



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 556 OF 2015

BETWEEN

DAVID KIPSANG KIPLIMO CLAIMANT

VERSUS

MODERN COAST EXPRESS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimant

Mogaka Omwenga & Mabeya Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 5th August 2015. He states he was employed by the Respondent as a Driver, on 5th April 2012. He worked up till 20th March 2015, when he states, his contract was unfairly terminated by the Respondent. Pay slips on record show he earned a monthly salary of Kshs. 45,535 described as basic and gross salary. He prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 45,535.
- b) Salary arrears at Kshs. 75,891.
- c) Gratuity/ service pay for 3 years served at Kshs. 68,302.
- d) Damages for unfair termination at Kshs. 546,420

Total...Kshs. 736,148

2. At paragraph 3.0 of the Statement of Claim, which is titled 'Relief Sought,' he makes additional prayers which are rather confusing. These are:-

- a) An order compelling the Respondent to immediately release the Claimant's terminal dues.
- b) An order directing the Respondent to pay the Claimant all terminal dues pending.
- c) An award for damages for unlawful and unfair termination.
- d) *In the alternative*** Judgment is entered for Kshs. 736,148 as prayed in the Claim.
- e) Costs and interest.

3. How is Kshs. 736, 148 an alternative prayer, while it is made up of compensation for unfair termination and terminal dues? What is the Court to make of prayers 3.0 [a] and [b] above? Pleadings, particularly those filed through Advocates must be intelligible. The Claim was filed through the reputable Legal Aid Group, KITUO CHA SHERIA, which makes the defects in the Pleadings all the more shocking.

4. The Respondent filed its Statement of Response on 22nd September 2015. Its position is that the Claimant was employed by the Respondent as a Driver, with effect from 29th January 2013, not 5th April 2012. He abandoned his work after the Respondent asked him to explain the whereabouts of certain of its items. He is not entitled to any of the prayers sought, having deserted work. The Respondent prays for dismissal of the Claim, with costs to the Respondent.

5. The Claimant was heard, and closed his case, on the 8th September 2016. Respondent's case was scheduled for hearing on 7th November 2016 and 23rd February 2017. On the latter day it was agreed that the Respondent had failed to secure the attendance of its intended Witness, and Documents filed by the Respondent were admitted as Respondent's exhibits, and proceedings marked as closed. The dispute was last mentioned on 23rd March 2017 when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

6. Kiplimo testified he was employed in April 2012. He drove from Mombasa to Kampala and Kigali. Occasionally he would drive to Congo.

7. He travelled to Goma in DRC on 12th February 2015 to deliver cooking oil. He returned on 15th March 2015. He was called by the Manager of 19th March 2015 and told he had stolen 25 USD, from the money assigned to him for DRC journey. He explained he surrendered the receipts at Respondent's Office at the border town of Busia. Haroun, the Fleet Owner, insisted that the Claimant had stolen and should leave. He left as advised. He and his family suffered. He only secured another job in September 2015. It is not true that he deserted. He delivered oil for UN in DRC. There was no complaint about delivery from the UN. He was paid Kshs. 55,000 by the Respondent for the journey, through m-pesa. This was to enable him meet border and visa fees. He does not know owe the Respondent USD 304.

8. Cross-examined, he told the Court he was not paid salary for February and March 2015. He worked for 3 years from 2012. He did not sign a contract. He was questioned about diesel use by Haroun. He was not issued with any document to show termination of employment. Security Guards at the gate were directed not to allow the Claimant in. he was not paid any terminal dues.

The Court Finds:-

9. The Claimant was employed by the Respondent Company as a Driver. The date of employment is disputed. The Claimant states it is 5th April 2012. The Respondent states it is 29th January 2013. The Respondent exhibited a letter of employment dated 29th January 2013, supporting its assertion on the date of employment. The Claimant denies he signed the letter of appointment.

10. The Court does not think the date when the Claimant was employed is relevant. It would only be relevant if there is a merited prayer on service pay. The number of years served would be relevant. The Claimant prays for gratuity/ service, but this is clearly without foundation. His pay slips show he was

subscribed to the N.S.S.F. He is not eligible for service pay under Section 35 [6] of the Employment Act 2007. He did not draw the mind of the Court to any law, wage instrument, CBA or contractual clause, granting him gratuity/ service pay. The date of employment is therefore immaterial, as it is not necessary to reach a finding on the number of years served. The prayer for service pay is rejected.

11. He drove to DRC to deliver cooking oil to the UN Office. He returned on 15th March 2015. On 19th March 2015, he was questioned by the Respondent for alleged stealing of USD 25 from the Respondent. Haroun the Business Owner alleged the Claimant had stolen the money. The Claimant was asked to leave employment. He was paid nothing on termination.

12. The Respondent alleges the Claimant deserted after the Respondent enquired about the money. His contract was not terminated by the Respondent. There is no evidence marshaled by the Respondent to support its position. The Claimant was not taken through a disciplinary process, for the offence of desertion, or the offence of stealing Respondent's money. There is no letter asking him to show cause, why he should not face disciplinary action for any employment offence. There was no follow up with the Police for the criminal offence of stealing by servant. No counterclaim of any sort has been pleaded by the Respondent. Termination was instigated by the Respondent. It was without justification. It was carried out without regard to fair procedure. The Respondent did not satisfy the standards of fairness under Sections 41, 43 and 45 of the Employment Act 2007. Termination was unfair.

13. The Claimant is granted the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 455,350.

14. He is granted 1 month salary in lieu of notice at Kshs. 45,535.

15. The Claimant states he was not paid salary for February 2015, and for 20 days worked in March of the same year. The Respondent offered no proof of payment. It should have been a simple task, to show the Court pay slips for the period in question, and corresponding bank transfers. **The prayer for arrears of salary at Kshs. 45,535 for February 2015 and Kshs. 35,026 for March 2015- total Kshs. 80,561 is granted.**

16. It is declared termination was unfair.

17. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

18. No order on the costs.

IN SUM, IT IS ORDERED: -

a) It is declared termination was unfair.

b) The Respondent shall pay to the Claimant: the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 455,350; notice pay at Kshs. 45,535; and arrears of salary at Kshs. 80,561- total Kshs. 581,446.

c) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

d) No order on the costs.

Dated and delivered at Mombasa this 21st day of June 2017

James Rika

Judge