



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT MOMBASA**  
**CAUSE NO. 70 OF 2013**

**IBRAHIM MOHAMED ABDI .....CLAIMANT**

**VERSUS**

**PANAL FREIGHTERS LTD .....RESPONDENT**

**J U D G M E N T**

**BACKGROUND**

The claimant has sued the respondent alleging that he was unlawfully terminated from employment on 18/11/2011 and prays for accrued employment benefits of ksh.97,513/-. The respondent has denied liability to pay any further dues after having paid to the claimant ksh.28,487. The suit was heard on 19/9/2012 when the claimant testified as CW1 and Sada Musa testified as RW1 for the respondent.

**CLAIMANT'S CASE**

The claimant was employed by the respondent in May 2007 as casual but on 25/10/2008 he was given a written confirmation as a Port Clerk on permanent basis. He worked until 18/11/2011 when he received a letter terminating his services summarily due to company restructuring. He was told by the HR Manager to come for his accrued benefits after 2 weeks. When he could not get paid he reported the matter to the labour office. The respondent admitted liability to pay ksh.28000/- before the Labour Officer and brought a cheque for the same but it was not enough hence the present suit. CW1 contended that he had cashed the leave for 2007 by receiving ksh.6,066/- but never took any other leave until he was dismissed. He however admitted taking a total of 6 off days between 2009 and 2010.

He prayed for 63 days accrued leave, salary for October plus 18 days worked in November 2011. He also prayed for all his lawful accrued terminal dues. He maintained that the kshs.28000 paid as dues was not enough. He denied defrauding his employer ksh.40,000/- as alleged by the defence.

On cross examination, he disputed the debt of ksh.40,400 for escort millage and maintained that the money was given to him with the authority of the respondent's transport manager and the CEO for purposes of paying bribes to hasten processing and release of transit lorries. He referred to letter dated 6/9/2011 to demonstrate that the bribe money was known by the boss.

On the leave issue, he maintained that the leave records filed by the defence were correct if they reflected that he utilized his 2007/2008 leave plus 6 off days.

## **DEFENCE CASE**

RW1 is the respondent's HR Manager and admitted that CW1 was their Loading Clerk between 2007 and November 2011 when he was terminated for laxity at work and taking ksh.40,400/ without authority. CW1 went on leave on 19/10/2011 to resume on 6/12/2011 but was terminated on 18/11/2011 while still away on leave. The reason cited was internal restructuring which was intended to remove workers who did not add value to the company. CW1's file reflected negative performance. RW1 added that the termination letter offered to pay one month salary in lieu of notice, salary upto 18/11/2011, 36 leave day and then issue a certificate of service.

RW1 admitted that CW1 took leave for 2007/2008 plus 6 leave days between 2009 and 2011. CW1 also went for his last leave on 24/10/2011 and was terminated on 18/11/2011 reducing the outstanding leave to 15 days. RW1 admitted also that when the respondent paid the terminal dues the claimant she reduced ksh.40,400 to recover what was stolen by the claimant as escort millage fees. She produced vouchers approved by the transport manager for the escort millage.

On cross examination RW1 admitted that the processing and escort millage money was paid from 2007 but the records produced in court were only for 2011. RW1 also admitted that the reason for termination was restructuring and not stealing or fraud. RW1 further confirmed that the alleged fraudulent money was approved by a senior manager. After close of the hearing, the parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

The issue for determination arising from the pleadings, evidence and submissions are:

- a. **whether the termination of the claimants services was unlawful.**
- b. **Whether the claimant is entitled to the reliefs sought.**
- c. **Whether the claimant should repay kshs.40200 to the respondent.**

In answer to the first question, is contained in the termination letter dated 18/11/2011. The reason given for the termination in the letter was internal restructuring. That appears to suggest the termination was through redundancy. The procedure for termination through redundancy is contained in Section 40 of the Employment Act. The said provisions of the law requires that a written notice be served upon the employee and the labour office 30 days prior to the termination. In addition certain terminal dues including one month notice, severance pay and other benefits accruing from the employee's service should be paid.

In the present case no prior notice was served upon the claimant and the labour office. All the accrued benefits were not paid as per the Section 40 *supra*. Consequently this court finds that the termination on ground of internal restructuring was wrongful and unlawful summary dismissal. It was a blatant labour malpractice calculated to circumvent the legal provisions of Section 41 and 45 of the Employment Act which bars an employees from terminating the employment of an employee unfairly.

As regards the second issue for determination the court has been asked to award one month notice pay, salary for October plus 18 days worked in November 2011, severance of 15 days per year of service, leave for 4 years and any other relief that the court may deem just. The court will award ksh.18000 being one month salary in lieu of notice and salary for October and November 2011 being ksh.18000/ and 10800/ respectively. The claimant will also get cash in lieu of 63 leave days less 22 and 6 leave and off days taken respectively. Between 209 and 2011. Hence  $63 - 28/30 \times \text{kshs. } 18000 = \text{ksh.}27000/$ . In addition the claimant has prayed for severance of ksh.36000 for the 4 years served and the defence has admitted. The total employment benefits due to the claimant is therefore ksh.103,800/.

The last question to consider is whether the claimant should repay ksh.40,400 to the respondents in respect of escort millage fraud. The court view that such an amount was not counter claimed and no evidence was adduced to prove that the money was fraudulently received by the claimant. The defence has admitted that the money was authorized by the transport manager of the respondent after the amount was negotiated by the CEO. It follows therefore that the claimant did not steal or defraud the respondent.

Secondly, the uncontested evidence by the claimant is that the money was intended to bribe some public officers who were processing release and escorting the transit lorries from the Port of Mombasa. No accountability in the form of receipt was expected from the claimant at all. It is therefore not possible at this juncture or at all for the defence to demand back what was lawfully advanced to the claimant for executing an illegality. The court will deem that the bribe was for the best interest of the respondent who never demanded refund before the dismissal of the claimant.

### **DISPOSITION**

For the reason stated above, the court enters judgment for the claimant against the respondent for the payment of ksh. 75,313 being ksh.103,800 less ksh.28,487 paid during the conciliation before the labour officer. The said ksh.75313 will attract interest at court rates from 18/11/2011 till payment in full. The claimant will also have costs and interest. He will also be issued with a certificate of service by the respondent.

**Signed, dated and delivered this 6th day of December 2013**

**ONESMUS MAKAU**

**JUDGE**