



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 97 OF 2014

BETWEEN

PETER KISILU MUTUA..... CLAIMANT

VERSUS

PANAL FREIGHTERS LTD..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Gekonde Advocate, instructed by Hezron Gekonde & Co. Advocates for the Claimant

Ms Lilian Oduor Advocate , Legal & Claims Officer or the Respondent

AWARD

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

1. The Claimant, Mr. Peter Kisilu Mutua filed his Statement of Claim on 18th March 2014. He states he was employed by the Respondent transport Company as a Driver, on the 28th June 2012. He earned a salary of Kshs. 22,000 per month. He was summarily dismissed in May 2013. He claims the decision was unfair and unlawful and seeks against the Respondent, the following orders:-

- a. A declaration that he was employed on permanent terms, having worked for 5 years;
- b. A declaration that the Claimant was entitled to compensation as enshrined in the Employment Act.
- c. A declaration that the Claimant was entitled to be paid the following:
 - i) ***3 months' salary in lieu of notice at Kshs. 66,000.***
 - ii) ***Leave pay for 1 year at Kshs. 22,000.***
 - iii) ***12 months' salary in compensation for unfair termination at Kshs. 264,000.***
- d. Any other suitable relief.

e. Costs.

2. The Respondent filed its Statement of Response on the 16th July 2014. It states the Claimant was employed by the Respondent on 1st June 2012 as a Highway Driver earning a monthly salary of Kshs. 22,000. He was involved in an accident while driving Respondent's Truck registration KBN 891Z. The Claimant failed to report the accident. When asked to explain the negligence, he was rude to the supervisor, saying it was not only the Respondent, that he could work for. He was summarily dismissed in accordance with section 44(4) of the Employment Act. He was heard before dismissal. The Respondent offers to pay the Claimant salary for 14 days worked, pay outstanding annual leave days and issue the certificate of service.
3. Parties were heard, and concluded their respective cases on 24th February 2015. The Claimant gave evidence, as did Mr. Khatib Mwinyi Haji, Respondent's Operations Manager.
4. Mutua testified he used to transport goods from Mombasa to Kampala, Uganda. On 12th May 2013, he was denied access to the Respondent's premises. The Guards at the gate told him he had been sacked. He asked to see the Human Resource Manger. He was advised he could not.
5. The Claimant sought legal advice. His Advocates wrote a letter to the Respondent. The Respondent alleged to have written a letter dated 13th May 2013, inviting the Claimant to a disciplinary hearing. He did not receive the invitation. It is not true that the Claimant was involved in a road traffic accident. He did not damage the Motor vehicle KBH 891Z. He has never seen the invoice dated 11th May 2013, alleging to capture costs of repairing the vehicle at Kshs. 10,071. There was no valuation accompanying the invoice.
6. The Claimant stated he did not insult anyone. He was not given the opportunity to defend himself. He was not paid May 2013 salary. On 3rd December 2012, he was advised by the Respondent his salary had been reduced to Kshs. 15,000 from Kshs. 22,000. He had not consented to pay cut, and was not given the reason for the cut. This underpayment went on from December 2012 to May 2013. He prays for the orders listed in paragraph 1 above. He testified he should be paid also Kshs. 42,000 in underpayment of salary.
7. On cross-examination, the Claimant testified he last worked on 13th May 2013. On 11th May 2013, the Truck assigned to him was in the garage being serviced. The Claimant did not drive. He was not asked by the Operations Manager to write a Report on the damage to the vehicle. The Claimant's contract had a clause on termination. The Truck was serviced after every journey.
8. He did not receive any letter of termination of employment. He was informed by the Guards that he had been dismissed. He is not a member of the Long Distance Truck Drivers' Union, and was unaware of correspondence between the Employer and the said Union. The Claimant did not write any letter complaining about his demotion and pay cut. He explained on redirection that 3 months notice pay he seeks, was implied in the worksheet. He urges the Court to allow the Claim.
9. Khatib Mwinyi Haji testified the Claimant worked for the Respondent as a Shunting Driver. This is a Driver who transports goods from the Port, to the Respondent's yard within Mombasa. A Highway Driver is assigned long distance duties, such as driving from Mombasa to Kampala.
10. On 11th May 2013, Mutua was called to park Motor Vehicle KBH 891Z. While reversing, a Driver is normally directed by a Turn-man. The Claimant ignored the instructions of the Turn-man. By-standers shouted to alert Mutua he was about to knock a pole while reversing. He ignored their shouts and drove right on to the pole. The Truck's bumper was completely damaged.
11. When asked by Haji why he drove carelessly, the Claimant became agitated, saying he could work elsewhere. The Witness asked the Claimant to go home, cool down, and would be recalled after he had cooled down.

12. He was recalled on 13th May 2013, and required to sign the letter inviting him to the disciplinary hearing slated for 14th May 2013. He attended the hearing on 14th May 2013. The Disciplinary Panel composed of the Security Manager, the Human Resource Manager and the Operations Manager. The Claimant was rude once again, saying the Respondent was not the only Employer he could work for. He stood up, and left.

13. He did not go back to the workplace. The Respondent wrote the letter of summary dismissal, which the Claimant refused to receive. The Vehicle was repaired at a total cost of Kshs. 10,071.70. The Claimant was not locked out. He had been demoted because of his stubbornness. The Respondent is ready to pay the Claimant's rightful terminal dues. He had agreed to become a Shunting Driver.

14. Haji testified on cross-examination that he was employed on 1st January 2013, and the Claimant employed earlier, in June 2012. The Claimant had worked for 6 months by the time the Witness joined the Respondent.

15. The Claimant had been issued with written warnings. These were not availed to the Court. There were no records supporting the position that Shunting Drivers were paid Kshs. 15,000. The Driver of the Truck KBH 891Z, was one Mr. Nyololo. The Claimant was a Shunting Driver when requested to reverse and park this vehicle. He reversed, occasioning the accident. The accident was not reported to the Police as it was self-caused. A Garage Valuer did the valuation for the Respondent. A professional Valuer was not called in.

16. The Invoice dated 11th May 2013 does not have a signature. It is not shown to have been prepared by the workshop Manager. The stores department prepared the handwritten quotation accompanying the Invoice, indicating the cost of the spares at Kshs. 5,071.70.

17. This quotation shows the front bumper was damaged. The Witness stated this happened while the Claimant reversed. Photos of the damaged vehicle were taken by the Respondent, but unavailable before the court.

18. The Claimant was invited for the disciplinary hearing. He declined to sign the invitation letter. He nonetheless attended the hearing on 14th May 2013. The proceedings at the disciplinary hearing were not recorded. The meeting did not resolve to dismiss the Claimant. The decision to do so, was made by the Human Resource Manager and the Director. It is not true that the Claimant used to drive from Mombasa to Kampala.

19. Redirected, Haji testified the Respondent does not report minor accidents to the Police. There was no need for external valuer. The disciplinary meeting derailed, after the Claimant declined to defend. The Respondent urges the Court to dismiss the Claim.

20. The Parties filed Closing Submissions re-stating their respective positions.

The Court Finds

21. The Claimant was employed by the Respondent Transport Company on 1st June 2012, as a Highway Driver, earning a salary of Kshs. 22,000. He served under probation for 3 months. He was demoted on 3rd December 2012 to a Shunting Driver, operating between the Port and Respondent's yard. His salary was slashed to Kshs. 15,000 per month.

22. He was eventually summarily dismissed on 14th May 2013. He was alleged to have damaged the Respondent's Motor Vehicle KBH 891Z, while reversing, resulting in a loss of Kshs. 10,071.70 to the Respondent, in cost of repairs.

23. He disputes the decision made by his Employer, raising the following questions:-

- a. ***Whether the Respondent had valid ground under section 43 and 45 of the Employment Act, to***

terminate the Claimant's contract of employment through summary dismissal.

- b. ***Whether the decision was arrived at fairly in accordance with Section 41 and 45 of the Act.***
- c. ***Whether the Claimant is entitled to compensation and other terminal benefits as pleaded, and prayed in his evidence.***

24. The Claimant was unpersuasive in making several denials during his evidence in chief. He denied the occurrence of the road traffic accident. He denied damaging Motor Vehicle KBH 891Z. He did not insult anyone. He was not given the opportunity to defend himself. He did not drive the Truck on the material day. He was not asked to make a Report by the Operations Manager on the damaged Vehicle.

25. These denials were discounted by the clear evidence of the Operations Manager Mr. Haji. There were documents showing the Motor Vehicle KBH 891Z was damaged, repaired and costs for the repair incurred by the Respondent. There was no reason suggested by the Claimant, why Haji would fabricate these documents, and lie to the Court about the events of 11th May 2013.

26. Weighing the evidence of the 2 Witnesses against each other, the Court finds Haji was the more truthful Witness, and the Respondent demonstrated valid and fair reason justifying its decision to summarily dismiss the Claimant. The grounds cited by the Respondent as justification for its decision – willful neglect, carelessness and improper performance of duty and use of abusive language to an Employer, were shown to have been present and were valid and fair grounds under Section 43, 44(4) and 45 of the Employment Act 2007.

27. Procedural requirements under Sections 41 and 45 of the Act were largely met. The Claimant was given a written invitation to attend the disciplinary hearing. The invitation letter is dated 13th May 2013. The Claimant unconvincingly testified he did not receive the invitation, and was denied access to the workplace. The invitation advised he was free to have the company of an Employee of his choice to the hearing. He attended hearing on 14th May 2013, but declined to offer any explanation holding that he could work elsewhere.

28. In the view of the Court, the decision to summarily dismiss the Claimant was fair in procedure and substance, and compensation is not warranted.

29. The Claim for 3 months' notice pay has no foundation. There was nothing in the contract implying the Claimant would have 3 months' notice or 3 months' salary in lieu of notice. He was fairly summarily dismissed, and is not entitled to any form of notice pay.

30. He was summarily dismissed on 14th May 2013. He deserves salary for 13 days worked in May 2013, computed at Kshs. 22,000 divide by 26 working days = Kshs. 846.15X13=Kshs.11,000. ***He is granted 13 days' salary for work done in May 2013.***

31. On 3rd December 2012, the Respondent informed the Claimant he had been demoted to a Shunting Driver. It was not on any disciplinary ground. The Respondent merely stated it was compelled to do because it was restructuring. His salary was slashed from Kshs. 22,000 to Kshs. 15,000.

32. This was the wrong way to go about restructuring. It amounted to a unilateral variation of the terms of conditions of employment given in the letter of appointment. The unilateral change disadvantaged the Claimant. He was not consulted, and did not consent to have the inferior terms. He had gone past probation. Demotion was not based on poor performance. This unilateral action by the Respondent falls in the category of unfair labour practices, and must therefore be corrected.

33. ***The Claimant is granted the shortfall in his salary of Kshs. 7,000 per month for December 2012, January, February, March and April 2013 at Kshs. 35,000.***

34. ***The Respondent concedes annual leave pay of 1 year at Kshs. 15,000 . The claimant prays for***

Kshs.22,000. Based on the monthly salary of Kshs. 22,000, the Court grants the Claimant 21 days of annual leave, valued at $kshs.22,000/26=Kshs. 846.15 \times 21= Kshs.17,769$.

35. The Respondent shall release to the Claimant his Certificate of Service forthwith in compliance with Section 51 of the Employment Act 2007.

36. No order on the costs and interest.

In Sum, IT IS ORDERED:-

- a. **Termination was fair.**
- b. **The Respondent shall, within 30 days of the delivery of this Award pay to the Claimant 13 days' salary at kshs. 11,000; underpayment of salary at Kshs. 35,000; and annual leave pay at kshs. 17,769 – total Kshs. 63,769.**
- c. **Certificate of Service be issued forthwith.**
- d. **No order on the costs and interest.**

Dated and delivered at Mombasa this 5th day of June 2015

James Rika

Judge