



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 662 OF 2016

DANIEL ANDALIA NDONGA.....CLAIMANT

VS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Daniel Andalia Ndonga against his former employer, Hakika Transport Services Limited. The claim is documented by a Memorandum of Claim dated 9th September 2016 and amended on 15th May 2017. The Respondent filed a Response on 26th October 2016.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Rajab Yeri Kombe. Both parties further filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent from 2006 until 2nd September 2015, in the position of Mechanic. He earned a monthly salary of Kshs. 21,300.
4. The Claimant states that on 1st September 2015, he was asked to sign a contract. He asked for time to peruse the contract before signing. The Claimant adds that the Respondent’s Director became furious when he heard that the Claimant had declined to sign the contract and threatened the Claimant with dismissal from employment.
5. The Claimant avers that the following day, 2nd September 2015, he reported to work as usual but was declined entry. He deemed this to be summary dismissal. He now claims the following;

- a) 1 month’s salary in lieu of notice.....Kshs. 21,300
- b) Unpaid leave allowances.....191,700
- c) Compensation for unfair termination.....255,600
- d) Service pay for 9 years.....95,850
- e) Costs

The Respondent’s Case

6. In its Response dated 25th October 2016 and filed in court on 26th October 2016, the Respondent admits that the Claimant was its employee and that he worked until 1st September 2015. The Respondent however states that the Claimant’s employment was lawfully and regularly terminated on 2nd September 2015 after he was found to have committed breach of the terms of his employment thus exposing the Respondent to prejudice with legal and financial consequences.
7. The Respondent maintains that the Claimant’s termination was carried out lawfully, regularly and procedurally as he was allowed an opportunity to be heard in his defence but which defence was not satisfactory. The Respondent further states that in a disciplinary meeting

held on 1st August 2015, the Claimant aggravated his acts of gross insubordination and indiscipline and became rowdy and riotous.

8. The Respondent states that the Claimant was a registered member of the National Social Security Fund (NSSF) and the Respondent remitted all the statutory deductions payable on his behalf. The Respondent further states that the Claimant enjoyed all the statutory and contractual benefits due to him, including annual leave days which were fully utilized. In any event, any leave and/or benefits not utilized by the Claimant were forfeited by reason of limitation of time.

9. The Respondent avers that apart from this claim, there is **Cause No 758 of 2015: Boniface Olienge & 67 others v Hakika Transport Services Ltd** in which the Claimant seeks compensation on account of redundancy, arising from the same circumstances as in this case.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case for unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

11. The Claimant states that his employment was terminated because he asked for time to consider an employment contract issued to him by the Respondent. He however did not produce a copy of the subject contract.

12. The Respondent denies the Claimant's averment in this regard and states that the Claimant's employment was terminated on account of negligence, insubordination and poor performance. The Respondent produced a termination letter dated 2nd September 2015 addressed to the Claimant as follows:

“Dear Sir,

RE: NEGLIGENCE AND INSUBORDINATION

The management regrets to inform you that; subsequent to the disciplinary committee sitting of the 1st August 2015, the committee established that you have on various occasions failed to put on the requisite Personal Protective Equipments that have been supplied to you and thereby exposed yourself to risks.

Please note that an employee who carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed it carefully and properly is a danger not only to himself but to others working with him as well and is liable to disciplinary action up to and including summary dismissal as per section 44(4) of the Employment Act.

It has further established (sic) that you have knowingly failed and or refused to obey lawful and proper commands which are within the scope of your duty to obey issued by your superiors. This is in contravention of sec 44(4)e of the Employment Act.

The foregoing issues were clearly displayed in your attitude before the entire disciplinary committee. You also failed to satisfy the committee on the reasons to (sic) a drop in your performance.

In this regard, you are hereby asked to proceed for one month's leave pending your termination from employment upon expiry of the said leave.

Yours faithfully

Hakika Transport Services Limited

(Signed)

Yeri Kombe”

HUMAN RESOURCE MANAGER”

13. Section 47(5) of the Employment Act, 2007 provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

14. In **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** my brother, **Radido J** stated the following:

“The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act.....An employee therefore has the burden of proving that an unfair termination of employment has occurred.”

15. The evidential burden placed by Section 47(5) of the Employment Act is echoed by Sections 107 and 109 of the Evidence Act.

16. According to the evidence on record, the Claimant received the termination letter on 15th October 2015, confirming that he had read and understood its contents. He appears not to have challenged its veracity at the shop floor and he cannot come to this Court with a different tale.

17. The result is that the Claimant has failed to prove a case of unlawful termination and his claims for compensation and notice pay must fail. The claim for unpaid leave allowances was not proved and is dismissed. Having been a contributing member of the National Social Security Fund (NSSF), the Claimant is not entitled to service pay.

18. Ultimately, the Claimant’s entire claim fails and is dismissed with costs to the Respondent.

19. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kyalo for the Claimant

Mr. Onyango for the Respondent