seems to me that the Claimant's action of ferrying his goods in the Respondent's truck, without express authority was a valid reason for termination of his employment.

18. That settled, the next question is whether in effecting the termination, the Respondent observed the mandatory procedural fairness requirements set out under Section 41 of the Employment Act.

19. On 4th November 2017, the Claimant was issued with a letter asking him to show cause why disciplinary action should not be taken against him on account of loading 3 water tanks on to the Respondent's truck registration number KBF 792E/ZC 5025. The Claimant was required to respond not later than 6th November 2017.

20. There was no evidence that the Claimant received the show cause letter. What is clear is that he was invited to a disciplinary hearing on the same day the show cause letter was issued.

21. The Court was unable to understand why the Respondent decided to convene a disciplinary hearing before the deadline given to the Claimant to respond to the show cause letter had lapsed.

22. In the final submissions filed on behalf of the Claimant reference was made to the decision in **John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR** where my sister **Onyango J** termed a disciplinary process that is conducted in a manner that does not allow the employee adequate time to prepare their defence as cosmetic compliance with Section 41 of the Employment Act.

23. In the instant case, the Claimant was notified of a disciplinary meeting on the same day of the meeting. Clearly, he did not have adequate time to prepare his defence. Moreover, according to the minutes filed by the Respondent, the Claimant appears not to have participated on the disciplinary proceedings.

24. In light of this, the Court finds and holds that the Claimant's dismissal was unfair for want of due process and for this reason, he is entitled to compensation.

Remedies

25. I therefore award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service tempered with his contribution to the dismissal.

26. I further award the Claimant one (1) month's salary in lieu of notice.

27. From the evidence on record, the Claimant was paid in lieu of his pending leave days as well as salary for 4 days worked in November 2017. The claims thereof are therefore without basis and are disallowed.

28. The claim for overtime was not proved and is dismissed.

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

a) 5 months' salary in compensation.....Kshs. 215,000

b) 1 month's salary in lieu of notice.....Kshs. 43,000

Total.....Kshs. 258,000

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

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

DATED SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 2019

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JUDGE

Appearance:

Mr. Kalimbo for the Claimant

Mr. Okanga for the Respondent