



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 4 OF 2015

BETWEEN

SAIDI WETENDE AUMACLAIMANT

VERSUS

CENTRAL FURNITURE SHOP LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Mwashushe Advocate instructed by Christine Kipsang & Company Advocates for the Claimant

Mr. Mwakireti Advocate instructed by Mwakireti Ndumia & 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. Mr. Saidi Wetende Auma filed his Statement of Claim on the 15th June 2015 and a Supplementary Statement of Claim on the 25th March 2015. He claims he was employed by the Respondent Company as a Long Distance Truck Driver. He worked from May 2010 to 3rd December 2014. His contract was not reduced into writing. His contract was terminated by the Respondent on the latter date, after the Truck assigned to him, registration number KBH 170 S, broke down. He earned a monthly salary of Kshs. 25,000 as of the date 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. 25,000.
- b) Unpaid salary for November and December 2014 at Kshs. 50,000.
- c) Severance pay at 15 days' salary for each of the 4 years completed in service at Kshs. 100,000.

d) Annual leave pay for the 4 years at Kshs. 100,000.

e) Overtime pay for 4 years worked at Kshs. 666,250.

f) Unauthorized deductions at Kshs. 10,000

Total..... Kshs. 951,250

g) Compensation for unfair termination.

h) Certificate of Service to issue.

i) Declaration that termination was unfair and unlawful.

j) Costs and any other relief the Court may deem it just and fit to grant.

2. The Respondent filed its Statement of Response on 13th February 2015. It concedes the Claimant was its Employee, in the designation given by the Claimant. He was employed in May 2010. The Respondent gave the Claimant 1 month termination notice on 3rd December 2014. He remained an Employee until 3rd January 2015. He was not treated unfairly or unlawfully. The Respondent urges the Court to dismiss the Claim.

3. Parties recorded a partial Award on the claim for November and December salary at a total sum of Kshs, 50,000, on 27th July 2015. The Claimant and the Respondent's Director Mr. Tajinder Singh Pandal, both gave evidence in support of their respective positions, bringing the hearing to a close on the 11th February 2016.

Claimant's Case

4. Auma told the Court he used to drive from Mombasa in Kenya, to Tororo in Uganda. He was advised by the Respondent work had diminished. His Truck had broken down. It had gear box problems. The propeller shaft was damaged. The Respondent alleged, without providing evidence, that the Claimant caused the gear box damage, as he used to free-wheel. He last worked on the 3rd December 2014, the date on the letter of termination.

5. The Respondent used to deduct from the Claimant's salaries penalties paid at weighbridges, imposed for overloading. He was once charged in Court; the Respondent paid the fine, and deducted Kshs. 10,000 from the Claimant's salary. It was not the Claimant's duty to examine the cargo weight upon loading.

6. He never went on annual leave. He worked overtime. He took 3 or 4 trips in a month. Cross-examined, he stated he was conversant with an area known as Salgaa along the Kenya- Uganda Highway. There was a road sign post warning Drivers against exceeding 50kmh. There was none about free-wheeling. The Truck used to break down. At one time the propeller shaft got damaged and a part of it fell off and got lost. It is not true that the Claimant drove the Truck without engaging its gears.

7. On 3rd December 2014, the Claimant was issued the termination letter. He was advised work had diminished due to the numerous breakdowns. He did not know if the termination letter stated work had diminished. He did not agree that the letter contained a 1 month notice of termination. It is not true the Claimant ran away, leaving behind his November and December salary. The Respondent's Advocates wrote to the Claimant's advising the Claimant was still Respondent's Employee up to 3rd January 2015. He was charged and fined Kshs. 20,000 for overloading. The Respondent paid the fine and decided the cost be shared 50-50 between the Parties. The Claimant never took annual leave. It was not indicated in the salary vouchers that he took annual leave. Termination letter did not show annual leave would be utilized in the notice period. He slept occasionally while on a journey. He was paid Kshs. 6,400 as mileage allowance for every journey, translating to approximately Kshs. 24,000 a month. This allowance

did not compensate for excess hours worked. The Claimant did not go to collect his Certificate of Service from the Respondent's Offices.

8. The Claimant explained on redirection that he was never invited to collect his Certificate of Service. Mileage allowance was for subsistence, not compensation for excess hours. He was advised notice period would serve as part of his annual leave. When the propeller shaft broke, the Claimant followed regulations given by the Respondent by reporting the breakdown to the Management. A Mechanic was sent to fix the problem.

Respondent's Case.

9. Pandal confirmed the Claimant was employed by the Respondent as its Heavy Commercial Driver, from May 2010. He was assigned a particular Truck. On 1st October 2011, the Claimant called Management while at a place called Maji ya Chumvi [Place of Salty Water]. He had rammed the Respondent's Truck on to another car. It was damaged. He was not surcharged. In April 2011, he called saying "*gari imeingia msituni [Truck has veered off the road into the bush.]*" The Truck was extensively damaged and computer box stolen. The Respondent had to off-load the cargo of 27 tonnes, and re-load in an alternative Truck. The Claimant was sent away on leave on 5th May 2011 pending repair of his Truck. He continued to be paid his monthly dues while not working. He used to free-wheel, occasioning damage to the gear box. He was severally warned but did not rectify the conduct.

10. He called Management from a place called Hunters' Lodge, saying "*propeller flange imepotea [propeller flange is lost]*" He was warned to cease free-wheeling. Eventually he was given a notice of termination. He received the notice and went away. He was not told that work had diminished. The notice was dated 3rd December 2014, and became effective 3rd January 2015. Notice period was to run consecutively with pending annual leave. The Respondent received Claimant's Advocate's demand letter within 2 days of issuing the notice. The Respondent replied through its Advocates, advising the Claimant was still its Employee. The Respondent did not declare Claimant's position redundant. Driving role is still there. The Claimant had utilized a total of about 94 days in annual leave, while he was entitled to about 84 days. He does not merit overtime. He reported to the office at 11.00 a.m. whenever he was not on journey. Work was not available all the time. He was not on journeys all the time. He was entrusted Loaders' allowances, security fees, toll fees, clearing fees and parking fees etc. He was not instructed to return within a specific number of days.

He took a loan of Kshs. 10,000 from the Respondent, to enable him attend a Friend's burial. This was deducted from his salary. The Respondent did not deduct from the Claimant's salary on account on any fine imposed by the Court. The Respondent prepared the Claimant's Certificate of Service. He failed to collect it.

11. Cross-examined, the Director stated the Respondent did not place the Claimant on a written contract. The Truck was used, with normal tear and wear. The Witness was not sure if the Respondent had availed to the Court records of motor vehicle accidents, it attributed to the Claimant. There was no mechanical evidence given to support the allegation of damage occasioned to the Truck. The Claimant was only issued verbal warnings. There may have been 2 separate incidents of Kshs. 10,000 deducted from the Claimant's salary. Pandal closed his evidence on redirection, with the clarification that there were documents on record, showing the Truck was variously repaired. There was mention of verbal warnings in the termination notice. The Respondent bought genuine and new auto-spares for the Truck. The Respondent urges the Court to dismiss the Claim.

The Court Finds:-

12. It is not contested the Claimant was employed by the Respondent Company as its Heavy Commercial Driver in May 2010. It is also correct that he was given a notice of termination of employment by the Respondent, dated 3rd December 2014. The notice is indicated to be for 1 month, which would lapse 3rd January 2015. It was indicated the notice period would run concurrently with the Claimant's balance of annual leave of 30 days. The termination notice gives the reasons for termination to broadly comprise the

Claimant's improper use of the assigned Truck registration KBH 170 S.

13. Parties agreed the Claimant shall be paid his salary for November 2014 and December 2014, at a total of Kshs. 50,000. The consent is endorsed as part of this Award.

14. Parties should also have agreed on the Certificate of Service. This is granted under Section 51 of the Employment Act 2007. It should have been forwarded to the Claimant through his Advocates. It is not proper that the Respondent argues the Claimant failed to collect the Certificate, while both Parties have Advocates who can assist them in communicating and in settling some of the basic issues in dispute. **The Respondent shall through its Advocates, release to the Claimant, through his Advocates, the Certificate of Service forthwith.**

15. The Claimant was clearly given 1 month notice of termination. The Respondent confirmed to the Claimant's Advocates, in the reply to the Claimant's demand letter before action that the Claimant was still in employment until 3rd January 2015. The Claimant's contract was not terminated without notice. **There is no justification in his prayer for notice pay. The prayer is rejected.**

16. The Claimant was assigned transport duty to Tororo in Uganda, at most on four occasions in a month. The Respondent testified there was no particular time set for the Claimant's return journey.

The Claimant himself stated he was given 4 days for the return journey. His claim, for overtime pay of Kshs. 666,250, which carries the bulk of his monetary claim, is without evidential support. He did not show that he was out driving for 30 days in a month as claimed. He did not drive throughout when on the journeys to Tororo. He reported to the Office at around 11.00 a.m. when not on a journey. The Respondent did not have cargo for transportation around the clock. The claim for overtime lacks in details. The Claimant did not show the Court the specific hours of overtime worked, and the formula adopted, in coming up with the overtime pay of Kshs. 666,250. While the Court agrees with him that mileage allowance is different from overtime pay, he did not establish a case for grant of overtime pay. **The prayer for overtime pay is rejected.**

17. The claim for annual leave is similarly lacking in evidential support. The Claimant seeks annual leave for the 4 years worked at Kshs. 100,000. First the termination notice indicated the Claimant was to utilize the notice period as his balance of annual leave for his last year in employment. Secondly the salary vouchers indicated various days when the Claimant was away from duty. Lastly, he was not on duty for large periods when his Truck was placed on repair. Pandal computed the days the Claimant was away from duty at 94. This was not discounted by the Claimant. It is not proper that he pursues balance of annual leave pay, without taking into account these days. **The prayer for annual leave pay is rejected.**

18. Severance pay would be payable under Section 40 of the Employment Act, in a case of redundancy. The Claimant was not advised in the letter of termination that the Respondent was scaling down its operations for any economical reason. He was not told there was an operational restructuring. The driving role was not scaled down or phased out. There was no redundancy situation, and none was communicated in the notice of termination. There is therefore, no basis to claim severance pay. **The prayer for severance pay is declined.**

19. The notice of termination assigns reasons for the Employer's decision. The question is whether these reasons were substantively justifiable and whether the decision was arrived at fairly. At play is Section 41, 43 and 45 of the Employment Act 2007, not Section 40.

20. The Respondent was aghast that the Claimant constantly drove contrary to instructions given to him by the Respondent, occasioning accidents and mechanical breakdowns of the Truck. He drove into bushes, rammed on to other Motorists, free-wheeled, and damaged the gear box. He was a big burden to the business.

21. These allegations were not shown by the Respondent to be true. They were not shown to be true in the employment record leading to termination. There were records showing the Truck had been repaired. The

repair work was not shown to have been necessitated by any conduct of the Claimant. He drove a used Truck to Tororo. Normal wear and tear, and even major breakdown such as that which affected the gear box would be expected. There was no evidence of a mechanical nature, showing the Truck broke down from freewheeling. There were no records availed to the Court, capturing the many incidents of traffic accidents attributed to the Claimant. There were no Court proceedings and decisions implicating the Claimant in any reckless driving. The Director conceded he was not a mechanical person and did not have in Court, any records showing the Claimant was to blame for the Truck's persistent problems. In the view of the Court, there was no substantive justification preceding the termination decision.

22. The Respondent lost the opportunity to give substance to the myriad accusations against the Claimant, by denying the Claimant a hearing before termination. Issues could have crystallized if the Respondent had given the Claimant clear charges of the offences; called upon the Claimant to show cause why he should not be disciplined; and given the Claimant the benefit of a hearing under Section 41 of the Employment Act. The Respondent simply got tired of the quality of driving exhibited by Auma, and terminated his contract without according him his procedural guarantees. The Court is satisfied termination was unfair for want of substantive justification as well as want of procedural justice. ***It is declared termination was unfair. The Claimant is granted compensation the equivalent of 9 months' salary, computed at Kshs. 225,000.*** No details of the Court proceedings where the Claimant was fined Kshs. 20,000, was availed to the Court. There was no Court receipt showing such a penalty was imposed. Deductions of Kshs. 10,000 made on the Claimant's salary could have been made on more than one occasion, and for different reasons. It was for the Claimant to persuade the Court what his claim for refund of Kshs. 10,000 represented. He did not do so. ***The claim for unauthorized deductions of Kshs. 10,000 is refused.*** Parties shall cater for their costs of the Claim. IN SUM, IT IS ORDERED:-

a) It is declared termination was unfair.

b) The Respondent shall pay to the Claimant 9 months' salary in compensation for unfair termination at Kshs. 225,000.

c) The Respondent shall pay to the Claimant his salary for November and December 2014 at Kshs. 50,000 as agreed between the Parties.

d) The total sums shall be paid within 30 days of the delivery of this Award.

e) The Respondent to release to the Claimant his Certificate of Service forthwith.

f) Parties shall bear their costs of the Claim.

Dated and delivered at Mombasa this 15th day of July 2016

James Rika

Judge