



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 208 OF 2015
BETWEEN
RUBEN KIPLIMO KINYOR.....CLAIMANT
VERSUS
TRANSTRADE SERVICES LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Koech & Associates, Advocates for the Claimant

Mwakireti Ndumia & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 24th April 2015. He states he was employed by the Respondent as a Truck Driver, earning a gross salary of Kshs. 30,846 per month. His contract was terminated by the Respondent on the 26th August 2014, on the allegation that the Claimant caused a traffic accident within the jurisdiction of the Republic of Tanzania, and thereafter refused to cooperate regarding investigations of the accident. He feels termination was unfair. He was not issued a warning before termination. He prays for 1 month salary in lieu of termination notice at Kshs. 30,846; 12 months' salary in compensation for unfair termination at Kshs. 370,152- total Kshs. 400,998. He asks the Court to declare termination was unfair and to also, grant him costs.

2. The Respondent filed its Statement of Response on 18th June 2015. It agrees the Claimant was employed by the Respondent as stated in the Claim. He was charged on 21st July 2014 in a Tanzanian Court, for causing death through dangerous driving. The Respondent organized for an Advocate to represent the Claimant in District Court of Tarime, Tanzania. The Respondent organized for the Claimant to be bailed out. The Claimant flatly refused to travel to Tanzania, on the 20th August 2014 when the case was scheduled to be heard. He told the Respondent he would rather have his contract terminated, than subject himself to the jurisdiction of the Tanzanian Court. This resulted in forfeiture of the money posted as bail, and loss to the Respondent in Advocates' fees. Termination was fair. The Claimant disobeyed the lawful instructions of his Employer, and disobeyed an order issued by the Court requiring him to attend

hearing. The Respondent prays for dismissal of the Claim, with costs to the Respondent.

3. Both Parties presented and closed their respective cases on the 22nd June 2016. The Claimant was his own sole Witness, while the Respondent testified through its Transport Manager Charles Otieno Opondo.

4. The Claimant does not dispute he was involved in a traffic accident in Tanzania, in the course of his work. He was asked by the Respondent to attend Court. He was already in Kenya, and was not given the fare to enable him travel to Tanzania. He was not given the opportunity to defend himself before termination.

5. He told the Court on cross-examination that the accident happened at Tarime Tanzania. He was charged with causing death through reckless driving. The Respondent bailed him out. The case was scheduled for hearing. He did not recall visiting the offices of Respondent's Insurer, Jubilee Insurance, accompanied by the Transport Manager and declining to attend hearing in Tanzania as instructed. It is not true that the Claimant maintained this position, even after Police Officer Mr. Ng'etich was asked by the Transport Manager to implore, and implored the Claimant, to honour the terms of bail. It is no true that he refused to attend Court. He was not facilitated by the Respondent.

6. Mr. Opondo confirmed the Claimant was employed by the Respondent as a Truck Driver, driving from Mombasa to Tanzania, Uganda and Congo. He knocked down a motorcycle rider in Tanzania in July 2014. He was arrested and charged in Court. The Respondent, through its representative in Tanzania, organized for the bailing out of the Claimant. He came back and continued to work for the Respondent. He was paid his salary for July and August 2014. Hearing was in August 2014. He was apprehensive that if he attended Court, he would be locked up in Tanzania. The Respondent and its Insurer explained to the Claimant that he had to attend Court. Opondo asked the Claimant if there was a Police Officer he trusted in Mombasa, whose advice the Claimant could rely on. The Claimant suggested they consult Ng'etich, but even after Ng'etich advised the Claimant should attend Court, the Claimant still declined all entreaties.

7. The Claimant thereafter disappeared from work. The Respondent wrote the letter of termination. This was on the ground that the Claimant had disobeyed the instructions of his Employer. The Respondent settled the case in Tanzania with the assistance of Jubilee Insurance. Bail was forfeited. Termination was not because the Claimant caused an accident in Tanzania. Accidents in the transport business, the Witness testified, happen frequently; termination was on the ground that the Claimant disobeyed the lawful instructions of the Respondent. It is not true that the Respondent declined to facilitate his travel.

8. Opondo told the Court on cross-examination that there were other accidents involving the Claimant, but none of them fatal. The Respondent paid Kshs. 89,000 in bail and other fees. Termination was on the ground that the Claimant defied the instructions of the Respondent, and the order of the Court. The Respondent did not determine Claimant's guilt in the accident, in the letter of termination. He absconded after refusing to travel to Tanzania. The Respondent urges the Court to dismiss the Claim.

The Court Finds:-

9. The Claimant was employed by the Respondent Transport Company as its Truck Driver. He drove from Mombasa to Tanzania, Uganda and Congo. He earned a monthly gross salary of Kshs. 30,846 as of the day the Respondent terminated the Claimant's contract.

10. He was driving in Tanzania, in the course of duty when he was involved in a traffic accident. He knocked down and killed a motorcyclist. He was arrested and charged. The Court accepts the evidence that the Claimant was bailed out by the Respondent; an Advocate was engaged to represent him; and hearing was scheduled for 20th August 2014.

11. The Claimant did not attend Court when required to do so, in accordance with the bail terms, issued by a competent Court in a sister Country. He was instructed to attend Court by the Respondent and its Insurer. The Respondent went an extra mile, by asking a Police Officer of the Claimant's choice, to

reassure the Claimant that attending Court was Claimant's obligation. The Claimant did not attend Court.

12. The Court finds no persuasion in the Claimant's explanation that he failed to attend hearing in Tanzania, because the Respondent did not facilitate his travel. It would not make sense for the Respondent to engage Advocates in Tanzania, and together with Jubilee Insurance and Police Officer Ng'etich, implore the Claimant to travel to Tanzania for hearing, and at the end of it all, decline to facilitate the Claimant's travel. Why would the Respondent commit resources in defending the charges facing the Claimant in Tanzania, yet fail to pay bus fare to Tarime for the Claimant? The Claimant simply apprehended he would, for some reasons be placed in a Tanzanian Jail or Police Cell if he availed himself at the hearing, and therefore opted not to revisit Tanzania. He was not concerned about the effect his non-attendance in Court would have on his Employer.

13. He was correctly found by the Respondent to have, under Section 44[4] [e] of the Employment Act 2007, knowingly failed, or refused to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his Employer or a Person placed in authority over him by the Employer. Termination was based on valid ground.

14. Was termination carried out fairly? The Respondent testified that after the Claimant refused to travel to Tanzania, he absconded which led to the letter of termination dated 26th August 2014. There was no evidence showing the Claimant abandoned his job. It is not captured in the letter of termination. Termination was grounded on the Claimant's disobedience of lawful instructions. It was not based on abandonment of work.

15. Either way there is no record of any hearing granted to the Claimant by the Respondent in the manner contemplated under Section 41 of the Employment Act 2007. He was not heard for insubordination, or absconding. The Court has stressed the value of meeting procedural requirements, even where employment offences are obvious. Termination did not therefore conform to the minimum standards of fairness under Section 41 of the Employment Act 2007.

16. Considering the finding that the Respondent had valid ground in terminating the Claimant's contract summarily under Section 44 [4] [e], the prayer for notice pay has no merit and is rejected.

17. Procedure was flawed, and the Claimant is granted 2 months' salary in compensation for unfair termination, at Kshs. 61,692.

18. Parties shall meet their costs of the Claim.

IN SUM, IT IS ORDERED:-

a) Termination was based on valid ground, but flawed on fairness of procedure.

b) The Respondent shall pay to the Claimant 2 months' gross salary at Kshs. 61,692 in compensation for unfair termination.

c) Parties to meet their costs of the Claim.

Dated and delivered at Mombasa this 18th day of November, 2016

James Rika

Judge