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Advocates:	-
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REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.E017 OF 2021

(Before D.K.N.Marete)

FESTUS LUYENJI MUSUNDI.....CLAIMANT

VERSUS

FIDES KENYA LIMITED.....RESPONDENT

J U D G M E N T

This matter was originated by way of a Memorandum of Claim dated 6th May, 2021. The issues in dispute cited therein comes out as;

1. *Unfair and unlawful termination*
2. *Discrimination*
3. *Unfair Labour Practices by Respondent leading to premature loss of career by Claimant.*

The Respondent in a statement of Response denies the claim and prays that it be dismissed with costs.

The Claimant's case is that at all material times to this suit, he was a *bona fide* employee of the Respondent having been employed as the Respondent's Managing Director's driver.

The Claimant's further case is that he was engaged on 2nd January, 2018 as driver for Mr.Willem Selen who was the then incoming Managing Director. He reported to Mr.Willem but could also be assigned duties by the Head of Export and Logistics, a Mr.Vincent Andalya who was in charge of vehicles, drivers, transport and logistics.

The Claimant's other case is that prior to joining the respondent, he worked for Carter Centre in South Sudan as Executive Driver for the County Director who was American. This was for 9 years, a demonstration of good conduct and performance, among other successful engagements.

The Claimant's engagement were;

- a) *Driving the Managing Director as per his instructions and running errands on his behalf.*
- b) *Ensuring passenger safety at all times.*
- c) *Ensuring the safety and security of the vehicle at all times.*
- d) *Adherence to the relevant traffic laws and regulations.*

e) Responsible for the company vehicles and cargo while under his care.

f) Adherence to the company's drivers' code of conduct.

g) Responsible for vehicle maintenance before, after or during a run.

The Claimant's further case is as follows;

- He worked from Monday-Friday for 9 hours a day with Saturday and Sunday being rest days.
- Any extra work during the rest days was treated as overtime and compensated.
- He was especially engaged in personal errands by the Managing Director.
- These errands ran all the way to the Fridays.

His duties on Wednesday included;

a) Washing of company vehicles including pickups and trucks.

b) Running errands to Embu town with a pick-up mainly for shopping or picking materials from the suppliers.

c) Carrying flower cuttings from the green house to the cold room either using a pickup or the small truck.

d) On several occasions Willem instructed him to help Festus Lemingi and Gedion Murimi Gitari (both from security) in disposing off the baboons killed by employees at the Senior Staff quarters compounds at the farm's dumpsite, called Thagamu. Willem would authorize the claimant to use the pickup KAS 529M to lead the dead baboons and take them to Thagamu for disposal. The killed baboons were normally kept by security at a spot where Willem would come to inspect them, and approve the payment to the killers ranging between Kshs.5,000.00 – 10,000.00 and also approve for disposal.

His duties on Saturday's included;

- a) Taking his wife for personal shopping and purchases of the pig farm inputs which would end around 4:00pm to 5:00pm.
- b) One Saturday he was sent to Nanyuki to pick Willem's dogs (puppies) and take them to the farm in Embu.
- c) 2018 Easter Holiday, Willem detained the claimant at the farm in Embu and he was never compensated.

His further case is that bad blood cropped in and the two could not see eye to eye any longer. This is expressed as follows;

32. The Claimant avers that Willem used the above events as part of the reasons for the disciplinary process which led to his termination. He was invited for a disciplinary hearing on 8th May, 2018 at 12:00pm at Willem's office. The issues raised were;

a) Driver etiquette- loud chewing/coughing and belching.

b) Reckless driving, scratches and dents on KCH 744A since he stated driving it.

c) Poor corner turns with a case of going off the road when coming out of roof top parking, on two scenarios.

d) Failure to pick the car as earlier agreed with the MD on Wednesday 25th April, 2018.

e) Failing to pick the MD on 27th April, 2018 at 2:00pm as earlier planned and failure to communicate to him on the anticipated delays.

33. The Claimant states that the hearing was rushed and lasted for only 30 minutes. He was not afforded sufficient time to defend himself or to question the attendants. He was also not allowed to ask for witnesses from the employer to prove the allegations against him.

34. At the end of the hearing, Willem told the Committee that he did not want the claimant as his driver and ordered them to terminate his Employment. Willem openly stated that he had already found another driver to replace the Claimant.

He was on 10th May, 2018 issued with a termination letter on the following grounds;

a) On 27th April, 2018 he failed to pick the MD at 2:00pm as it had been earlier planned and further he failed to communicate the anticipated delays.

b) As a driver, he failed to ascertain that the vehicle was in good condition while driving.

c) Failure to communicate the vehicle tyres were worn out was a negligence of his duty.

d) He lied that he went to check the MD's car on 25th April, 2018. From the CCTV footage, his presence was never captured. This is contrary to the Company Code of Conduct clause 3 which highlights honesty as a principal.

e) Recklessness while driving, case of going into a drainage week during 14. The scratches and dents on KCH 744A ascertained his inability to drive safely on the roads. This was proof of his incompetence as a driver. (see Appendix 3).

Further;

41. The Claimant avers that he never had an accident while driving any company car. He also had no traffic offence raised against him. The accusations of reckless driving were unfounded. Even when Willem would bark at him and make him nervous, he never caused an accident or made the car to have any scratches or dents save for one small dent which occurred on 15th January 2018 at Aberdare's Country Club in Nyeri County. The matter was resolved by the staff of the club and Fides Kenya Limited.

42. The Claimant also states that at no one point did Willem raise any complain of lack of driver etiquette including belching, coughing and chewing loudly while driving him. He was therefore disturbed when Willem raised such issues at the disciplinary hearing.

He was not issued with a show cause letter prior to termination.

The Claimant further submits as follows;

a) The procedure followed in terminating his employment was flawed and demonstrated a premeditated decision to terminate his employment at whatever cost.

b) The disciplinary hearing was held in MD's office instead of the Boardroom as was the norm; and the motive was to intimidate the Claimant and the disciplinary committee members so that they would dance to the tune of the MD.

c) He was never issued with a show cause letter prior to being invited for a disciplinary hearing.

d) Willem abused him verbally and physically and used him as his personal servant against the code of conduct of the Respondent.

e) Willem machinated his termination by making false allegations against him in connivance with the HR Manager.

f) All the accusations levelled against him at the hearing were false as he had adequate explanations in his defence including receipts, vouchers, claim forms and call logs but the disciplinary committee, intimidated by Willem chose to overlook that evidence and deliberately rushed the hearing so as to deny him an opportunity to defend himself.

g) He was never given a chance to read, confirm and sign the minutes before a verdict was reached.

h) The verdict was reached in a rush, barely 1.5 hours after the disciplinary hearing.

The termination was substantively and procedurally unfair.

He prays as follows;

a) *A finding that the Claimant's termination was procedurally and substantively unfair.*

b) *An award of Kshs.597,258.00 made up as follows;*

i) *12 months' compensation..... Kshs.420,000*

ii) *One month salary in lieu of notice..... Kshs. 35,000*

iii) *Gratuity based on exit salary..... Kshs. 24,231*

iv) *Leave days..... Kshs. 11,308*

v) *Accrued overtime..... Kshs. 67,219*

vi) *Refund for taxi and fare expenses..... Kshs. 21,200*

vii) *Money owed by Willem/Respondent..... Kshs. 9,000*

viii) *Meals for working past 9:00pm..... Kshs. 9,300*

c) *Costs of the suit.*

d) *Any other relief that the court may deem fit to grant.*

The Respondents case is that the Claimant was employed by the Respondent as a personal/Managing Director driver and he was required to report to the Managing Director directly unless released to be assigned roles by the Head of Export and logistics. She denies ever prompted the claimant to leave his assignments to take up his employment.

The Respondents further case is that the duties and responsibilities of the claimant were set out per his employment contract and included;

a) *Handling of the motor vehicle, which included driving the MD, driving the MD's vehicle in a safe manner, performing daily and routine safety and maintenance checks, ensuring the MD's car is kept clean and perfect and undertaking the MD's routine errands.*

b) *Safety and security, which included, being responsible for the MD's vehicle, driving in a safe manner to avoid damage to the vehicle or injury, and general adherence to traffic etiquette.*

c) *Hospitality, which included giving excellent service to the MD, the MD's guests, and other customers, being courteous, adhering to the code of conduct, and maintaining good etiquette.*

d) Cost control which included adhering to the vehicle's scheduled routes and moving with a map in case he did not know a place where he had been sent.

The Respondents other case is as follows;

- The claimant's assignment as a driver would take him a maximum of forty- five (45) hours per week.
- There was no space for overtime but time out if they worked overtime.
- The claimant was given a company house to live.
- The claimant's allocation of duty was in terms with his employment contract.
- The duties complained off fall in the ambit of a personal driver and were part of the employment contract.
- Monies incurred on behalf of the company were recoverable per clause 3.5 of the HR Manual (staff allowances) Regulations and the claimant was aware of this.
- Denies allegations of the claimant being in Nairobi and running personal errands on farm input transportation.
- Denies harassment, this was not reported to the relevant officer.
- Argues that a professional driver should have maneuvered the mud sketch and claim on expenses incurred should have been made.
- Claimant failed to pick the MD at the car wash on 25th April, 2018 and pocketed Kshs.500.00 of the car wash sum of Kshs.6,000.00.
- The claimant never raised any complaints against the MD to the Respondent.
- On 30th April, 2018, the Respondent received a complaint from the MD against the claimant's continued smoking the, lack of driver etiquette, reckless driving, having problems with locations, failure to adhere to instructions, financial impropriety and failure to pick the MD.
- A notice to show cause was issued to the claimant on 28th April, 2018 with a request for a response.
- A response was made on 30th April, 2018.
- Disciplinary meeting held as scheduled and due process pursued.
- He was found culpable and his contract of employment terminated.
- He was paid all his terminal dues outstanding.

This matter came to court variously until the 7th July, 2021 when the parties agreed on a disposal by way of written submission.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was illegal, unfair, inhuman and unlawful"
2. Whether the Claimant is entitled to the relief sought"

3. Who bears the costs of the claim"

The claimant seeks to rely in the authority of **John Mwaura Ngugi v Safaricom PLC (2019) eKLR** where the court relied on the case of **Janet Nyandiko vs Kenya Commercial Bank Limited (2017) eKLR** in which adherence to Sections 41, 43 and 45 of the Employment Act of 2007 was emphasized. The court held thus;

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision.

In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”

The Respondent submits thus;

27. The Claimant has in his responses produced by the Respondent denied all allegations including smoking in the MD’s car. He has further explained in a subsequent disciplinary that he had already responded to some of the issues raised in earlier correspondence and he does not understand why he was being subjected to double jeopardy. The only thing he admitted to in all those proceedings was that tyres were worn out. The accusations that git him nailed for termination were never proven beyond the averments of Willem at the hearing. It was his word against Willem and the Respondent easily chose to go with the Boss’s position.

37. The Claimant has stated on his pleadings that he was called for a final hearing on 8th May, 2018 wherein some of the charges facing him had already been handled and responded to by him earlier on. The respondent found it necessary to repeat them to make his burden heavier.

The Respondent’s case takes sway. She has established a case of compliance with substantive and procedurally aspects of termination of the employment of the claimant. This was by taking all necessary disciplinary processes and informing the claimant of the reasons for termination of his employment.

The Respondent was fully compliant with the requirements of Sections 41, 43 and 45 of the Employment Act, 2007. The claimant having failed to controvert and rebut a case of lawful termination of employment would not claim the same. I therefore find a case of lawful termination of employment and hold as such.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Dated and delivered at Nyeri this 23rd day of March, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Njiru instructed by Mumia & Njiru Company Advocates for the Claimant.
2. Miss.Musyoka instructed by Iseme, Kamau & Maema Company Advocates for the Respondent.



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