



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NUMBER 859 OF 2016

BETWEEN

NDUVA KILUNGYA.....CLAIMANT

VERSUS

KASSAM HAULIERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wandai Matheka & Company Advocates for the Claimant

No appearance for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th November 2016. He states he was employed by the Respondent Transportation Company as a Truck Driver in April 2013. His contract was terminated in circumstances he feels were unfair, in November 2015. His last salary was Kshs. 28,000 per month.

2. He received a call in November 2015 from Respondent's Director, one Mohammed Kassam, informing the Claimant that his contract had been terminated. No reason was given. There was no hearing. He sustained injury while at work on 15th September 2015. The Respondent turned its back on him. He worked without rest throughout. He worked on Public Holidays without pay. He prays the Court to grant him the following orders against the Respondent:-

- a. Unpaid salary for the month of November at Kshs. 28,000.
- b. 1 month salary in lieu of notice at Kshs. 28,000.
- c. Overtime for 2 years and 7 months at Kshs. 3,036,923.
- d. Public Holidays at Kshs. 49,538.
- e. House allowance at Kshs. 130,200.
- f. Unpaid N.S.S.F contributions at Kshs. 5,600.
- g. 12 months' salary in compensation for unfair termination at Kshs. 336,000.

Total.....Kshs. 3,698,261

- h. Certificate of Service to issue.
- i. Costs and interest.
- j. Any other suitable relief.

2. There are Affidavits of Service filed, indicating the Respondent was served and acknowledged service of Notice of Summons, Statement of Claim and Hearing Notice. The Respondent did not file anything by way of Response, and did not attend Court at any time. The Claimant gave evidence by way of formal proof, on 25th July 2017. He adopted his Witness Statement on record, which essentially replicates the Statement of Claim, whose contents have been summarized above.

The Court Finds:-

3. The Claimant was employed by the Respondent as a Truck Driver in April 2013. He was dismissed in November 2015. He was not given notice, or reasons for the decision, before dismissal. He was not heard. His last salary was Kshs. 28,000 monthly. The Respondent did not justify its decision or follow a fair procedure, as required under Sections 41, 43, 45, and 47 of the Employment Act 2007.

4. It is declared termination was unfair.

5. The Respondent shall pay to the Claimant the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 336,000 and notice pay at Kshs. 28,000.

6. He claims unpaid salary for the month of November 2015. It is not clear from his evidence when, in November 2015 he was dismissed. In the absence of evidence from the Respondent, the Court accepts that the Claimant worked the whole of November 2015, and merits salary for the whole month. **He is allowed salary for the month of November 2015 at Kshs. 28,000.**

7. The prayer for overtime pay was not backed by evidence. The Claimant was a Truck Driver, and his nature of work would involve journeying. He was not in an office, working under supervision, and under a verifiable clocking system. He did not persuade the Court how these excess hours applied to him, in the course of driving. Even without this aspect of the Claimant's evidence being countered, it does not stand judicial scrutiny. He did not show that he drove excess hours daily. The prayer is rejected.

8. The claim for Public Holidays' Pay is sustained. He is granted Kshs. 49,538 under this head.

9. He alleges he was not paid house rent allowance. Again the claim is not challenged. The Respondent made no effort to show compliance with Section 31 of the Employment Act 2007, on affording an Employee reasonable housing accommodation at or near the place of work, or paying house rent allowance to enable the Employee to procure such accommodation. **The prayer for house allowance is granted at Kshs 130,200.**

10. Annual leave pay is granted at Kshs. 84,000.

11. N.S.S.F contributions are statutory obligations due to the statutory body. If deducted and unremitted, the recourse should be with the Claimant seeking enforcement under the N.S.S.F regime. Statutory dues should not revert to the Claimant's pocket. They ought to go to his N.S.S.F account. The Claimant should pursue release of these dues by his former Employer to the N.S.S.F from where he can access the contributions alongside his full social security benefits. The prayer for refund of N.S.S.F dues is declined.

12. Certificate of Service to issue.

13. Costs to the Claimant.

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

IN SUM, IT IS ORDERED:-

- a. **Termination was unfair.**
- b. **The Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 336,000; notice pay at Kshs.28,000; November salary at Kshs.28,000; public holidays' pay at Kshs. 49,538; house allowance at Kshs.130,200; and annual leave pay at Kshs. 84,000- total Kshs. 655,738.**
- c. **Certificate of Service to issue.**
- d. **Costs to the Claimant.**
- e. **Interest granted at 14% per annum from the date of Judgment till payment is made in full.**

Dated and delivered at Mombasa this 29th day of September 2017.

James Rika

Judge