



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT  
AT MOMBASA  
CAUSE NUMBER 217 OF 2014

**BETWEEN**

SIMBA ISABU MWANGOMA .....  
CLAIMANT

**VERSUS**

RADAR HARDWARE LIMITED .....  
RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Tindika & Company Advocates for the Claimant*

*Mutisya Bosire & Company Advocates for the Respondent*

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JUDGMENT

1. The Claimant filed his Statement of Claim, on 2<sup>nd</sup> April 2014. He states he was employed by the Respondent as a Truck Driver, on 6<sup>th</sup> April 2009. His salary was Kshs. 20,000 per month.
2. He was instructed by the Respondent to transport goods from Mombasa to Malindi, on 14<sup>th</sup> February 2014. At a weighbridge along the route, his Truck was found by Traffic Officers to have in excess of the maximum allowable weight of 28 tons. It had 8 excess tons.
3. He and his Truck were arrested and detained at the roadblock by Traffic Officers. The Claimant called Respondent's Manager, John Orguba for assistance. The Manager only arrived at the scene on 19<sup>th</sup> February 2014.
4. On the same date the Claimant was arraigned before the Resident Magistrate's Court at Shanzu, and charged with the offence of overloading. He was sentenced to pay a fine of Kshs. 150,000, which the Respondent paid.
5. He returned to the Respondent's Offices on 21<sup>st</sup> February 2014. A Manager, Omar Ahmed Yusuf,

informed the Claimant his services were no longer needed. His contract was therefore terminated without notice or justifiable cause. He was not heard. He prays the Court to grant him Judgment against the Respondent in the following terms;-

a) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 240,000.

b) 3 months' salary in lieu of notice at Kshs. 60,000.

c) Balance of February 2014 salary at Kshs. 6,000.

d) Annual leave pay for 5 years at Kshs. 100,000.

e) Leave travelling allowance over the same period at Kshs. 10,000.

f) Allowances for 6 days [16<sup>th</sup>-21<sup>st</sup> February 2014] at Kshs. 9,000.

Total...Kshs. 425,000.

g) Interest.

h) Costs.

6. The Respondent filed Response to the Claim on 10<sup>th</sup> June 2014, and Amended Response, on 27<sup>th</sup> February 2015. Its position is that the Claimant's contract was terminated on the ground that the Respondent experienced diminished business. Termination was fair. Notice issued upon the Claimant. All salary was paid to the Claimant. Leave dues were paid. He took all his leave. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

7. Mwangoma testified, and rested his case on 26<sup>th</sup> June 2015. Fredrick Edward Makokha Ondako, Respondent's Human Resources Manager, testified on 16<sup>th</sup> November 2016. Proceedings closed on 23<sup>rd</sup> March 2017. The matter was last mentioned in Court on 17<sup>th</sup> July 2017 when Parties confirmed filing of their Closing Submissions.

8. The Claimant told the Court he used to transport construction material. Management instructed him on the quantity to be loaded. He was arrested at a weighbridge in Mtwapa Town along Mombasa-Malindi road, for loading excess tons. He called his Manager as stated at the outset in this Judgment. He was not assisted. He was taken to Court and fined Kshs. 150,000 which the Respondent paid. His contract was terminated by the Respondent when he reported back to work. He asked his Manager Omar why his contract was terminated. He was told it was because Respondent's Truck was arrested at the weighbridge. The Claimant was paid Kshs. 14,000 in terminal dues, and issued with the Certificate of Service. He never went on annual leave. He was not subscribed to the N.S.S.F. He instructed his Advocates to issue demand before filing the Claim.

9. Cross-examined, the Claimant stated he was an experienced Driver, having previously driven for Kenya Bus Services Limited. He was not given a letter of employment by the Respondent. He had been arrested 3 times by Traffic Officers. Fine of Kshs. 150,000 was paid by Orguba. Omar did not advise the Claimant that he was no longer needed because of persistent arrests. He was not notified of diminished work. If there was reduced work, the Respondent would be entitled to reduce staff. There was no reduced work as stated in the Certificate of Service issued upon the Claimant by the Respondent. He did not know how many Employees left. Redirected, he told the Court Certificate of Service was authored by the Respondent. The Claimant did not know it contained information on reduced work. He was not notified about reduced work. There were no consultative meetings held with Management on the subject of reduced work.

10. Fredrick told the Court Respondent issued notice of diminished work to its Employees. Director made

the decision. The Respondent consulted with the Claimant in a meeting held on 8<sup>th</sup> January 2014, attended by Respondent's Director, Fredrick, Transport Manager Orguba and the Claimant. The Claimant was paid Kshs. 14,000 as salary for days worked. He cleared. His contract was not terminated because of the overloading incident. Such incidents were commonplace at the weighbridge. He had taken leave for 2 years. He was issued notice of termination.

11. The Witness told the Court on cross-examination that Respondent's notice of diminished work issued upon the Claimant, merely informed the Claimant his contract would be terminated in February 2014, without giving any specific date. The Claimant was notified about the meeting of 8<sup>th</sup> January 2014. Only Fredrick signed the minutes capturing the meeting. It is not shown in the minutes what Claimant's views were. He was paid salary for days worked. Annual leave was not paid. Severance was not paid. On redirection, the Witness testified notice of termination would take effect any date in the month of February 2014.

12. In its Closing Submissions, the Respondent offers to pay the Claimant, if the Court finds in favour of the Claimant, gratuity at 15 days' salary for 4 years at Kshs. 60,000; annual leave pay for 98.5 days at Kshs. 65,670; salary for days worked in February 2014 at Kshs. 8,000; less Kshs. 14,000 received by the Respondent, total Kshs. 119,670.

### **The Court Finds:-**

13. The Claimant's employment history with the Respondent and his terms and conditions of service, are not largely in dispute.

14. The reason for termination is disputed. The Claimant states he was told his contract was terminated because he had had been arrested at the Mtwapa weighbridge, arraigned in Court, and occasioned the Respondent a Court fine of Kshs. 150,000. The Respondent denies that termination had anything to do with the weighbridge incident. Such incidents are commonplace. The reason why Claimant's contract was terminated was because the Respondent experienced diminished work. Termination was occasioned by redundancy. In support the Respondent exhibits a Notice of Reduction of Work dated 4<sup>th</sup> January 2014 issued upon the Claimant; and minutes of a consultative meeting held on 8<sup>th</sup> January 2014, involving the Claimant, Respondent's Director, Human Resources Manager and Transport Manager.

15. The Court accepts the evidence of the Respondent, on the reason for termination. The Notice of Reduction of Work, and the minutes are not contested documents. The Claimant was not asked to defend the weighbridge incident at any meeting with the Respondent. There is no document or other evidence, to suggest that termination was occasioned by the incident. The Respondent states and the Court has no reason to disagree that incidents of this nature, are commonplace. The Claimant concedes he was involved in many other such incidents before, with no adverse action taken against him by the Respondent.

16. Was redundancy carried out fairly? There is adequate evidence to persuade the Court that redundancy failed to meet the requirements of Section 40 of the Employment Act 2007. The Claimant was not given a proper notice indicating the reasons for and extent of redundancy. The Notice of 4<sup>th</sup> January 2014 served to notify the Claimant that there was a redundancy situation, as well as notify him that his contract had been terminated. The effective date of termination was unknown. He was invited to a meeting with Management on 8<sup>th</sup> January 2014. He was asked to present his views and explanation if any. What explanation was he expected to give in a redundancy process? The minutes of the meeting, do not capture anything said by the Claimant, but allege it was agreed there was need to reduce Drivers. The only payment offered to the Claimant was Kshs. 14,000 expressed to be final dues. No severance pay was discussed or paid. It was not a serious consultative meeting. Notice of Reduction of Work, if it can be considered even for a fleeting moment to comprise a Notice of Redundancy, was not served upon the Labour Office.

17. The Court is satisfied redundancy was carried out contrary to Section 40 of the Employment Act

2007. It amounted to unfair termination. ***The Claimant is allowed compensation for unfair termination, the equivalent of 12 months' salary at Kshs. 240,000.***

18. The Claimant was not able to show what his prayer for 3 months' salary in lieu of notice is based on. He was given a Notice of Reduction of Work, rather than straightforward Notice of Intended Redundancy and Notice of Termination envisaged under Section 40 of the Employment Act. ***He is allowed 1 month salary in lieu of notice at Kshs. 20,000, under the Act.***

19. He did not establish the prayer for leave travelling allowance. The Court did not understand his prayer for unspecified allowance of 6 days. These items are rejected.

20. He prays for annual leave pay over a period of 5 years, amounting to Kshs. 100,000. The presumption is that he was entitled to 30 days of annual leave, every year. The Respondent offers 98.5 days of annual leave at Kshs. 65,670 relying on the Leave Schedule on record. The Court agrees with the Respondent that the Claimant did not work a full 5 years. He did not show he was entitled to 30 days of annual leave in any event, to merit annual leave pay of Kshs. 100,000.

21. The Court accepts the offer made by the Respondent on annual leave pay, gratuity, salary for days worked in February 2014, less Kshs. 14,000 paid to the Claimant, as reasonable terminal dues. ***He is granted the sum of Kshs. 119,670 as proposed by the Respondent, under the above heads.***

22. There is no reason why the Respondent did not pay Claimant's rightful redundancy package, at the time it should have been paid. Section 40 of the Employment Act contemplates that redundancy benefits are paid promptly. The Respondent was never in doubt there was a redundancy situation in January 2014. It was bound to pay the Claimant his full redundancy dues under the law, but only paid him Kshs. 14,000 and asked him to leave. Over 3 years down the line the Claimant has not received his dues. ***This default shall therefore be remedied through an order for payment of interest at 14% per annum from 1<sup>st</sup> February 2014.***

23. ***Costs the Claimant.***

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. 240,000; notice pay at Kshs. 20,000; and sundry terminal benefits as proposed by the Respondent at Kshs. 119,670- total Kshs. 379,670.***

***c) Interest is granted at 14% per annum from 1<sup>st</sup> February 2014, till payment is made in full.***

***d) Costs to the Claimant.***

Dated and delivered at Mombasa this 23<sup>rd</sup> day of October 2017.

James Rika

Judge