



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 673 OF 2016

(CONSOLIDATED WITH ELRC 674, 675, & 676 OF 2016)

SALIM NASSORO MWARIWA & OTHERS.....CLAIMANT

VERSUS

HAKIKA TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimants brought separate suits on 15.9.2016 claiming terminal benefits plus compensation for unfair dismissal by the respondent on diverse dates between 3.9.2015 and 5.9.2015. They blamed the employer for terminating them without valid reasons and without giving them an opportunity of being heard.
2. The respondent filed defence to the respective claims denying the alleged unfair dismissal and prayed for the suits to be dismissed. It is the defence case that the claimants were issued with letters summoning them to disciplinary hearing in relations to same misconduct but upon receipt of the said letters they absconded from duty never to return again.
3. The 4 suits were consolidated on 22.6.2017 and thereafter the claimants testified as Cw1, 2, 3 & 4 respectively and the respondent called her HR Manager Mr. Rajab Yeri Kombe as Rw1. In closing both parties filed written submissions which I have carefully considered herein.

Claimant's case

4. Mr. Salim Nasoro Mwariwa testified as Cw1. He was verbally employed by the respondent on 15.4.2006 as Tailgate earning Kshs.21,000 per month. On 3.9.2015 he reported to work as usual and at 12 pm, a person who was introduced to them by Mr. Salim the supervisor as HR Manager, told them that they will hence forth work under formal contract terms basis. He gave them contracts to sign but, they refused to sign after the HR Manager told them that there was no service pay for the years served without written contract. Upon refusal to sign the contract they were referred to the Head Office at Changamwe.
5. When they went to Changamwe they were told to go for disciplinary hearing after 5 days at Jomvu and the complained. However, they never found the disciplinary Committee at Jomvu and they went back to the Head Office where they were accused of absconding work for which they were summarily dismissed. He denied the alleged absconding of work and prayed for the reliefs sought in his suit.
6. On Cross examination, Cw1 stated that his work station was Bamburi, his last day at work was 3.9.2015 and he was dismissed at 12 p.m. after refusing to sign a formal contract. He admitted being served with a show cause letter dated 5.9.2015 but he denied the signature in a copy of show cause letter dated 5.9.2015 shown to the Court by the defence counsel. He admitted that he responded to the show cause letter by his letter dated 5.9.2015, however he admitted that he was given a letter inviting him to a disciplinary hearing on charges of absconding work on 3.9.2015 but he declined to sign. He also admitted that the letter asked him to attend the hearing with a fellow employee of his choice. He further admitted that he attended work on 9.9.2015.
7. On further cross examination Cw1 stated that after finding no one at the venue for his hearing, he went back to office of the HR Manager Mr. Rajab and found him there. He admitted that he never returned to work after 3.9.2015 because he was waiting for his case to be finalized. He admitted that the employer wrote letter dated 9.9.2015 to the Labour Officer reporting his absence from work. He however denied the alleged desertion of work and contended that he was waiting to attend hearing of his case on 11.9.2015, the date indicated in the invitation letter. He maintained that he was dismissed.

8. Mr. Edwin Madungu Lwambi testified as Cw2. He testified that he was employed verbally by the respondent on 3.4.2005 as a Mechanic and worked continuously until 2.9.2015 when he was dismissed. He was stationed at Vipingo and his salary was 24,650. On 2.9.2015, he reported to work as usual and in the course of the day, he and his colleagues were given written contracts to sign but they refused because the contracts were silent about the years the employees had already served. After refusing to sign, they were referred to the Head Office at Changamwe the same day.

9. When they arrived at the Head Office, the Cw2 and his colleagues were called to the office one by one and issued with redundancy letter or show cause letter for alleged insubordination. Cw2 was accused of gross misconduct and was invited for disciplinary hearing on 10.9.2015 and he attended with the shop steward where he explained that he refused to sign the new contract because it was unfair as it failed to factor his 10 years of service. He prayed for the reliefs sought in his suit.

10. On cross examination Cw2 stated that things were okay until when he refused to sign the contract which was meant to deny him benefits. He admitted that after refusing to sign the contract, he was given a show cause letter dated 2.9.2015 accusing him of insubordination and inviting him to a hearing on 10.9.2015 in company of a fellow employee of his choice. He admitted that he responded to the letter and also attended the hearing to defend himself. Thereafter he went to look for another job which he got in August 2016. He maintained that he was dismissed by the respondent.

11. Mr. Michael Munga testified as Cw 3. He was employed by the respondent verbally on 14.6.2010 as a Mechanic earning Kshs.31,950 per month. On 3.9.2015, he reported to work as usual at Bamburi station for night shift but at 7 p.m., the supervisor told the workers that those who had not signed their contract should not work and instead they should go to the Head Office at Changamwe. Cw3 had not signed his contract and he therefore went home as directed and the following day he went to the respondents' Head Office at Changamwe.

12. When he reached the HR Manager's office, he was given a letter dated 5.9.2015 accusing him of absenteeism and insubordination and further inviting him to disciplinary hearing. He attended the hearing but never found any one to hear him and he wrote a letter responding to the show cause letter and complaining that he never found any one at the venue to hear his case.

13. On cross examination Cw3, stated his last day at work was 3.9.2015 and on 4.9.2015 he went to the head office where he met the HR Manager Mr. Rajab. He admitted that he was not at his work place on 4.9.2015. He further admitted that he was given a show cause letter but no letter telling him not to attend work. He admitted that the respondent was paying NSSF for him and later other companies did so. He stated that he got another job in February 2016 from Hiram & Sons Transporters Limited. He maintained that left work after his supervisor Mr. Onsario told him that he could not work there without signing his contract of employment. He further stated that there were many other mechanics and only those who signed their contracts were allowed to continue working. He denied ever resigning from work and maintained he was dismissed.

14. Francis Wambire Otwane testified as Cw4. He was employed by the respondent verbally as a Tailgate on 4.4.20076 earning Kshs.21,000 per month. On 3.9.2015, he was on duty as usual and at 11 a.m. the HR Manager gave him and all the other workers written contracts to sign. He refused to sign the contract because it failed to factor the years previously worked. After refusing to sign the contracts, Cw4 and his colleagues were told to go to the Head Office at Changamwe on 4.9.2015.

15. When they went to the Head Office on 4.9.2015, the personnel Manager told them to see him on 5.9.2015 when they were each served with show cause letter accusing them of insubordination Cw1 respondent the same day and he was invited to a hearing on 11.9.2015. When he attended the hearing, he found no one to hear him and he returned to the Head Office where the Personnel manager told him that the case could not be heard that day. He denied ever absconding work and maintained that he was dismissed after refusing to sign a written contract.

16. On cross examination Cw4 stated that he was on duty on 3.9.2015 and the HR Manager Mr. Swaleh gave him a written contract to sign but he refused. He further stated that after refusing to sign the contract he was referred to the Head Office where he was given a show cause letter and invited for disciplinary hearing on 11.9.2015 at Jomvu but the hearing never took place. He maintained that he was topped from working by the HR Manager on 3.9.2015 after he declined to sign the written contract.

Defence Case

17. Rw 1 admitted that the claimants were employed by the respondent but denied that they were dismissed by the respondent for refusing to sign written contracts. He contended that the claimants absconded and disobeyed instructions from their supervisors and after receiving the report of the said misconduct, he sent the Assistant Personnel Manager to tell the employees to go to the HR Manager's office at Changamwe where he served them with show cause letters by which he also invited them to disciplinary hearing. He clarified that the show letters did not suspend the claimants from work.

18. RW1 contended that the claimants were to continue with work but they absconded forcing him to write a letter to the Labour Office about their absence. He contended that the Disciplinary committee met but the claimants failed to attend the hearing. He admitted that at the time the claimants' absconded work, there were allegations that a union had recruited the respondents staff as members but there was no formal notification. He however admitted that the union had brought a suit to court accusing the respondent of locking out her staff including the claimants. He stated that when the claimants responded to the show cause letter, they alleged that they were being victimized for joining the union and they never mentioned the alleged new contracts. He denied that he claimants were required to sign any new contracts. He further denied the alleged dismissal of the claimants and maintained that it is them who absconded work.

19. Rw1 further testified that the respondent remitted NSSF and NHIF in favour of the claimants' upto October 2015 but thereafter their new employers continued to pay for them.

20. On cross examination Rw1 admitted that paragraph 5 of his written statement acknowledged that the claimants were terminated by their employer for misconduct. He further admitted that the respondent had written the letter date 7.11.2016 to her Advocate stating that she had terminated the claimants. He further admitted that claimants' response to the show cause letters stated that they were sent to Changamwe

Head Office after refusing to sign contracts. He however, maintained the claimants were invited to disciplinary hearing but the declined to attend and deserted work voluntarily. He admitted that paragraph 49 of the ruling in ELRC 369 of 2011 stated that the respondent had locked out her employees.

21. On further Cross examination Rw1 was unable to produce any minutes of the disciplinary committee meeting of 11.9.2015. He further admitted that the claimants were never served with any written warning for the alleged absenteeism from work before the termination. He further could not produce any attendance Register to prove the alleged absenteeism. Finally, he admitted that the claimants were never paid terminal dues or issued with a certificate of service. He maintained that the claimants were not entitled to any terminal dues.

Analysis and Determination

22. After careful consideration of the pleadings evidence and submissions, there is no dispute that the claimants were all employed by the respondent. There is also no dispute from the written statement by Rw1 that the claimants were dismissed by the respondent. The issues for determination agreed by the parties are:

- (a) Whether the claimant committed any acts of misconduct to warrant the dismissal;
- (b) Whether the termination of employment of the claimants was fair and lawful;
- (c) Whether the claimants are entitled to any terminal dues sought by their suit;
- (d) Whether this claim was settled through conciliation.

23. No evidence was adduced to prosecute the issue of settlement of the dispute through conciliation and as such the same is deemed to have been abandoned. On the other hand, the first and the second issues are collapsed into one issue, to read, whether the termination of the claimants' employment by the respondent was unfair and unlawfully.

Unfair and unlawful termination

24. Under section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

Reason for the termination

25. The reasons cited for the termination by Rw1 were absenteeism and insubordination. According to Rw1 the claimants started attending work as and when they wished and also failed to obey instructions from their supervisors. The claimants denied the alleged misconduct and contended that they attended work as usual until 3.9.2015 when they were given contracts to sign but when they refused to sign because of the failure by the employer to factor the past years served they were send to the Head Office at the Changamwe where they were severed with show cause letters accusing them of insubordination and absenteeism and invited them to a disciplinary hearing on 11.9.2015.

26. Rw1 did not produce any Attendance Register or any other evidence to prove that the claimant had absented themselves from work. He also did not call the supervisors for Bamburi and Vipingo Branches where the claimants were stationed to confirm his evidence I therefore find that the testimony by the Rw1 on the alleged insubordination and absenteeism by the claimant was mere hearsay which cannot prove the alleged misconduct on a balance of probability. In the upshot it is hereby held that the respondent has failed to proved the reasons for terminating the claimants' contracts of service as required by section 43 of the Act.

27. There is no dispute that the claimants were each served with show cause letter which also invited them to a disciplinary hearing in the company of a fellow employee of their respective choice. Rw1 contended that the claimants never attended the hearing and instead absconded work never to return. The claimants have however denied the alleged absconding and contended that they attended the hearing but Disciplinary committee did not sit. They therefore contended that they were dismissed without being accorded any fair hearing.

28. After careful consideration of the evidence and submissions, I find that the claimants were terminated without being accorded any fair hearing. Although the claimants were invited to a hearing in the company of their fellow employees of their choice, the respondent's disciplinary committee never met on 11.9.2015 as scheduled to hear the first, third and fourth claimants. Rw1 did not state whether he was a member of the committee and he never produced any minutes to prove that indeed the committee met but the claimants declined to attend. There is however no dispute that the second claimant was heard on 10.9.2015.

29. In view of the foregoing finding, it is my holding that the termination of the first, third and fourth claimants' services was done without complying with the mandatory procedure provided by section 41 of the Act. Under the said section, before the employer terminates the services of his employee on account of misconduct, poor performance or physical incapacity, he shall first explain to the employee in a language he understands and the presence of fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided.

30. Having found that the respondent has failed to prove the reasons for terminating the claimants' employment, and that a fair procedure was followed before the termination, I proceed to find and hold that the termination of the claimants' employment was unfair and unlawful within the meaning of section 45 of the Act.

Reliefs

31. In view of the foregoing finding that the claimants' service were unfairly terminated by the respondent, under section 49 of the Act I award each of them one month salary in lieu of notice plus 10 months salary compensation for unfair termination. In awarding the said compensation I have considered the fact that the claimant had served for fairly long period without any record of indiscipline.

32. The claim for service pay is dismissed because the employer used to pay NSSF contribution for all the claimants under section 35(6) of the Act, employees who are member of the social security fund are disqualified from claiming service pay unless there is evidence that the employer never remitted the NSSF contribution for the employees. In this case the claimants have admitted that the NSSF contributions were contributed by the respondent during their service.

33. The claim for over time is also dismissed for want of particulars and evidence likewise the claim for annual leave is dismissed because no evidence was adduced to prove the same. The claim for certificate of service is however granted as prayed by each claimant.

Disposition

34. I enter Judgment for the claimants in the following terms;

Salim Nassoro Mwaviwa

Notice	21,000
Compensation	<u>210,000</u>
	231,000

Edwin Mazungu Lwambi

Notice	24,650
Compensation	<u>246,500</u>
	271,150

Michael M. Munga

Notice	25,000
Compensation	<u>250,000</u>
	275,000

Francis Wambwire Otwane

Notice	21,000
Compensation	<u>210,000</u>
	231,000

They will also get certificate plus costs and interest at the court rates from the date hereof till payment in full. The awards will be paid subject to the relevant statutory deductions.

Signed and dated and at Nairobi this 11th day of May, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 28th day of May, 2018.

LINNET NDOLO

JUDGE