



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

CAUSE NO. 37 OF 2014

JOHN ODHIAMBO ABILA.....CLAIMANT

v

ELDORET PACKERS LTD.....RESPONDENT

JUDGMENT

1. John Odhiambo Abila (Claimant) was employed by Eldoret Packers Ltd (Respondent) as a driver on 1 November 2003.
2. In a Statement of Claim filed in Court on 19 February 2014, he alleged that his services were unlawfully/unfairly terminated verbally and that he was not given notice. He also alleged that he was being underpaid, was not paid overtime, was not granted annual leave from 2003 to 2007, was not paid terminal dues, and was not issued with a certificate of service. He sought compensation for unfair termination and other dues totalling nearly Kshs 1,000,000/-.
3. The Respondent was served and it filed a Response on 2 April 2014, pleading that the Claimant was a medium duty vehicle driver and that the termination of the services of the Claimant was procedural, lawful and fair because of the Claimant's gross misconduct.
4. The Respondent also pleaded that the Claimant was given notice and was paid all his accrued leave. The underpayments and overtime work were denied.
5. The Cause was heard on 15 October 2014.

Claimant's case

6. The Claimant testified. He stated that he was employed as a driver on 1 November 2003 and worked until 20 February 2011. He was driving Lorries and trailers. At the beginning of the relationship he was earning Kshs 7,200/- per month which rose to Kshs 14,300/- at time of separation. Payment of salary was through a voucher.
7. On the circumstances leading to the separation, the Claimant stated that the trailer he was assigned to drive had mechanical problems and on 20 February 2011, he informed the Respondent's Transport Manager that he could not go on safari with it.
8. The Transport Manager took him to the Director, Raj Kachela who told him that if he did not want to use the assigned vehicle, he did not want to continue with work, after which he left and was not given a

letter of termination.

9. Regarding contractual and statutory entitlements, the Claimant stated that he was not granted annual leave prior to 2007 and that he would report on duty at 8.00am and would only return after delivery of goods. He further stated that he was not paid wages for February 2011, except an advance of Kshs 5,000/-. He also stated he was not paid terminal dues.

10. The Claimant denied that he absconded from work, received a notice to attend a disciplinary hearing dated 28 February 2011 and stated he was seeking the reliefs set out in the Statement of Claim.

Respondent's case

12. The Respondent called the Personal Assistant to the Director to the dock.

12. He testified that the Claimant was employed as a driver (canter KAQ 525P) and was not dismissed but failed to report to work from 11 February 2011. On 28 February 2011, the Respondent wrote to the Claimant to attend a disciplinary hearing on 16 March 2011, but the Claimant did not show up. The notice did not have an address though it was handed to the Claimant through a delivery book (not produced).

13. Further, at the disciplinary hearing, a decision was taken to dismiss the Claimant and a letter to that effect was written on 20 March 2011. Minutes of the disciplinary hearing were part of the Respondent's documents. The witness also stated the termination letter was handed over to the Claimant and he signed for it.

14. The witness stated that he did not hear the Director telling the Claimant to leave.

15. On the contractual and statutory entitlements, the witness stated that the Claimant used to go on annual leave or encash his leave and records dated 27 July 2007, 30 August 2007, 5 September 2008 and 6 October 2009 were produced.

16. The witness also made reference to Permanent Staff Salary Sheet from 2004 up to 2011, and stated that the Sheet for February 2011 indicated Claimant took an advance. Advances were ordinarily given on the 15th of the month. The Claimant was deducted National Social Security Fund contributions.

17. The Claimant was directed to file and serve submissions before 30 October 2014. The submissions were only filed on 4 November 2014. (Respondent's submissions were filed on 13 November 2014). No explanation for the late filing was offered.

Questions for determination

18. Arising from the pleadings, testimony and documents filed and submissions and as is common with complaints of unfair termination, two central issues fall for determination. These are whether the termination was unfair, and if so appropriate remedies. Some remedies are statutory and or contractual and do not depend on the fairness or lack of the termination.

Whether termination was unfair

19. Before discussing whether the termination was unfair, the Court has to determine whether indeed there was termination.

20. According to the Claimant, the Respondent's Director told him to leave if he was not going to drive a vehicle with a mechanical problem.

21. But for the Respondent, two versions have been given. At the onset of the Respondent's witness testimony, he categorically stated that the Claimant was not dismissed but absconded from work.

22. In the course of testimony, he made reference to a show cause notice to the Claimant and a disciplinary hearing and he stated that the Claimant did not turn up. He produced minutes of the meeting. According to the minutes, a decision was taken to dismiss the Claimant.

23. Further, evidence produced indicates the Claimant took an advance around 15th of February 2011.

24. With these inconsistent facts, the Court must unravel the true circumstances under which the separation took place.

25. With the minutes being clear that the Claimant was being dismissed, the Court is minded to find that this was a case of alleged desertion of duty or absconding from work and the Respondent dismissed the Claimant on that ground.

Procedural fairness

26. Pursuant to section 41 of the Employment Act, 2007, before terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*, an employer is under a statutory obligation to inform the employee of the reasons and to give the employee a chance to make representations before taking the decision.

27. The reason given in the instant case was failing to report to work without permission or explanation. Absenteeism goes to misconduct/behaviour and therefore the Respondent should have complied with section 41 of the Employment Act, 2007.

28. The process contemplated under section 41 of the Act can either be conducted orally or carried out through correspondence. In the case at hand, the Respondent's case is that a notice to explain was given and further, that the Claimant did not turn up at an oral hearing.

29. The Respondent's witness stated that the notice was given to the Claimant through recorded delivery. The Claimant on his part contended that he never received the notice. The delivery book was not produced in Court, though it was stated it was available.

30. The notice also had no address. The Respondent must be taken to have had records of contacts of its employees. The failure to give the contact details in the letter was not explained.

31. The cumulative effect of the non production of the delivery book or explanation for not indicating the contact details of the Claimant, leave the Court with no other option but to find as a fact that the Respondent did not comply with the procedural fairness safeguards of section 41 of the Employment Act, 2007 and to hold that the termination was procedurally unfair.

32. Having reached that conclusion, it is not necessary for the Court to discuss whether the Respondent has proved the reason for termination and that the reason was a fair and valid reason as contemplated by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

33. As already stated earlier, some remedies in employment law do not depend on the fairness of a termination. Some are contractual or statutory entitlements.

Salary in lieu of Notice

334. Pursuant to sections 35 and 36 of the Employment Act, 2007, the Claimant should have been given written notice. The Court would award him the equivalent of one month salary in lieu of notice.

Accrued leave

35. The Respondent produced the Claimant's leave records from 2007. The Claimant was encashing his leave days.

36. On a balance, the Court finds because no records were produced prior to 2007, the Claimant is entitled the sum of Kshs 34,569/- claimed.

Compensation for unfair termination

37. The Court has reached a conclusion the termination was unfair. One of the primary remedies in such cases is the equivalent of not more than twelve months gross wages.

38. The remedy is discretionary. The Court is enjoined to consider any, some or all of the factors set out under the section. The Claimant stated that at time of hearing, he was a casual driver. Further, he had served the Respondent for about 7 years.

39. Considering the length of service and that the Claimant has secured alternative employment, the Court is of the view that the equivalent of 5 months gross wages assessed at Kshs 71,500/- based on the wage at separation would be just and reasonable.

Underpayments

40. The Claimant sought Kshs 171,600/- on account of underpayments. According to the Claimant he was a trailer driver and he pleaded his case as that of a driver of a Lorry/trailer.

41. For the Respondent, it was stated that the Claimant was employed as a medium duty vehicle driver and was assigned to drive a canter KAQ 525P weighing 3510kgs.

42. To establish whether the Claimant was underpaid, the Court must determine his occupation and or type of vehicle he was driving.

43. The copy of the Claimant's driving license indicate he was licensed and authorised to drive motor vehicles classes 'B', 'C' and 'E'.

44. The Respondent's uncontroverted testimony was that the Claimant was driving a canter whose registration number was given. The Claimant did not give the registration number of the lorries/trailer(s) he was driving.

45. The Regulation of Wages (General) (Amendment) Order has various categories of drivers. These are, *wheeled tractor driver (light)*; *driver (cars and light vans)*; *driver (medium sized vehicle)*; *crawler tractor driver* and *driver (heavy commercial vehicle)*.

46. From the material placed before Court, the Court finds that the Claimant was assigned to drive a canter whose weight was 3510 kgs. My convertor told me that this is equivalent to 7,738lbs. This falls under class 'C', commercial vehicle exceeding 4000lbs tare weight. It does not fall under class 'B' heavy commercial vehicles.

47. By the stretch of any imagination, though the parties did not address the issue, a canter is not a heavy commercial vehicle. It is also not a light van. It is a medium sized commercial vehicle.

48. From 1 May 2003 to 30 April 2004, the prescribed minimum wage pursuant to Legal Notice No. 48 of 2003 for the Claimant's occupation was Kshs 6,094/-. With 15% house allowance the wage was Kshs 7,008/-. The Claimant was not underpaid during this period.

49. From 1 May 2004 to 30 April 2005, pursuant to Legal Notice No. 36 of 2004, the minimum wage inclusive of house allowance was Kshs 7,778/-. The Claimant was earning Kshs 7,200/- and was thus underpaid by Kshs 6,936/- over the year.

50. From 1 May 2005 to 30 April 2006, pursuant to Legal Notice No. 42 of 2005, the prescribed minimum wage was Kshs 7,237/-. With house allowance the amount was Kshs 8,322/-.

51. The Claimant pleaded he was earning Kshs 7,200/- during this period. During this period he was underpaid by Kshs 13,464/-.

52. From 1 May 2006 to 30 April 2007, the prescribed minimum wage pursuant to Legal Notice No. 38 of 2006 (not Legal Notice No. 42 of 2005 as pleaded by the Claimant), was Kshs 8,105/- . With 15% house allowance the gross came to Kshs 9,320/-. The Claimant was earning Kshs 8,500/- and was thus underpaid by about Kshs 9,840/-.

53. I have not been able to locate the Legal Notice providing for minimum wages from 1 May 2007 to 30 April 2008. The prescribed minimum wage would therefore be those prescribed in the 2006 Legal Notice. The underpayments would therefore be Kshs 9,840/-.

54. From 1 May 2009 to 30 April 2010 the prescribed minimum wage inclusive of house allowance was Kshs 10,998/-. The Claimant was actually earning Kshs 13,300/- and so was not underpaid.

55. From 1 May 2010 to February 2011 when the Claimant was dismissed, the prescribed minimum wage was Kshs 10,520/-. With house allowance, the wage was Kshs 12,098/-. The Claimant was not underpaid during this period.

Overtime

56. The claim for overtime must also be declined. Sufficient material as to contractual or statutory working hours was not placed before Court.

Salary arrears

57. This head of claim was not pleaded though itemized in the written submissions. It is declined.

Certificate of service

58. A Certificate of Service is a statutory right. The Respondent should issue one to the Claimant.

Conclusion and Orders

59. The Court finds that the Respondent did not comply with the procedural fairness safeguards in section 41 of the Employment Act, 2007 and thus holds that the termination was unfair.

60. The Court awards and orders the Respondent to pay the Claimant

i. One month salary in lieu of Notice	Kshs 14,300/-
ii. Accrued leave	Kshs 34,569/-
iii. 5 months gross wages as compensation	Kshs 71,500/-
iv. Underpayments 2004-2008	Kshs 30,240/-

TOTAL

Kshs 150,609/-

61. The claim for overtime is dismissed.

62. Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Nakuru on this 14th day of November 2014.

Radido Stephen

Judge

Appearances

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

For Respondent Ms. Odwa/ Mr. Makuto instructed by Nyairo & Co. Advocates