



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1665 OF 2013**

**JOSEPH MURAMBA MAKOKHA ..... CLAIMANT**

**VERSUS**

**AMICARBE TRAVEL SERVICE LTD ..... RESPONDENT**

**JUDGEMENT**

1. The claimant was employed by the respondent on 25<sup>th</sup> September, 2008 and issued with a letter of appointment. He was placed on probation for 3 months and paid a salary of Kshs.10, 000.00 per month. The salary was increased to Kshs.19, 239.00.

2. The claim is that the claimant worked diligently until 26<sup>th</sup> August, 2013 when he was unfairly and discriminatively terminated from his employment. There was no notice or reasons given for the unfair termination of employment. The termination notice was defective in that the respondent alleged that the claimant had been found carrying unauthorised passengers and operating off-route on 20<sup>th</sup> and 23<sup>rd</sup> August, 2013. The effect of the defective notice was a summary dismissal without payment of any terminal dues.

3. The claimant had worked for 11 hours for 6 days a week and his overtime work was not paid for. He claims for Kshs.1, 245,812.29; unpaid salary for August, 2013; notice pay; pro rata leave; and compensation. Claim for unpaid NHIF for 2009 and 2013 and NSSF unpaid for 2013 together with overtime unpaid and costs. No certificate of service was issued and damages should be assessed for wrongful termination of employment.

4. The claimant testified that upon employment by the respondent he would start work at 5am. And carry clients for the respondent from Kenya Airways or for Daystar University from Arthi River campus to the valley road campus and would only complete such duties after 9pm. No overtime was paid. On 26<sup>th</sup> August, 2013 he dropped clients at Arthi River and went to fuel the motor vehicle but was later called by the human resource officer with information that he had carried unauthorised passengers. That some passengers had not been approved to board the vehicle. The claimant was made to sign a letter under threat of termination of employment. This was followed by a letter of dismissal on the grounds that he had gone off-route and carried unauthorised passengers which were not true.

5. The claimant also testified that he was given a work schedule every day with time lines. Each trip was approved by the respondent. there was a schedule for overtime pay and shift changes. On 21<sup>st</sup> August, 2013 there was a notice to show cause issued. He used a work ticket for all trips made with a record of time of start and time of end of journey. The work ticket for 26<sup>th</sup> August, 2013 has no closing time.

**Defence**

6. In response, the respondent admit they had employed the claimant as a Driver vide contract of employment dated 25<sup>th</sup> September, 2008 on a salary of Kshs.10,000.00 and a shift allowance of Kshs.1,000.00 depending on availability of a shift. With the contract of employment, the claimant was also given a code of conduct which he signed and it provided that he would adhere to the highway code and traffic rules, not to over speed, not to carry unauthorised passengers and to seek instructions from the office before undertaking any deviations.

7. The respondent had entered into contracts with many other companies including institutions of higher learning being Daystar University to provide transport services and the claimant was assigned motor vehicle No.KBU 815N to serve the client. Daystar and the respondent agreed to provide transport services on set routes; from Daystar University Nairobi campus and to follow Mbagathi way via Mombasa road to Arthi River campus. Departure time would be 7.15am and in the evening 5.00pm.

8. On 20<sup>th</sup> August, 2013 the claimant was assigned work and vehicle KBU 815N from the parking yard at JKIA to pick clients from Nairobi campus to Arthi river campus. The claimant finished the assignment and later dropped the clients at the Arthi River campus. The claimant was then required to return the vehicle to JKIA parking yard through Mombasa road but at 19.00 hours he was found driving off Mombasa road and there were unauthorised passengers inside.

9. On 21<sup>st</sup> August, 2013 the claimant was issued with a show cause notice to answer as to why he should not be disciplined to breaking the code of conduct and express instructions but he arrogantly refused to accept the notice. On 23<sup>rd</sup> of August, 2013 the claimant was assigned the same instructions and upon completing his tasks diverted the vehicle off Mombasa road and was found with unauthorised passengers along Jogoo road.
10. On 24<sup>th</sup> August, 2013 the claimant was again required to show cause why he had broken the code of conduct and express instructions by the respondent. On 25<sup>th</sup> August, 2013 the respondent had not received any response from the claimant and his continued refusal to respond to allegations made resulted in an invitation to attend at a disciplinary hearing on 26<sup>th</sup> August, 2013. The claimant refused to attend and efforts to reach him were fruitless. This amounted to insubordination and warranted summary dismissal. Such summary dismissal was justified putting into account the act of gross misconduct to which the claimant refused to respond or attend at a disciplinary hearing.
11. The claims made have no merit and further, the respondent deducted and remitted statutory dues including NSSF and NHIF. The suit should be dismissed.
12. The respondent called Nancy Gathoni Kuria as the witness and testified that as the human resource assistant with the respondent she knew the claimant well. He was a driver attached to respondent clients and Daystar University on assignment to drive clients from Nairobi campus to Arthi River campus and back. The claimant had a work ticket to regulate his trips back and forth. He also had guidelines on his work allocation.
13. On 21<sup>st</sup> August, 2013 the witness got an email from Julius Mutiso the marketing manager after he found the claimant with strange passengers in the allocated vehicle with hazards on along Jogoo Road while the vehicle was supposed to have been at the JKIA yard. He went to the vehicle and found passengers alighting and the claimant was counting cash. Mutiso called the general manager and reported the case and the claimant was directed to report to the office the next day. The claimant refused to take the notice to show cause and remained arrogant. On the next day, a similar incident was reported and the claimant had diverted the vehicle to Jogoo road where he went picking passengers who were unauthorised. Again he refused to accept the notice to show cause. He was invited to a disciplinary hearing where he failed to attend or respond to the charges against him.
14. The claimant's work schedule was regulated under a time sheet. All overtime was factored in the monthly salary. The claimant did not work on weekends as the clients were transported during week days only. Where the claimant was allocated work outside the normal office hours, he was paid for the overtime. Salary for August, 2013 was paid before his summary dismissal.
15. At the close of the hearing both parties filed written submissions.
16. The claimant was dismissed from his employment with the respondent vide letter dated 26<sup>th</sup> August, 2013 on the grounds that on 20<sup>th</sup> and 23<sup>rd</sup> August, 2013 he was found carrying unauthorised passengers and operating off-route along Jogoo road and which was contrary to his employment contract and the code of conduct which he had signed upon employment. Such conduct amounted to gross misconduct and warranted summary dismissal under the provisions of section 44(4) of the Employment Act, 2007.
17. Section 44(3) and (4) of the Employment Act, 2007 allows an employer to terminate employment where an employee has fundamentally breached his obligations in employment and committed acts of gross misconduct. There are circumstances listed under section 44 of the Employment Act, 2007 which warrant summary dismissal of an employee especially where an employee wilfully neglects to perform any work which it was his duty to perform, is careless and improperly performs work or commits or is suspected to have committed criminal acts against the employee and which leads to loss of property as held by the Court of Appeal in the case of **CMC Aviation Limited versus Mohammed Noor [2015] eKLR**.
18. The claimant as a Driver of the respondent's vehicles was bound by his employment contract and code of conduct to undertake his duties within set parameters. The claimant does not deny that he was issued with a notice to show cause with various allegations touching on his work as a driver. Such notice was served upon him as he went to fuel his allocated vehicle No.KUB 815N. He did not respond to the allegations made as he felt the respondent was not acting on correct information.
19. However, upon being served with a show cause notice, the claimant was under an obligation to respond whether in writing or by personal attendance at the disciplinary hearing when he was called upon by the respondent as the employer to attend. He failed to abide.
20. At the time the respondent issued the claimant with a show cause notice and also invited him to a disciplinary hearing, there was sufficient reason justifying the same. Where the claimant felt innocent, he ought to have attended to disprove the same. As held in **Thomas Sila Nzivo versus Bamburi Cement Limited [2014] eKLR** the respondent had reasonable and sufficient grounds to summon the claimant having evidence that he had diverted its motor vehicle and carried unauthorised passengers.
21. Failure to attend at the disciplinary hearing, the summary dismissal that followed was justified under section 44(4) of the Act. The claimant was well aware of the reasons leading to his termination of employment as held by the Court of Appeal in **Justus Wambua Kavuu versus Kenya Commercial Bank Ltd [2016] eKLR**. He cannot allege that such allegations were a fabrication well aware that he was invited to show cause and failed to attend. The respondent discharged its duty under section 41(2) of the Employment Act. The summary dismissal was justified.
22. Upon summary dismissal, the salary due to the claimant was up and until the 26<sup>th</sup> August, 2013 and nothing more. To claim more where there was no labour offered after the 26<sup>th</sup> of August, 2013 is to seek unjust enrichment.

23. Notice pay is not due in a case of summary dismissal found to be justified. This also apply to compensation. Such claims are declined.

24. The respondent has attached work records with regard to the claimant’s timeline and work sheets. The salaries paid were inclusive of such costs as shift allowances and overtime hours worked. From the records it is apparent that the claimant was not at work during weekends. To claim a sum of Kshs.1, 245,812.29 as overtime pay on the grounds that the claimant started work at 5.00am and closed after 9pm while he had a shift allowance addressed under his employment contract to cater to the overtime hours is without justification. Such claims are declined.

25. Claims for unremitted NSSF and NHIF dues from 2009 to 2013 are on the grounds that the respondent failed to pay for the same. Statutory dues arising out of employment are due to the body legally required to receive such *statutory deductions*. Such cannot be received by the claimant. Where such statutory dues were not deducted and or remitted with regard to the claimant, the claim is not to be paid such amounts. The court cannot justify such an award.

**Accordingly, the claims made are without merit and are hereby dismissed.**

**Each party shall bear own costs.**

**Read in open court at Nairobi this 20<sup>th</sup> day of April, 2018.**

**M. MBARU JUDGE**

In the presence of:

Court Assistant:.....

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