



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 194 OF 2015

BETWEEN

KARISA CHARO KIRAGA CLAIMANT

VERSUS

**NAKAYIMA HAULIERS [K] LIMITED
RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Ms. Chala Advocate, instructed by Chala & Company Advocates for the Claimant

Mr. Gichana Advocate instructed by Gichana Bw' Omwando & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 7th April 2015. He states he was employed by the Respondent Transport Company as a Driver, on the 25th August 2014. He was paid a basic salary of Kshs. 20,000 per month. He was issued a written contract dated 25th August 2014. His contract was terminated by his Employer, after he disagreed with the Employer on the amount of diesel fuel to be allocated to the Truck driven by the Claimant. The Claimant's Supervisor proposed to reduce the fuel assigned to the Claimant on his trips to Uganda and back to Mombasa. It was after the disagreement that the Claimant's contract was terminated. He was not heard. He was not given reasons for termination. He was not given notice of termination. He feels termination was unfair and unlawful and seeks the following orders against the Respondent:-

[a] 1 month salary in lieu of notice at Kshs. 20,000;

[b] Annual leave pay for 1 year at Kshs. 16,153;

[c] The equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 440,000

[d] General Damages for loss of employment and loss of expected earnings;

[e] Costs;

[d] Interest; and any other suitable relief.

2. The Respondent filed its Statement of Response and Counter-claim, on the 3rd July 2015. The Respondent concedes to have employed the Claimant on a monthly salary of Kshs. 20,000. This was increased to Kshs. 23,000 after probation. The Claimant deserted; his contract was not terminated at the instance of the Respondent. He deserted after the Respondent reduced the amount of diesel fuel apportioned to its Drivers who drove between Mombasa and Kampala, by 50 litres. The Claimant parked the Motor Vehicle assigned to him outside his residence. He rejected the Employer's instructions to park at the Employer's yard. He placed the Motor Vehicle and the goods it was ferrying, at risk. Consequently the Respondent lost user of the Motor Vehicle for 3 days. The loss is quantified at Kshs. 50,000 per day, translating to Kshs. 150,000 for the whole period. He left employment without notice to the Respondent. The Respondent urges the Court to:-

- a. Dismiss the Claim with costs to the Respondent.
- b. Order the Claimant pays to the Respondent 1 month salary in lieu of notice at Kshs. 23,000, and loss of user at Kshs. 150,000.
- c. Order these amounts are paid together with interest.
- d. Grant the Respondent any other suitable relief.

3. The Claimant filed his Response to the Counter-claim on the 29th July 2015. He avers he did not desert employment. The Respondent did not have a motor vehicle yard. The Claimant did not park the Respondent's Motor Vehicle at his residence for 3 days. The Vehicle was driven away by the Respondent's staff, a day after the Claimant quarreled with his Supervisor. It is the position of the Claimant that even if he deserted, he should have been heard before termination. Termination was at the instigation of the Respondent, and the Claimant would not therefore, be required to issue notice to the Respondent.

4. The Parties gave evidence, and closed their respective cases, on the 10th February 2016. The Claimant Mr. Kiraga testified and called one Witness, Mr. Hamisi Katana Mwanzari. The Respondent testified through its Manager Mr. Abdulmajid Abeid Swaleh, and Driver Mr. Issa Hamad Issa.

The Claim

5. The Claimant affirmed he was employed by the Respondent as a Driver in August 2014, earning a salary of Kshs. 20,000 a month. He was given a written contract dated 25th August 2014. The contract was terminated by the Respondent on 18th February 2015. He was not given a letter of termination, but was given a recommendation letter dated 26th February 2015. He did not go on annual leave while in employment. He was not paid any terminal dues.

6. The Respondent reduced the fuel allocation for its Drivers. The Claimant told the Court on cross-examination he used to drive from Mombasa to Kampala and back. He was initially allocated 1,250 litres of diesel for the journey. This was reduced by 50 litres, to 1,200 litres. The Claimant was not aware Drivers were siphoning fuel. The Claimant refused to drive because he was sure the Vehicle would not make it to Kampala and back, on the reduced fuel. He earned Kshs. 20,000 per month. He was given a mileage allowance of Kshs. 10,000 per trip. He made 3 to 4 trips in a month. He informed the Employer he would not travel on reduced fuel. He parked the Vehicle at a place near his residence. The Respondent

did not have a designated parking bay. Abdulmajid had advised the Claimant to park near the Claimant's residence. The Vehicle was laden with expensive cargo. The parking was safe. The Claimant did not defy his Employer's instructions. Redirected the Claimant testified he was not advised about the decision to reduce fuel after he lodged his complaint. Abdulmajid told the Claimant there would be further consultations involving the Directors. There was no further communication made to the Claimant. Abdulmajid just came with another Driver. The Claimant was asked to hand over the Motor Vehicle to this Driver. It was the end of the employment relationship. The parking adjacent to the Claimant's residence was well-known to the Respondent. The Claimant had been parking there, and the Respondent used to service the Vehicle from there.

7. Hamisi Katana Mwanzari testified he knows the Claimant. The Claimant was a Driver. He used to park his Truck near the place where Mwanzari resided. Mwanzari had seen the Claimant park there from the very beginning. Three people came and drove off the Motor Vehicle. The Claimant informed Mwanzari the Employer took away the Motor Vehicle. Mwanzari told the Court on cross-examination that the Vehicle was always parked at the place. He did not recall the exact dates when the Claimant's Employer took away the Vehicle. He denied that he was hired by the Claimant to testify.

Claimant's Submissions

8. The Claimant submits termination was unfair and unlawful. The Respondent did not observe the provisions of Section 41, 43 and 45 of the Employment Act 2007. The Claimant complained about fuel reduction. He was advised there would be consultations and the Employer would revert to him. Nothing was communicated to the Claimant on the outcome of the consultations. The Management instead took away the Motor Vehicle which had been assigned to the Claimant. It was assigned to another Driver. The Claimant's contract was terminated. There was no notice. There was no hearing. The Claimant did not disobey the Respondent by parking the Motor Vehicle near his residence. There was no designated parking. The Respondent prays for dismissal of the Claim with costs to the Respondent.

Respondent's Case.

9. Abdulmajid Abeid Swaleh testified his Company has 10 Trucks, plying the Mombasa- Kampala route. The Director instructed Management to reduce fuel allocation for all Trucks, from 1,250 litres, to 1,200 litres per Truck, per journey. All the Drivers save for the Claimant accepted the decision. The Claimant was ferrying hides and skins from Jinja Uganda. He declined to drive the Truck and its cargo to Respondent's yard at Port Reitz Mombasa. He alleged he did not have sufficient fuel to reach Port Reitz. The Respondent acquired this yard in January 2015. The Claimant parked the Truck at his residence where he had been parking before the acquisition of the new yard. He stayed put at his residence for 2 days. Abdulmajid went on the 3rd day and retrieved the Truck. The Claimant told Abdulmajid he did not wish to continue working. Later on the Claimant went to the Respondent's Office and requested he is given a recommendation letter. The Respondent gave it to him in good faith. The Respondent paid to the Claimant salary for 18 days worked.

10. On cross-examination Abdulmajid told the Court the Claimant had complained about fuel reduction. He was advised there would be consultation between the Management and the Director. The advice was not in writing. He requested for the recommendation letter on the 20th February 2015. He collected it on the 26th February 2015. The Respondent did not issue any notice of termination.

11. Issa Hamad Issa is a Driver working for the Respondent. He was employed effective February 2015. He was called by Abdulmajid on 18th February 2015, and offered the job. He had been looking for a job. He was told there was a vacancy. Together with Abdulmajid, the Witness went to the place where the Truck was parked, a place called Zaire Bar. It was packed with hides and skins. They took the ignition keys from the Claimant, and Issa drove to the Port, offloaded, and loaded more cargo ready to make the journey to Kampala. Questioned by the Claimant's Advocate, Issa told the Court he was employed on the same day he drove the Truck to the Port. He did not know what took place between the Claimant and the Respondent. The Claimant asks the Court to allow his prayers.

Respondent's Submission

12. The Respondent submits it reduced fuel allocation for its fleet of Trucks, driven by its overall responsibility of managing its business, and adopting best market practices. Reduction was by 50 litres. The Claimant refused to go by the decision, and stayed put. He parked the Truck at Zaire Bar with all its cargo. He placed his Employer's property at risk. He engaged in insubordination. He finally deserted duty. Citing the *Labour Court of South Africa in JR 2512/2007 between National Union of Mineworkers & Another v. Commission for Conciliation, Mediation and Arbitration*, the Respondent argues that where an Employer does anything incompatible with the due or faithful discharge of his duty to the Employer, the Employer has the right to dismiss the Employee. The Claimant declined the instructions of his Employer. He occasioned loss to the Employer. The Respondent was compelled to source another Driver to mitigate the loss. The Respondent urges the Court to dismiss the Claim and allow the Counter-claim.

The Court Finds:-

13. The Claimant was employed by the Respondent Transport Company as a Driver, on the 25th August 2014. His initial monthly salary was Kshs. 20,000. He transported goods from the Port of Mombasa to Kampala in Uganda. He also brought in goods from Uganda to the Port of Mombasa. A recommendation letter issued the Claimant by the Respondent indicates the Claimant left employment on 18th February 2015. Parties did not agree on the circumstances of this departure, the Claimant holding the Respondent terminated his contract of employment, and the Respondent holding the Claimant deserted employment after the Respondent reduced the amount of fuel apportioned to the Drivers from 1,250 litres, to 1,200 litres per trip.

14. The first issue the Court must resolve is this: which of the two Parties instigated termination of the contract of employment? The Claimant was instructed to drive the Truck to Port Reitz, where the Respondent had recently acquired a parking bay. He had arrived from Jinja Uganda, transporting hides and skins from there to the Port of Mombasa. He arrived on 17th February 2015. He parked the Motor Vehicle at Zaire Bar. He did not honour the Employer's instructions to drive on to Port Reitz. The Motor Vehicle remained parked at Zaire Bar with its cargo for 3 days, until it was driven to Port Reitz by the freshly recruited Driver Issa, who offloaded the cargo and loaded more cargo ready for the routine journey.

15. The Court has no hesitation in finding the Claimant to have been at fault, in declining the instructions of the Employer, to drive the Truck to the Port. It was not in his place to determine the amount of fuel to be apportioned to the Employer's fleet of Trucks. The decision on the amount of fuel sufficient for any journey was entirely a management prerogative. Other Drivers did not raise hue and cry over the reduction. It was not for the Claimant to advise the Respondent how best to manage its business. It was not made clear by the Claimant why he wanted excess fuel. He refused to drive to Port Reitz alleging the Truck did not have enough fuel, while Issa drove the same Truck without making unreasonable demands on the Respondent.

16. Section 44 [1] [e] of the Employment Act 2007 makes insubordination an employment offence, over which the Employer has the right to summarily dismiss the Employee. *In Industrial Court at Nairobi Cause Number 635 of 2010 between Dede Esi Annie Amanor-Wilks v. Action Aid International [2014] e-KLR*, it was held insubordination includes constant or continuing refusal by an Employee to obey a direct or implied order, reasonable in nature, given by or with proper authority. The Claimant declined the instructions of the Employer for 3 days, arguing he would not make it to Kampala and back on reduced fuel. He had not by this time even completed his journey from Jinja and delivered the hides and skins at their destination. He parked at Zaire Bar and remained put. By parking the Vehicle and refusing to drive, the Claimant demonstrated a degree of insolence and arrogance to, and lack of cooperation with, the Management. All these elements were deemed in the case of *Amanor-Wilks* above, to constitute insubordination and incompatibility, justifying termination decision.

17. The Respondent however states it did not terminate the Claimant's contract. The Claimant walked

out. He deserted. Though there was justifiable ground for the Respondent to terminate the contract, its position is that it did not terminate; the Claimant left voluntarily. He deserted. The Court is not persuaded that this was the case.

18. The Respondent retrieved the Truck from the Claimant. A fresh Driver Issa was engaged to go collect the Truck from the Claimant. The Claimant was not called to explain himself before or even after the Respondent collected the Truck. There were no charges against the Claimant either on insubordination or desertion. The Respondent simply engaged another Driver, picked the ignition keys from the Claimant, and drove off its Truck. In the mind of the Claimant the message was that his contract had been terminated by the Respondent.

19. The Respondent while justified in termination of the Claimant's contract did not follow the provisions of Section 41, 43 and 45 of the Employment Act. It does not even acknowledge to have terminated the Claimant's contract. While not in any way absolving the Claimant for his role in the termination of his services, the Court is persuaded termination was by the Employer. The Employer took away the Claimant's tools of work; stopped paying the Claimant any further salaries after 18th February 2015; and made no effort in disciplining the Claimant and ending the relationship formally. These actions and omissions did not result in a fair termination process.

20. For this procedural default the Court finds termination was unfair and grants the ***Claimant 1 month salary in compensation at Kshs. 20,000, being the rate he avers he earned at the time of his exit.*** It is noted the entire period the Claimant served as a confirmed Employee, was no more than 3 months. He has no good reason to demand for 12 months' salary in compensation. The Court is satisfied that the Respondent should have put in place a process aimed at formally bringing the employment relationship to an end. ***The Claimant is granted 1 month salary in lieu of notice in accordance with Section 36 of the Employment Act and Clause [1] of the Contract dated 25th August 2014.*** Clause 3 of the Contract was clear on annual leave. The Claimant would only be eligible for annual leave on completion of 1 year of service. He left on 18th February 2015. He served the first 3 months on probation, ending November 2014. By the time of exit, the Claimant had in effect, served for about 3 months. He was ineligible for annual leave. His claim for annual leave pay has no merit. The Claimant has not shown that he is entitled to damages in addition to the compensation granted under statute above. The economic injury occasioned by the loss of employment has adequately been remedied through statutory compensation. The claim for damages has no merit and is rejected.

21. The Respondent's Witnesses did not establish loss of user of 3 days at Kshs 150,000. They are not recorded to have said anything about lost business amounting to Kshs. 150,000. This was a mere sum floated in the Respondent's Pleadings and Submissions. It has no evidential grounding. It is not sufficient for the Respondent to submit that Kshs. 50,000 per day for 3 days is a fair charge for loss of user. There must be evidence of loss of user for the Court to consider grant of the prayer. The Respondent gave nothing by way of evidence. It is not captured in the oral evidence of Abdulmajid and Issa, or in any document availed to the Court by the Respondent. The Counter-claim for Kshs. 150,000 is rejected. The prayer by the Respondent, for notice pay the equivalent of the Claimant's 1 month salary is rejected. The reasons for this are the same reasons given at paragraph 19 above, in finding termination was at the instance of the Employer. The entire Counter-claim is rejected. ***IT IS ORDERED:-***

[a] It is declared termination was unfair but the Claimant substantially contributed to the circumstances leading to termination.

[b] The Respondent shall pay to the Claimant 1 month salary in compensation for unfair termination and 1 month salary in lieu of notice at a total of Kshs. 40,000.

[c] Other prayers by both Parties are declined.

Dated and delivered at Mombasa this 22nd day of June 2016

James Rika

Judge