



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 346 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

GILBERT INYILA OJALA.....CLAIMANT

-Versus-

ATACO FREIGHT SERVICES COMPANY LIMITED...RESPONDENT

JUDGMENT

By statement of claim dated 15th September 2015 and filed on 6th October 2015 the claimant avers that his employment with the respondent, a limited liability company engaged in clearance and transportation of cargo, was terminated unlawfully and unfairly.

He prays for the following remedies:

- a) Compensation, salary, emoluments, perks, gratuity, and related disbursements from the date of the first employment until the date of the claimant's expected retirement at the age of 60 years.
- b) Costs of this suit
- c) Interest on (a) and (b) above until payment in full.
- d) Any other relief this Honourable Court may deem just and fit to grant.

The respondent filed a defence on 29th June 2016 in which it denies that the claimant was its employee. The respondent further avers that the claimant's services were terminated summarily for gross misconduct following his failure to secure the release of the respondent's truck impounded at Webuye Weigh Bridge Police Station for excess load.

At the hearing of the case the claimant testified on his behalf while the respondent called STEPHEN KAESONG, its Chief Executive Officer in charge of operations. Parties thereafter filed and exchanged written submissions.

Claimant's Case

It is the claimant's case that he was employed by the respondent in February 2005 as a Declarations Officer stationed at Malaba Kenya. His salary was a basic of Kshs.9,000, but the gross fluctuated between Kshs.11,000 and Kshs.12,000. The salary was paid through the bank. He did not work for any other company.

His employment was terminated on 2nd April 2013 by letter sent through email. The grounds for termination as stated in the letter are that:

- a) You have become a liability.
- b) Mombasa bonds are supposed to be cancelled within 14 days but this is not happening.
- c) You are supposed to monitor trucks' arrival and follow up in case of problems, this is not being done.
- d) Last week you were given instruction to go to Webuye and check on the shipment which has been held there for days; you did not

do so.

e) Your presence at Malaba Kenya side has become irrelevant.

The claimant avers that the termination was unlawful and unfair and he was not paid his terminal dues. He was not given any warning and did not appear before a disciplinary committee to defend himself.

The claimant testified that he was not negligent in handling the release of the truck detained in Webuye and the reason for delay in releasing the truck was because payment of the fine was made on 28th March 2013 which was Thursday before Good Friday, thus the truck could only be released on Tuesday 2nd April 2013, the very date that he was dismissed. He testified that prior to this he had never had any incidents of discipline.

Respondent's case

The respondent's case is that the claimant was never its employee, but worked on piece rate, that the claimant's employment was terminated after he caused the respondent to incur huge losses due to its negligence.

Determination

I have considered the pleadings, the evidence on record, the written submissions and authorities cited. The issues arising for determination are the following:-

- (i) Whether or not the claimant was an employee of the respondent.
- (ii) If the answer to issue No. 1 is in the affirmative, whether his employment was unfairly terminated; and
- (iii) Whether he is entitled to the prayers sought.

1. Whether claimant was an employee of the respondent

The claimant avers that he was an employee of the respondent from February 2005 to 2nd April 2013 when he was summarily dismissed. To prove this fact he has produced in his bundle of documents the following:-

- (i.) Employment card issued by the respondent in which he is described as "*Declaration Officer*" commencing the period February 2006 to 31st December 2009.
- (ii.) A Kenya Revenue Authority PASS in which he is described as "*Clearing Agent*" and name of company is given as ATACO Frt.
- (iii.) A letter of introduction dated 5th March 2007 which states:-

"This is to confirm to you that GILBERT INYILA OSALA ID NO. [particulars withheld] is an employee of Ataco Freight Services Company Limited.

Designation: Clerk. He is authorised to handle all customs documentations at Malaba Station.

Thanking you in advance for your cooperation.

SIGNED

Yours faithfully

For Ataco Freight Services Co. Ltd.

Signed

MOSES E. OMUSOLO

BRANCH MANAGER"

- (iv) Ataco Freight Services Limited. Malaba Branch Report to the Company Annual General Meeting Held at Jinja – February 2008 dated 3rd January 2008.

- (v) In the Report the staff are listed as follows:-

ERNEST OSABIT

NABWIRE JOYCE

INYILA GILBERT

ANENO JULIET

EMMANUEL SANTOS

In the defence, it is pleaded at paragraph 2 that the claimant was summarily dismissed for gross misconduct and in the witness statement of STEPHEN AKOLONG he states:

“That the claimant was a casual employee who used to check trucks arrival at Malaba border and assist the drivers cross the border on behalf of the respondent company having offered services for the company from 2005 to the year 2013.”

In his testimony RW1 MR. AKOLONG stated that the claimant was a casual and was not issued with any contract of employment. He stated that the claimant was paid through his KCB account.

Section 2 of the Employment Act defines a casual employee as:-

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

The Act defines a contract of service as follows:-

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

Employee is defined as follows:

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

The averment that the claimant was not issued with a contract of employment by the respondent is not a determinant of his employment status as an employment contract may be oral or in writing, or may be implied as defined in Section 2.

Under Section 9(2) of the Employment Act an employee shall be responsible for causing a contract to be drawn up and that the contract is signed by the employee.

A person who is not an employee cannot be subject to summary dismissed for gross misconduct. Again a person cannot be a casual from 2005 to 2013. This would be against the provisions of Section 37 of the Employment Act which provides that after 30 consecutive days a casual's terms of employment are converted by operation law to a regular contract. The term used by RW1 to describe the claimant as an *“independent casual”* is unknown to the law.

From the foregoing it is the finding of the court that the claimant was indeed an employee of the respondent from 2005 to 2013 when was employment was terminated by way of summary dismissal.

2. Whether the claimant was unfairly dismissed

The claimant's letter of dismissal states –

“Subject: Re: Termination of Services

Good Morning Gilbert

This is to inform you that with effect from today April 2, 2013, your services are no longer required due to the following: -

- 1. You have become a liability.*
- 2. Mombasa bonds are supposed to be cancelled within 14 days but this is not happening.*
- 3. You are supposed to motor trucks arrival and follow up in case of problems. This is not being done.*

4. Last week you were given instruction to go to Webuye and check on the shipment which has been held there for days; you did not do so.

5. Your presence at Malaba Kenya side has become irrelevant.

Please handle all company property to Emma immediately after which you pay for March and April will be arranged by the account accordingly.

Meanwhile Alex our IT is requested to delink/block email communication within 24 hours.

Regards

John Atalyeba

CEO

ATACO Freight Services Limited”

Under section 41 of the Employment ACT the claimant is entitled to be informed of the grounds for termination and given a hearing before the termination is effected. In the present case the termination was by email and the grounds cited in the letter had never been brought to the attention of the claimant before.

Section 43 further requires proof of reasons for termination.

In the present case there is no evidence adduced by the respondent that the claimant was guilty of negligence. Even in the case of detention of the truck at Webuye which was the immediate or only reason for termination there is no evidence that the claimant was responsible for the delay in the release of the truck.

The respondent does not deny that the money for payment of the fine was released to the claimant on Thursday 28th March 2013 or allege that the claimant delayed in paying the money once it was availed to him. The overloading of the truck was not the claimant’s fault, neither was the impounding caused by the claimant. There is evidence of consultations between 25th March 2013 when the truck was detained and 28th March 2013 when the payment of the fine was effected which do not implicate the claimant in the delay in the release of the truck.

I find from the foregoing that the summary dismissal of the claimant was both procedurally and substantively unfair.

Remedies

The claimant prayed for compensation, salary, emoluments, parks, gratuity, and related disbursement to retirement age of 60 years.

Before I determine these I have to determine what salary to use. The claimant testified that he earned Kshs.9,000 per month as basic salary and between Kshs.11,000 and 12,000 inclusive of overtime.

It is not disputed that the claimant was a declaration officer or clerk of the respondent. The minimum salary for a general clerk in 2012 which is the one applicable as at 2nd April 2013 under All Other Areas Column in the General Order was Ksh.10,301.15 basic and kshs.11,846.30 consolidated (basic + house allowance). Section 26 of the Employment Act and Section 48(1) of the Labour Institutions Act prohibit this court from making any determinations that provide for terms below the minimum rates under the law.

Section 26 provides as follows –

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Section 48(1) of the Labour Institutions Act provides as follows –

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

For these reasons I will use the rate of Kshs.11,846.30 for purposes of tabulation. The claimant did not pray for underpayments so I will not venture into that.

The claimant's employment having been unfairly terminated, he is entitled to compensation. Taking into account the length of service, the manner in which his employment was terminated and all the circumstances of his case and guided by Section 49(4) of the Employment Act, I award him compensation at 10 months gross salary. This would amount to Kshs.118,463.00.

Under Section (35) of the Employment Act the claimant is entitled to service gratuity which I award him at the rate of 15 days per year worked being 8 years at Kshs.47,385.30.

Under Section 49(1) the claimant is entitled to pay in lieu of notice which I award him at Kshs.11,846.30. The claimant did not clarify what he meant by the other prayers.

Conclusion

In conclusion I find that the claimant was a regular employee of the respondent and that he was unfairly dismissed from employment. I therefore award him the following –

1. Compensation	Kshs.118,463.00
2. Service Gratuity	Kshs.47,385.30
3. Notice	Kshs.11,846.30
TOTAL	KSHS.177,694.60

The respondent shall also pay claimant's costs. The decretal sum will attract interest from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE