



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 68 OF 2014

REUBEN LUCHELELI SHIKURI.....CLAIMANT

v

ELDORET PACKERS LTD.....RESPONDENT

JUDGMENT

1. Reuben Luchelesi Shikuri (Claimant) filed a Statement of Claim against Eldoret Packers Ltd (Respondent) on 18 March 2014 and he stated the issues in dispute as

- a) Unlawful/unfair termination of employment
- b) Pay in lieu of Notice
- c) Pay in lieu of leave
- d) Gross underpayments
- e) Pay for overtime worked
- f) Compensation for unlawful termination.

2. The Respondent filed its Response on 2 April 2014, and on 9 April 2014, the Claimant filed a Reply to Defence. The Respondent filed its List of Documents on 12 May 2014, while the Claimant filed a further List of Documents on 9 October 2014.

3. The Cause was heard on 18 November 2014 and 20 January 2015. The Claimant filed his submissions on 12 February 2015.

4. After considering the pleadings, documents, testimony of witnesses and the submissions, the Court has identified the issues for determination as, *the occupation of the Claimant, whether the Claimant's resignation was voluntary/constructive dismissal, whether Claimant was underpaid, whether Claimant worked overtime, whether the Claimant has outstanding leave and appropriate remedies.*

Claimant's occupation

5. The Claimant pleaded and testified that he was employed by the Respondent with effect from 1 October 2003 as a lorry/trailer driver (heavy commercial vehicles) but was not issued with an

appointment letter.

6. He stated that at the time of separation he was driving a trailer registration number KBQ 880J Scania. He had started driving trailers in 2010, and that previously he was driving 15-20 tonners.

7. In cross examination, the Claimant stated that on employment, he was driving KAL 440J, a heavy commercial vehicle. Thereafter, he was assigned KAX 021X, KBD 351G and KAR 874J.

8. The Respondent's witness, Japheth Ngusale stated that the Claimant was driving medium vehicles of 5-10 tonnes and was assigned a heavy commercial vehicle when he was about to leave.

9. In his witness statement filed in Court, this witness strongly denied that the Claimant ever drove a heavy commercial vehicle during his employment with the Respondent.

10. The Claimant gave the registration numbers of the vehicles he was assigned to drive. He stated that from 2010, he was driving trailers but before he was driving 15 to 20 tonners. This evidence was not challenged.

11. The Respondent on whom the burden shifted could have produced the registration books for the vehicles mentioned by the Claimant to rebut his evidence that these were heavy commercial vehicles but did not.

12. Under the Traffic Act, class 'b' driving license applies to heavy commercial vehicles, while class 'c' licenses are issued for vehicles whose tare weight exceed 4000lb and are classified as commercial vehicles.

13. The Claimant did not produce copy of his driving license but under the Regulation of Wages (General) Order, drivers are classified as, driver (cars and light vans); driver (medium sized vehicles) and driver (heavy commercial vehicles).

14. After the commencement of the Employment Act, 2007 on 2 June 2008, it became mandatory for employers to issue employers with written contracts.

15. The written contract, pursuant to section 9 of the Act should have particulars of the job description. The Claimant should have been issued with a written contract giving particulars of the job description after the commencement of the Employment Act, 2007 but was not.

16. Considering all these circumstances and pursuant to section 10(7) of the Employment Act, 2007, the Court reaches a conclusion that the Claimant was a driver (heavy commercial vehicle).

Voluntary resignation or constructive dismissal

17. The Claimant pleaded that he was coerced into tendering his resignation on 2 November 2013, and thus he considered his contract terminated unfairly.

18. In testimony, the Claimant stated that after returning from a safari, the Respondent's Director Ray Kachela instructed him to proceed with him on a journey to Nairobi on 2 November 2013, but he told him he was tired whereupon the Director told him he was the boss and he should resign if he did not want to travel to Nairobi.

19. He also stated that the said Director gave him a pen and paper and directed him to write a resignation letter.

20. In cross examination, the Claimant insisted that he wrote the resignation letter under coercion.

21. For the Respondent, its witness stated that the Claimant wrote a resignation letter which was accepted

through a letter dated 12 November 2013, and that the Claimant was not forced to resign.

22. During cross examination, the witness stated that the Claimant went to the Director's office and said he wanted to resign and he was asked to write a resignation letter and he was present.

23. In his resignation letter, the Claimant wrote,

Due to unavoidable circumstances I have by written letter of resignation from work duties. I appreciate the time and moments we've been together... since you employed me almost 9 years ago. It is my sincere hope that you are going to grant me my request. Yours in advance.

24. For the Claimant to succeed in his assertion that he was unfairly terminated despite his resignation (constructive dismissal) he had to demonstrate that the Respondent or any of his supervisors had made the work environment or conditions so intolerable for him or acted in breach of some fundamental term of the contract that he had no other option but to resign.

25. In my view, the tone of the Claimant's resignation letter does not suggest he was coerced into resigning from work. An employee who is coerced to resign would in one way or the other mention the fact of coercion or duress in the letter, but each case should be determined on its own peculiar circumstances.

26. I therefore find that the resignation was not under duress or coercion but was voluntary.

Whether Claimant was underpaid

27. The Claimant's pleaded wages from January 2007 to December 2008 was Kshs 8,500/- per month.

28. According to the Claimant's Staff Salary Sheet produced by the Respondent (Respondent's exh. 3), the Claimant's gross wage from May 2008 to October 2008 was Kshs 7,450/- while from November 2008 to April 2009, he was paid a gross wage of Kshs 8,100/-.

29. According to Legal Notice No. 38 of 2006, the basic wage for a driver (heavy commercial vehicle) in Eldoret was Kshs 11,031/-. Factoring 15% house allowance, the gross was Kshs 12,685/-

30. The Claimant was thus underpaid during this period by Kshs 50,220/-.

31. From May 2009 to April 2010, the Claimant was on a gross wage of Kshs 9,565/-. During this period, the minimum basic wage pursuant to Legal Notice No.70 of 2009 for his occupation was Kshs 13,017/-. With 15% house allowance, the gross was Kshs 14,969/-.

32. The Claimant was thus underpaid by Kshs 64,848/-.

33. From 1 May 2010 to 30 April 2011, the Claimant's gross wage was Kshs 10,520/-. The prescribed minimum basic wage pursuant to Legal Notice No. 98 of 2010 factoring 15% house allowance was Kshs 16,466/-.

34. The Claimant was thus underpaid by Kshs 71,362/-.

35. From 1 May 2011 to 30 April 2012, the Claimant was getting gross pay of Kshs 12,000/-. According to Legal Notice No. 64 of 2011, the prescribed minimum wage factoring 15% house allowance was Kshs 18,525/-.

36. The Claimant was underpaid by Kshs 78,304/- during this period.

37. From 1 May 2012 to 30 April 2013, the Claimant was being paid Kshs 15,000/- per month. According to Legal Notice No. 71 of 2012, the prescribed minimum wage inclusive of house allowance was Kshs

20,951/-.

38. The Claimant was thus underpaid by Kshs 63,422/-.

39. From 1 May 2013 to termination in October 2013, the Claimant was on a gross wage of Kshs 19,340/-. He thus earned a total of Kshs 116,040/-.

40. The prescribed minimum wage by dint of Legal Notice No. 197 of 2013, inclusive of house allowance was Kshs 23,885/-. The Claimant was thus underpaid by Kshs 27,273/-.

Whether Claimant worked overtime

41. The Claimant pleaded that he worked an average of 4 hours overtime per day beyond the recommended 8 hours per day. He further pleaded that he worked over the weekends.

42. For the overtime, the Claimant sought Kshs 1,070,203/-.

43. During testimony, the Claimant stated that he was supposed to work 8 hours per day and that while on trips he would not be paid overtime.

44. In his submissions, the Claimant urged that according to the Employment Act, 2007, the normal working hours were 8 hours per day.

45. I have perused the Employment Act, 2007. Section 27 thereof does not prescribe the working hours except to provide for one rest day in each week.

46. The Claimant did not cite any particular provision of the Labour Institutions Act which prescribes the working hours/days.

47. The Court's view on this question is that the Claimant failed to establish any contractual or statutory foundation for this particular claim.

48. And the Court wishes to observe that parties should not casually prosecute their cases and expect the Court to fill in the gaps for them as well as carry out research to give contractual or statutory underpinning to cases of this nature, especially where they are represented.

49. Further, parties should as much as possible, and on a preliminary basis use the expertise and experience of Labour Officers to ascertain claims based on underpayments and unpaid overtime otherwise the Court's would be turned into arithmeticians instead of dispensing justice.

50. The Court therefore declines the invitation by the Claimant to find that he worked overtime.

Outstanding leave

51. The Claimant pleaded he did not go on leave from 2004 to 2009. For this he sought Kshs 51,900/-.

52. In testimony, he stated that he only started going on leave in 2009.

53. The Respondent's witness referred to and produced leave/encashment records dated 11 September 2007, 16 September 2008, 9 September 2009, 25 September 2010, 21 September 2011, 25 September 2012 and 26 September 2013.

54. It is clear the Claimant did not go on leave in 2004, 2005 and 2006 or the Respondent did not keep records.

55. The Court would award the Claimant Kshs 9,205/- for 2004, Kshs 9,849/- for 2005 and Kshs 11,031/-

for 2006, being the equivalent of pay (prescribed minimums), in lieu of leave.

Appropriate relief

One month pay in lieu of Notice

56. The Court having found the resignation voluntary, this head of relief is not applicable.

Accrued/outstanding Leave

57. The Court would award the Claimant Kshs 30,085/- as pay in lieu of leave for 2004, 2005 and 2006.

Compensation

58. The Claimant's contract was not unfairly terminated and therefore he is not entitled to compensation.

Underpayments

59. The Court has found the Claimant was underpaid and would award him Kshs 355,429/-.

Overtime

60. This head of relief is declined.

Certificate of Service

61. This is a statutory right and the Respondent should issue one to the Claimant.

Conclusion and Orders

62. The Court finds and holds that the Claimant voluntarily resigned and his contract was not unfairly terminated but still finds in his favour in respect of contractual and/or statutory entitlements which do not depend on the manner of separation and awards him and orders the Respondent to pay him

a. Accrued/outstanding leave	Kshs 30,085/-
b. Underpayments	Kshs 355,429/-
TOTAL	Kshs 385,514/-

63. All the other reliefs are dismissed.

64. The Claimant did not file submissions on time as directed and no explanation was offered. He is therefore denied costs.

65. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 6th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Namiti instructed by Maritim Omondi & Co. Advocates

For Respondent Ms. Khayo instructed by Nyairo & Co. Advocates