



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 524 OF 2013

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

STARWAYS EXPRESS LTD1st RESPONDENT

MR. SALIM SHEIKHAN2nd RESPONDENT

JUDGMENT

1. The Transport Workers Union (Union) moved Court on 15 April 2013 alleging that Starways Express Ltd and Salim Sheikhan (Respondents) had unfairly terminated the contracts/locked out Peter Kithuka Nguva (Grievant).
2. On 28 November 2014, the Union filed another Memorandum of Claim wherein the Issue in Dispute was stated as
Lock out/unfair termination from employment of 3 employees namely:-
 - a) Peter Kithuka Nguva
 - b) Joseph Mutiso Kioko and
 - c) Cosmas Ndote Mutune and failure to pay each of them their accrued terminal benefits.
3. The Union filed/attached affidavits from the Grievants to the Memorandum of Claim.
4. On 15 December 2014, the Respondents in a *Joint Reply to Statement of Claim* contended that the 1st Respondent had been struck off the register of companies (no evidence was filed/produced in Court); that the Grievants were not employees but were engaged on casual basis and that the cause of action was statute barred.
5. The Cause came up for fixing of a hearing date on 19 April 2018, and the Court scheduled hearing for 5 July 2018 with an order to the Union to serve a hearing notice.
6. According to an affidavit of service filed in Court on 4 July 2018, a secretary with the firm of Nyende & Co. Advocates accepted service of hearing notice. However, the Respondents and their advocate did not attend the hearing.
7. Two of the Grievants, Peter Kithuka and Cosmas Ndote Mutune testified.
8. Peter Kithuka testified that he was employed by the Respondents as a driver in 1992 and served until 1 December 2012 when he was dismissed by a Mr. Rashid without any notice or hearing. He stated that he was earning Kshs 12,000/- at the time of dismissal.
9. According to this Grievant, he was being paid below the prescribed minimum wage.
10. Mr. Cosmas Ndote on his part testified that he was employed by the Respondents as a driver in 1989 and served until he was dismissed on 13 May 2013 while earning Kshs 12,000/-. He stated that there was no notice or hearing.
11. This grievant also stated that he did not go on leave during the duration of employment (23 years).

12. Considering that the Grievants were not dismissed at the same time, the Court is at a loss as to why the Union opted to file one *Memorandum of Claim*. This is not the first time the Court is confronted by pleadings which would not be allowed were they to be filed by an advocate. The Unions need to train their Industrial Relations Officers on the basics of pleadings.

13. The Respondents were aware of the hearing but opted to sit out the hearing, and thus the Court only has the unrebutted/untested evidence of the 2 Grievants.

14. The Court in effect will find that there was unfair termination of the Grievants employment for lack of notice as contemplated by section 35 of the Employment Act, 2007 and thus entitled to pay in lieu of notice of Kshs 12,000/- each.

15. In consideration of the Grievants lengths of service, the Court is of the view that the equivalent of 6 months compensation would be appropriate (Kshs 72,000/- each).

16. On the questions of underpayments and annual leave, the Court finds that the Grievants did not lay any proper factual/evidential foundation. There was no evidence as to the categories of vehicles driven.

17. Equally, the claims for leave would be circumscribed by the provisions of section 28(4) and 90 of the Employment Act, 2007.

18. Any claims in respect of Joseph Kioko were not proved.

19. The Court in overall regrets the failure by the Respondents to attend the hearing to advance the defences set out in their Reply to Memorandum of Claim.

Conclusion and Orders

20. The Court finds and holds that the termination of the Grievants contracts were unfair and awards

Peter Kithuka Kshs 84,000/-

Cosmos Ndote Mutune Kshs 84,000/-

21. No order as to costs.

Delivered, dated and signed in Nairobi on this 2nd day of November 2018.

Radido Stephen

Judge

Appearances

For Union Mr. Nasib Mokuu, Industrial Relations Officer

For Respondents Nyende & Co. Advocates

Court Assistant Lindsey