



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 336 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**FREDERICK SEWE.....CLAIMANT**

**VERSUS**

**NDUGU TRANSPORT COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

By memorandum of claim dated 30<sup>th</sup> November and filed on 3<sup>rd</sup> December 2014 the claimant aver that he was unlawfully and unfairly terminated by the respondent. He further avers that while in the employment of the respondent he was underpaid. He prays for the following remedies –

- (a) That the court to find the summary dismissal and contend withholding of the claimant's dues by the respondent to be unjustified, unlawful, unfair wrongful and illegal.
- (b) That the court to order the respondent to pay the claimant's story entitlements and/or terminal dues totalling to Kshs.1,234,803.30/=.
- (c) That the court to order reinstatement in terms of paragraph 11.
- (d) That the court to award costs of the suit be borne by the respondent.

The respondent filed reply/defence to the memorandum of claim on 6<sup>th</sup> January 2015, denying the allegations therein.

On a without prejudice basis, the respondent avers that the claimant was employed as a loader, that on 10<sup>th</sup> June 2013 the claimant in collusion with two other employees caused the respondent's lorry to be overloaded so as to illegally and unlawfully benefit from the excess load, that previous verbal warnings had been given to the claimant to desist from such acts. The respondent avers that the claimant was asked to explain his actions by the respondent's Director but failed or refused to do so thereby occasioning his summary dismissal.

The respondent avers that the summary dismissal was lawful and procedural in line with the provisions of the Employment Act. The respondent denies that the claimant is entitled to leave as he took all his leave. The respondent further denies that the claimant is entitled to notice as he was summarily dismissed.

With regard to the claimant's prayer for house allowance the respondent avers that the claimant was housed by the respondent and is not entitled to the same. The respondent denies that the claimant is entitled to underpayments or compensation.

In a reply to memorandum of defence filed on 13<sup>th</sup> February 2015 the claimant joins issues with the respondent on all the averments in the defence and reiterates the contents of the memorandum of claim.

At the hearing of the case the claimant testified on his behalf while the respondent called ATIENO ALBERT AKECH its transport and Logistics Manager who testified on its behalf. The parties thereafter filed and exchanged written submissions. This case was heard together with Cause 335 of 2014. The evidence of the respondent's witness was taken in the file for cause 335 of 2014.

**Claimant's Case**

The claimant testified that he started working for the respondent on 1<sup>st</sup> April 2005 as a machine operator and worked in the same capacity until 10<sup>th</sup> June 2013.

He testified that he was off duty for three days and resumed on 10<sup>th</sup> June 2013. He reported for duty at 7.30 a.m. and picked the keys for the machine. When he went to start the machine he was told by Balraj, a Director of the respondent to stop working. When he asked why, Balraj told him to stop arguing or Balraj will run him over with a machine. Balraj then told the watchman to close the gate. While this was happening, he was called by someone on the phone. Balraj snatched the two phones he had and accused him of taking a video of the incident without permission.

The claimant testified that on 12<sup>th</sup> June 2013 he wrote a letter jointly with Gilbert (claimant in cause 335 of 2014) and Koech the watchman who were also stopped from working on the same day with him.

Under cross-examination, the claimant testified that he was supervised by Balraj and Arwar Ali and Gilbert Onyango was a general supervisor. He stated the joint letter they wrote was not in response to a verbal request to explain why he overloaded a lorry. He stated that they were summarily dismissed verbally. He stated that the phones snatched by Balraj were never returned to him, that he reported the incident at Mamboleo Police Station and he was given an OB number.

### **Respondent's Case**

Mr. Aketch for the respondent testified that on 10<sup>th</sup> June 2013 the respondent confirmed that trucks from its quarry were being overloaded. The respondent suspected the quarry foreman, the loader and the day guard. The respondent verbally asked the three to explain under what circumstances the overloading occurred but they did not give any explanation either on the same day or later. The company therefore summarily dismissed them. He testified that the claimant did not collect his terminal dues.

Under cross-examination, he testified that he did not deal with the cases personally, that it is a Director who discovered the matter and dismissed the claimant and the other two employees. He stated that there was no letter of dismissal issued. He stated that the Director Balraj who dealt with the matter was available. He testified that there is no weighbridge at the quarry. He stated he was not aware the claimant's phones were confiscated, that he is not the immediate supervisor of the claimant. He stated that the respondent worked on Sundays and public holidays.

### **Determination**

I have considered the pleadings, evidence and submissions filed by the parties. The issues for determination are whether the dismissal of the claimant was fair and whether he is entitled to the prayers sought.

The law relating to termination of employment is contained in the Employment Act. Section 41 of the Act sets out the procedure, section 43 provides for proof of grounds for termination and Section 44 sets out the grounds that constitute gross misconduct. Section 45(2) provides that where either sections 41 or 43 is not complied with the termination is deemed to be unfair.

It is not in dispute that the claimant was verbally dismissed without compliance with either section 41 or 43 of the Act. This is averred by the claimant and admitted by the respondent's witness.

The dismissal of the claimant is therefore unfair both procedurally and substantively.

### **Remedies**

The claimant prays for terminal benefits to the date of retirement with built in inflation at 10% rate per year. This is not provided for either in the terms of employment or in the law. Section 49 provides for remedies payable to an employee who has been dismissed unfairly to constitute salary and allowances to the date of termination, notice and compensation for unfair termination capped at a year's gross pay.

The claimant is therefore entitled one month's notice or pay in lieu thereof. He is entitled to compensation and to salary and allowances for days worked which the respondent's witness admitted he has not been paid.

The claimant further prayed for underpayments. He stated that he was paid Kshs.15,600 for three years and Kshs.16,000 up to the date of dismissal. He further stated he was not given annual leave for the entire period he worked and that he worked on public holidays and rest days. Mr. Aketch for the respondent confirmed that the quarry worked on both public holidays and Sundays.

The claimant testified that he was not housed. This was not contested by the respondent's witness. I therefore make the following award to the claimant in respect of his prayers –

### **Basic wage**

The claimant stated he was a plant operator at the quarry. Under the Regulation of Wages General Order, I will equate this to a crawler tractor driver. The minimum was for crawler tractor driver in June 2013 was Kshs.18,329.25. The consolidated wage (inclusive of 15% house allowance) was Kshs.21,078.60.

(i) Notice

I award the claimant pay in lieu of notice in the sum of Kshs.21,078.60.

(ii) Salary for 10 days worked Kshs.8,107.15.

(iii) Public holidays

I award the claimant public holidays for three years only, for 11 public holidays per year being 33 days. Work done on public holidays is paid at double rate based on basic pay. The claimant is therefore awarded

$(18,329.25/26 \times 33 \times 2)$

Kshs.46,528.10

(iv) House allowance and underpayments

I will award these two heads together under consolidated wage (basic plus house allowance).

The claimant's salary as at June 2013 was Kshs.16,000. He was however entitled to Kshs.21,078.60.

He was thus underpaid by Kshs.5,078.60 in May 2013.

From 1<sup>st</sup> May 2011 the claimant was underpaid by Kshs.348.40 as the consolidated wage was Kshs.16,348.40.

From 1<sup>st</sup> May 2012 the consolidated pay was Kshs.18,490.00 so the underpayment was Kshs.2,490 per month.

Total underpayments is therefore as follows –

From May 2011

$Kshs.348.40 \times 12 = 4,180.80$

From May 2012

$Kshs.2,490 \times 12 = 29,880.00$

From May 2013

$Kshs.5,078.60 \times 1 = 5,078.60$

Total underpayments = Kshs.39,139.40

(v) Accrued leave

I award the claimant accrued leave for seven years at 21 days per annum (147 days) at Kshs.103,630.80 (based on basic wage of Kshs.18,329.25)

(vi) Rest days

I award rest days for only three years at 52 days per year (156 days) Kshs.109,975.50

(vii) Compensation

Having worked for 7 years and taking into account all circumstances of the case including length of service, the award granted and the manner in which the claimant's employment was terminated, I award him 7 months' gross salary  $(21,078.60 \times 7)$  at Kshs.147,550.20

(viii) Costs

The respondent shall pay claimant's costs for the suit.

(ix) Interest

Interest shall accrue from date of judgment.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JUNE 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 12<sup>TH</sup> DAY OF JULY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**