



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1608 OF 2011

BETWEEN

PATRICK MBISI MUTHENGI

..... **CLAIMANT**

VERSUS

SOUTH SLOUX FARMS LIMITED

..... **1ST RESPONDENT**

AMRIK SINGH

HEER..... 2ND

RESPONDENT

HARDEEP HEER AMRIK..

..... **3RD RESPONDENT**

Rika J

CC. Elizabeth Anyango

Mr. Mageto instructed by M’Njau and Mageto Advocate for the Claimant

Mr. Ongicho instructed by Maari, Nyaberi & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Patrick Mbisi Muthengi is a Heavy Commercial Driver. The 1st Respondent is a Limited Liability Company registered in Kenya, involved in commercial transportation. The other two Respondents are Directors of the Company. The Claimant was employed as a Heavy Commercial Driver by the Respondents, on 2nd February 2001. His contract was, according to his pleadings, terminated by Amrik Singh Heer by word of mouth, on 7th April 2011. At the time of termination, he was on a monthly salary of Kshs. 24,000. He states his contract was terminated unfairly and unlawfully. He filed this Claim on 20th September 2011 seeking-:

- a. Salary payment at Kshs. 24,000 per month from the date of termination to-date;
- b. Notice Pay;
- c. Trip Allowance of Kshs. 20,000 per month;
- d. Severance Pay;
- e. Refund of National Social Security Fund [NSSF] contributions deducted from his salary;
- f. Accrued Leave Days;
- g. Rest Days;
- h. House Rent Allowance;
- i. Public Holidays Overtime; and
- j. Compensation.

He added these up to Kshs. 1,582,523. He asks for costs of the Claim.

2. The Respondents filed their joint Statement of Reply on 27th October 2011. They explain that they had an administrative change, whereof Drivers were to be assigned different Lorries on rotational basis. When assigned a different Lorry, the Claimant refused to work, demanding to continue driving the old one. He completely refused to follow instructions, in the end opting to desert work. He left employment of his own volition. The Respondents made several calls to the Claimant imploring him to resume duty. He failed to do so, and the Respondent summarily dismissed him, relying on Sections 44 [3] and 44 [4] [c] of the Employment Act 2007. He was at the time of dismissal, indebted to the Respondents to the amount of Kshs. 105,000, advanced to him by the Respondents in the course of employment. The Respondents urge the Court to dismiss the Claim, and allow their Counterclaim for the sum of Kshs. 105,000. They pray for costs.

3. The Claimant gave evidence on 26th October 2012. The Respondents' Personnel Officer Benedict Malonza, gave evidence for the Respondents on the same date, bringing proceedings to a close. Parties were granted 14 days apiece to file their Closing Arguments. The Respondents filed theirs with the leave of the Court, on 8th January 2013. The dispute was last mentioned in Court on 16th January 2013, when Parties were advised by the Court that the Award would be delivered on notice.

4. Muthengi testified he was employed in February 2001 as a Truck Driver. He was dismissed in March 2011. He had traveled on duty to Bungoma, Eldoret and then Athi River. After running these errands, he parked his Truck at the Respondents' parking yard. When he reported to work the following day, he was prevented from gaining entry by the Security Guards. He called the Managing Director, who told him he had been dismissed from employment, and should look for work elsewhere. The Claimant was not paid any terminal dues. He sought the assistance of his trade union. He went to see his employer accompanied by his trade union officers, but they were denied entry. The Respondents completely refused to submit to the conciliation of the Ministry of Labour. Muthengi testified he did not abscond duty. He agrees he had a loan balance of Kshs. 105,000 at the date of dismissal, which he would be willing to offset against any sums that may be granted in this Claim.

5. Answering questions from the Advocate for the Respondents, Muthengi testified he worked for the Respondents for 10 years. He was paid Kshs. 24,000 all through. He did not sign any contract with the employer. He was not employed as a casual employee. He had a job identification card. He was paid at the end of every month. He was driving an old Truck for 4 years. There were changes, whereof the Respondents reassigned Trucks to different Drivers. It is not true that the Claimant was reassigned a newer Truck which he declined to drive, preferring his regular older Truck. Muthengi testified there were normal disagreements between him and his employer in the course of duty, particularly in relation to overloading. It was not possible for him to ferry his own goods, other than those he was directed to transport by his employer. It was not true that Muthengi got angry after he was deprived of the older larger Truck, and assigned the newer smaller Truck which would prevent him from ferrying his own goods. He was locked out of the workplace on 28th/ 29th March 2011. Redirected, the Claimant testified he worked for 10 years. The payslip showed deductions of Kshs. 200 in NSSF contributions. He disclosed the problem of overloading in his pleadings, as causing some misunderstandings. The employer did not give any reasons for termination. He was never confronted by his employer for ferrying goods for his personal gain. It is not true that the Respondents reassigned the Claimant a Truck. The loan for the sum of

Kshs. 160,000 was a friendly loan, of which the Claimant had repaid Kshs. 55,000 on the date of dismissal. Muthengi prays the Court to uphold his Claim.

6. Benedict Malonza had at the time of giving evidence, worked with the Respondents for 2 years. The Respondents' Offices are based at Nairobi. They have over 150 employees, 100 of them drivers and turn boys. The Respondents have a policy of reassigning Drivers different Trucks. Malonza did not know the Claimant personally. The Claimant's employment file however showed that the Claimant deserted employment in protest, upon being assigned a vehicle he was not happy with. All Respondents' vehicles are Mercedes-Benz Actros. It was lost on Malonza why Muthengi did not like the vehicle assigned to him. He had a loan of Kshs. 160,000 out of which he paid Kshs. 55,000, having a balance of Kshs. 105,000 on exit. The employer had a duty to pay N.S.S.F dues even for irregular employees. Malonza testified on cross-examination that he was not in employment, during the Claimant's employment and at the time of the Claimant's dismissal. The employment records showed the Claimant refused to have the new Truck assigned to him. Malonza did not see any letter of termination on record. The company places Drivers on 3 months of probation. Upon confirmation, an employee is deemed permanent. Records showed N.S.S.F deductions were made and remitted. All vehicles are big, carrying 28 tonnes. Changes on the operation of the vehicles were at the discretion of the company. The Respondents pray for dismissal of the Claim.

The Court Finds and Awards:-

7. There is little to suggest that the Claimant, after working for 10 years as a Driver for the Respondents, can by any description of the law, be termed as a casual employee. He satisfied the Court that he was a regular employee for 10 years. The Court however is not persuaded that the Respondents just asked him to stop working, for no reason. The explanation that the Claimant deserted work in anger, after being assigned a different Lorry from the Lorry he was accustomed to driving, was believable evidence. The Court was persuaded by the evidence of Malonza and does not see anything on record that supports the Claimant's position, that after 10 years, the Respondents simply asked him to make himself scarce without any reason. He says that he believes the Respondents abolished his job. His position was declared redundant. This is highlighted in the submissions contained his Statement of Claim. Being assigned a different Truck, which was unattractive to the Claimant, cannot amount to the diminution or phasing out of the driving job. The Claimant left on his own volition, after refusing to drive the given Truck. Other drivers continued to work, and the Respondents did not indicate to the Claimant at any one time, that they did not need drivers any longer.

8. The claim for severance pay is baseless. There was no redundancy situation, preceding the exit of the Claimant from employment. Severance pay under Section 40 of the Employment Act 2007 is not awardable. N.S.S.F contributions are shown to have been deducted from the Claimant's monthly dues. The Provisional Member Statement from the N.S.S.F, indicates, that the Claimant was employed on 1st February 2011 and registered on 21st March 2011. This date of employment was given in an attempt by the Respondents, to fool the N.S.S.F. There were no N.S.S.F Statements relating to the period before, or after these dates availed to the Court. The payslips applicable to the dates, before the Claimant was registered with the N.S.S.F are shown to attract N.S.S.F deductions. Payslips for 2009 and 2010 are shown too include N.S.S.F deductions. Muthengi was not registered with the N.S.S.F. During the pre-Industrial Court interventions by the Ministry of Labour, the Respondents were requested to make full disclosure of the N.S.S.F records, but did not do so. It is not clear from the evidence of the Claimant how much was deducted from him this way. The Court finds his claim for refund of money, alleged to have been deducted as N.S.S.F contributions, credible. **The Respondents shall refund the Claimant all deductions made in the name of the N.S.S.F, prior to 21st March 2011. The Claimant may also follow the matter with the N.S.S.F for possible prosecution of the Respondents for violation of the N.S.S.F Act, Cap 258 the Law of Kenya.**

9. The Payslips capture payment of house rent allowance. The prayer for arrears of house rent allowance is declined. There were indications in the payslips of cash paid to the Claimant in lieu of leave. He did not come out clearly in his evidence, with specific years when he was denied annual leave days, or cash in lieu of leave. He did not explain the context of the amounts shown in the payslips as payment of cash in

lieu of leave. The claim for accrued leave is refused. He did not persuade the Court that he worked over public holidays, and that the Respondents failed to compensate for work performed over the public holidays. He did not even attempt to particularize the public holidays in question. An employee, who seeks the assistance of the Court, must assist the Court with cogent evidence. Other prayers are similarly unsupported by evidence. Muthengi claims Kshs. 24,000 per month for the period he has been out of employment. He does not seek reinstatement. He is in effect, asking for back salaries. He seeks to be paid for the period he has been out of employment. No Court would sanction payment of salaries not earned, or deemed earnable. He prays for Trip allowance of Kshs. 20,000 per month. The item was not justified through any written document, or oral evidence of the Claimant. Notice pay is not available to Muthengi, having himself invited termination by desertion. The Court has no evidential material that would lead to a grant in favour of the Claimant, of these terminal benefits and compensation as claimed.

10. The Claimant concedes he owed the Respondents a loan balance of Kshs. 105,000 on the date of desertion. The counterclaim is undefended. The Claimant was quite comfortable asking the Court to offset the debt owed from the amount the Court may be pleased to grant the Claimant. He gave little support to most of the claims, and his method was a risky gamble. The Court has noted elsewhere that the Respondents do not appear to have registered the Claimant with the N.S.S.F until 21st March 2011. This was a month before the Claimant left employment. The Respondents then appear to have misinformed the N.S.S.F that they only employed the Claimant in February 2011, while he had been working from 2001. The Court has suggested that the N.S.S.F ought to carry out its own investigations and prosecutions surrounding this misinformation. From the perspective of the Court, there is sufficient ground to conclude that the Respondents did not register the Claimant with the N.S.S.F for the 10 years worked. **Section 35 of the Employment Act makes the Claimant eligible for service pay, which the Court grants the Claimant at 15 days' salary for each year completed in employment, amounting to Kshs. 138,461.50.** He may have confused service pay for severance pay. The Court does not think that failure to expressly plead service pay, should result in withdrawal by the Court, of a benefit conferred by law, on the employee. **Offsetting the amount of Kshs. 138,461.50 against the**

counterclaim of Kshs. 105,000, the Court grants the sum of Kshs. 33, 461 to the Claimant. In sum:-

[a] Termination was occasioned by the Claimant's desertion and therefore not unfair;

[b] The Respondents shall refund the Claimant all deductions made in the name of the N.S.S.F, prior to 21st March 2011;

[c] The Claimant is at liberty to follow up the matter under [b] with the N.S.S.F for possible prosecution of the Respondents for violation of the N.S.S.F Act;

[d] The Claimant is granted service pay at the rate of 15 days' salary for each year completed in service, amounting to Kshs. 138,461.50;

[e] The counterclaim is allowed for the amount of Kshs. 105,000;

[f] The sum left after the offsetting, of Kshs. 33, 461 shall be paid by the Respondents to the Claimant within 30 days of the delivery of this Award; and

[g] No order on the costs.

Dated and delivered at Nairobi this 21st day of June 2013

James Rika

Judge

