



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 767 2012

**BETWEEN**

FRANCIS NJUGUNA WAIME

..... CLAIMANT

**VERSUS**

TRANSLOGISTICS [K]

LIMITED..... RESPONDENT

*Rika J*

*CC. Leah Muthaka*

*Mr. Gathii instructed by Gathii Irungu & Company Advocates for the Claimant*

*Mr. Oduor instructed by Otieno Okeyo & Company Advocates for the Respondent*

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ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 8<sup>th</sup> May 2012. The Respondent filed its Statement of Response on 19<sup>th</sup> June 2012 and a Supplementary Statement of Response on 5<sup>th</sup> October 2012. The Claimant testified and closed his case on 15<sup>th</sup> May 2013. The Respondent did not call testimonial evidence and closed its case on the same date aforesaid. The dispute was last mentioned on 6<sup>th</sup> June 2013 when the Court confirmed receipt of the Parties' Final Arguments and advised Award would be given on notice.

2. Waime's evidence is that he was employed by the Respondent as a Truck Driver for a period of 42 months, beginning March 2008 to October 2011. Employment was by way of an oral agreement. His starting salary was Kshs. 18,000, the last Kshs. 32,000. He was not allowed to take annual leave and was not compensated in lieu of leave, for the period served. He claims annual leave pay at Kshs. 128,000. The Respondent deducted National Social Security Fund [N.S.S.F] contributions as well as the National Hospital Insurance Fund [N.H.I.F.] contributions from the Claimant's monthly pay, but did not forward these dues to the respective Statutory Bodies. He was not paid salary for the months of July, August, September, and October 2011 amounting to Kshs. 128,000.

3. The Claimant states he left employment as a result of work-related frustrations from the Respondent. He was paid through salary vouchers, which however were not issued consistently. The vouchers were issued by the Director Jagjit. In 2009, the business relocated to Kampala in Uganda. The Claimant worked there and was sometime later sent to Nairobi by the Director. He travelled to Nairobi in May 2011. The June salary was late. He was asked by his Director to pick a Truck from a Dealer in Embakasi Nairobi. He found the vehicle but it did not have the Trailer. The Claimant stayed in Nairobi running errands for the Respondent. He was not paid anything from July to October 2011. The Claimant then came to learn that the Motor Vehicle he used to drive, registration KBP 085N was assigned to another driver. Waime kept calling the Director to have clarification on his employment status; the Director chose to constantly disconnect his calls. It was not true as alleged by the Respondent that the Claimant absconded. He would not be able to raise fare to work, without the payment of his monthly salary. He did not refuse to drive the company Truck to Mombasa as alleged by the Employer. It was incorrect to say that when sent to Nairobi, the Claimant just loitered around the yard. It was not true that the Claimant refused to pick the Director's calls.

4. Cross-examined, the Claimant testified he was employed in March 2008. The salary voucher for March 2008 showed he received a salary of Kshs. 16,481. There was no voucher showing salary of Kshs. 32,000. He was last paid in June 2011. He was paid in Dollars. At no time did Jagjit call the Claimant, and the Claimant refused to pick his calls. The Claimant did not have records to show N.S.S.F and N.H.I.F contributions were not remitted. He stopped working on 31<sup>st</sup> October 2011, after he realized he had not been assigned any vehicle. His job description was to drive his Employer's Trucks. He was not sent on any day between July and November 2011, and declined the assignment. He would obey the instructions of his employer to drive any of the vehicles to any place. The Respondent had an office at Nairobi. The Claimant did not lodge any complaint to the Manager Hannington who oversaw the operations there. The Claimant urges the Court to allow his prayers comprising-:

- a. July –October 2011 salaries at Kshs. 128,000;
- b. Annual leave pay 2008-2011 at Kshs. 128,000;
- c. Respondent be compelled to remit N.S.S.F and N.H.I.F contributions deducted from the Claimant's salary for the period worked;
- d. Compensation for implied termination;
- e. Costs; and,
- f. Any other remedy the Court may find it suitable to grant.

5. The Respondent's position as contained in its pleadings and submissions is that the Claimant abandoned his job without notice or warning. He was not frustrated by the Respondent. He was paid salary up to June 2011, at the rate of Kshs. 22,300, not 32,000. Sometime in July 2011, the Claimant was sent by the Respondent's Officer to drive a Truck to Mombasa from Nairobi and back. He refused to do so, and from then, the Respondent did not hear from the Claimant until it was notified of this Claim. He never worked after his refusal to travel to Mombasa. He nonetheless kept creeping in and out of the Respondent's yard. The Respondent's Director Mr. Jagjit tried to call the Claimant without any response.

6. It is submitted for the Respondent that the Claimant conceded in cross-examination that his contract of employment was not terminated by the Respondent. He absconded, and should pay the equivalent of one month salary to the Respondent in lieu of notice. He did not show the Court any material to support his evidence that his salary was reviewed upwards to a figure of Kshs. 32,000 per month. His pay voucher of 28<sup>th</sup> August 2009 shows a net monthly pay of Kshs. 16,481. He was allowed to take his annual leave, and while not, compensated by way of annual bonus. The Respondent has remitted N.S.S.F and N.H.I.F deductions faithfully. No document was offered in evidence by the Claimant to show no remission was made. The Delivery Note dated 13<sup>th</sup> November 2011 has nothing to do with the Respondent. It is not in the name of the Respondent, and is not signed by the Respondent. He is not entitled to Kshs. 256,000 as prayed, having absconded duty. The Respondent states that the last salary paid to the Claimant was Kshs. 22,000. The Respondent urges the Court to dismiss the Claim with costs paid by the Claimant to the Respondent.

*The Court Finds and Awards:-*

7. It is agreed the Claimant was employed by the Respondent as a Truck Driver, from March 2008 to October 2011. There is no dispute his first salary was Kshs. 18,000. Beyond this there is dispute on nearly all other aspects of this employment relationship, including on the last amount of salary paid or due to the Claimant; and the manner of his exit from employment.

8. The Court finds the prayer for an order compelling the Respondent to remit PAYE, N.S.S.F and N.H.I.F deductions groundless. No material was given in evidence to support this prayer. No records from the responsible Statutory Bodies were provided to the Court. No specific amounts were mentioned. The prayer was made in an evidential vacuum, and is rejected.

9. There is similarly no persuasive evidence to find that the Respondent terminated the Claimant's contract of employment. The Employer and the Employee relocated to Uganda in 2009. The Employee was sometime in May 2011, sent back to Nairobi to collect a Truck from a Dealer at Embakasi. The Truck was not ready in good time. Waime and Jagjit seem to have thereafter engaged in a cat and mouse game. The Employee seems not to have found anything useful to do and it is possible he loitered at the Respondent's Nairobi yard, while the Director Jagjit seems not to have been keen on paying the Employee his monthly dues as and when they fell due. The employment relationship became icy, and calls went unanswered either way. The Employee does not seem to have submitted himself to the direction of the Respondent's Nairobi Office, and the Director back in Uganda appears not to have been keen to retain the Claimant. The Claimant did not tell the Court why, after all the frustrations he allegedly suffered from the Director, did not deem it necessary to return to Uganda and sort out the wavering employment relationship from there. The Respondent did not show that any attempts were made to direct the Claimant in writing, to report to the Manager at Nairobi. Eventually, the Respondent stopped paying the Claimant his salary in November 2011, and reassigned the Truck the Claimant had been driving, to a different driver altogether. It was the end of the relationship. Both Parties share responsibility for the termination of the contract of employment, and no damages or notice pay would be due either way. The Court was convinced that the Claimant's last rate of monthly salary was Kshs. 32,000. The salary voucher showing a gross figure of Kshs. 18,000 was for the year 2009, at the beginning of the employment relationship. The Respondent alleged the last salary was Kshs. 22, 000, but offered no payment records. The Employment Act places the duty of keeping records on the employer, and it was way out of place to demand from the Claimant, that he shows records to support his evidence of the Kshs. 32,000 rate.

10. In view of these findings, the Court is persuaded to allow the Claim to this extent:-

***[a] The Respondent shall pay to the Claimant his salary for July, August, September and October 2011, at the rate of Kshs. 32,000, total Kshs.128,000.***

***[b] No order on the costs and interest.***

Dated and delivered at Nairobi this 17<sup>th</sup> day of January 2014

James Rika

Judge