



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 528 OF 2016

BETWEEN

PETER MUTUNE.....CLAIMANT

VERSUS

YALFA CARGO LOGISTICS.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

The Dock Workers Union for the Claimant

J. A. Abuodha & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 5th July 2016. He avers he was employed by the Respondent Company as a Mechanic, in January 2011. His contract was terminated by the Respondent on 1st December 2015. He earned a basic monthly salary of Kshs. 60,000 as of the date of termination. He was not paid house allowance. He reported on duty on many occasions at 7.00 a.m. leaving at 7.00 p.m. or later. He worked on Public Holidays, and on rest days. He was not granted annual leave. His contract was terminated on the allegation that he delayed in repairing Respondent's Truck. He considered termination was unfair and reported his grievance to his Trade Union, Dock Workers Union, who issued demand to the Respondent, for remedial action. The Respondent ignored demand. The Claimant seeks Judgment against the Respondent in the following terms:-

- a. House allowance from January 2011 to December 2011 at the rate of 15% of basic salary, at Kshs. 540,000.
- b. Rest days at Kshs. 1,620.
- c. Public Holidays at Kshs. 160,000.
- d. Overtime pay at Kshs. 4,545,000.
- e. 1 month gross salary in lieu of notice at Kshs. 69,000.
- f. Unpaid annual leave at Kshs. 210,000.
- g. Severance pay at 22 days' salary for each completed year of service at Kshs. 220,000.
- h. Compensation for unfair termination the equivalent of 12 months' gross salary at Kshs. 828,000.
- i. Declaration that termination was unfair.

2. The Respondent was granted by the Court, 21 days on 7th February 2017 to file and serve its Response. There was no Response on record

by the time the dispute was next mentioned on 23rd February 2017. The Respondent was granted another 14 days to file Response. The matter was mentioned on 14th March 2017. There was no Response filed. Further mention was made on 8th September 2017. Still no Response had been placed on the record. The dispute was set down for formal proof, on 13th November 2017. Counsel for the Respondent appeared in Court on the date of formal proof. She told the Court she had just received documents from her Client and was ready to file and participate in the proceedings. The Court bent backwards and granted the Respondent 14 days to file its papers, with costs of Kshs. 15,000 awarded to the Claimant. Parties agreed to mention the matter on 14th December 2017, to confirm compliance on the part of the Respondent. Come 14th December 2017, and there was no compliance in any form, on the part of the Respondent. The Court set aside the order granting the Respondent leave to file its Response, and once again, scheduled the matter for formal proof.

3. The Claimant told the Court he was employed by the Respondent as pleaded. He was assigned repair of Respondent's Motor Vehicle on 3rd November 2015. He found there were certain spare parts required to be purchased to do repair work. He informed his Supervisor about this. His Supervisor told the Claimant he could not authorize purchase of new spare parts, and the Claimant should use his brain, and work with what was available. The vehicle was ready by 10th November 2015, and made several routine journeys. The Claimant was later called by the Personnel Manager and told the Director had complained that the Claimant had occasioned the Respondent delay, in repairing the vehicle. The Claimant was told to go to the Accounts Department. There, he found his terminal dues had already been tabulated. He did not know the reasons for termination. He was asked to remove the work uniform and leave. He never went on annual leave. He was not paid house allowance. He rested occasionally. N.S.S.F contributions were deducted and remitted. He prays the Court to grant the Claim.

The Court Finds:-

4. There is no Response on record. The Court as outlined above, went to a ridiculous level and bent backwards to bring the Respondent to participate in the proceedings. Every opportunity to respond to the Claim, every procedural order issued by the Court, was ignored by the Respondent. The Court has no reason to doubt that the Claimant was employed by the Respondent on the terms and conditions of employment outlined in the Claimant's Pleadings, Evidence and Submissions.

5. Termination of the Claimant's contract was instigated by the Respondent, ostensibly on the allegation that the Claimant delayed in putting back on the road, Respondent's Truck. The Respondent did not take the Claimant through a disciplinary process to establish the veracity of the allegation. There were no charges levelled against the Claimant. There was no requirement for him to show cause why, he should not be disciplined. There was no notice preceding termination. There were no valid reasons shown by the Respondent, to justify its decision. Termination was unfair, having failed to meet the minimum statutory standards of fairness, under Sections 41, 43 and 45 of the Employment Act 2007.

6. The Claimant has not availed to the Court sufficient material to support his prayers for Rest Days, Public Holidays, Overtime and Severance Pay. His evidence was that he rested on certain occasions. He did not specify which these occasions were, so as to assist the Court to have a reasonable inference on days he did not rest. He did not give details of Public Holidays worked. Overtime is pleaded at over Kshs. 4 million. The hourly rate is not disclosed, and neither are the specific days when the excess hours were done. A prayer for over Kshs. 4 million cannot be granted on the foundation of bare Pleadings. Severance pay is provided for under redundancy law. The Claimant does not plead redundancy as the reason he left employment.

7. The other prayers appear to the Court awardable, on the balance of probability, and in the absence of any counterevidence from the Respondent. There is no material to contradict the Claimant that Kshs. 60,000 paid to him as salary, did not comprise the housing element. **He is granted house allowance at 15% of the basic salary for 60 months, at Kshs. 540,000.**

8. **He is allowed the prayer for notice pay of 1 month, based on his gross salary of Kshs. 69,000, at Kshs. 69,000.**

9. **The prayer for unpaid annual leave of 105 days is granted at Kshs. 210,000.**

10. **As concluded above, termination was unfair. The Claimant is granted compensation the equivalent of 12 months' gross salary at Kshs. 828,000.**

IN SUM, IT IS ORDERED:-

a. It is declared termination was unfair.

b. The Respondent shall pay to the Claimant: arrears of house allowance at Kshs. 540,000; notice pay at Kshs. 69,000; annual leave pay at Kshs. 210,000; and compensation for unfair termination, the equivalent of 12 months' salary at Kshs. 828,000- total Kshs. 1,647,000.

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge