



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 603 OF 2016

SAID HAITHAM.....CLAIMANT

VERSUS

READY CONSULTANCY COMPANY LIMITED.....RESPONDENT

J U D G M E N T

1. The Claimant sued the Respondent herein vide a Memorandum of Claim dated 15th August 2016 and filed in Court on 16th August 2016, and pleaded *inter alia*, as follows:-

- a) that the claimant was employed by the Respondent as a driver earning ksh.30,210 per month until 9th July 2016 when his employment was unlawfully and unfairly terminated by the Respondent.**
- b) that the termination of employment was without notice, and was without any reason or justifiable cause.**
- c) that the termination was unfair and unlawful and did not conform to the procedure for terminating employment as set out in the Employment Act 2007.**
- d) that the Respondent had refused to pay the Claimant’s terminal dues.**

2. The Claimant sought the following reliefs:-

- a) One month salary in lieu of noticeksh.30,210.
- b) Service pay @ ½ month pay for ten (10) years151,050
- c) Compensation for wrongful termination (12x30,210).....ksh.362,520
- Totalksh.543,780

3. The Claimant also filed his recorded witness statement dated 15th August 2016, and filed in Court on 16th August 2016. The Claimant further filed a list of documents dated 15th August 2016 and filed in Court on 16th August 2016, listing some eight (8) documents. The listed documents included the Respondent’s letter to NHIF dated 20th July 2016, a bundle of the Claimant’s medical treatment notes, Claimant’s leave application dated 13th June 2016, a show cause letter dated 7th July 2016, the Claimant’s letter dated 7th July 2016, summary dismissal letter dated 9th July 2016, a discharge voucher dated 22nd July 2016 and a demand letter dated 27th July 2016. Copies of the documents were filed together with the Memorandum of Claim.

4. The Respondent entered appearance on 16th September 2016 and filed Response to the statement of Claim on the same date. The Respondent pleaded, *inter alia*,

- a) that the Claimant was earning ksh.26,182 per month but not ksh.30,120.**
- b) that service and notice could not be paid as the Claimant had been summarily dismissed.**

c) that the Claimant was rude and insubordinative to his superiors prompting summary dismissal, which was legal in the circumstances.

d) that the dismissal was not unfairly done.

5. The Respondent further filed a list of documents dated 17th May 2017 listing three documents. These being the Show Cause letter dated 7th July 2016, the summary dismissal letter dated 9th July 2016 and a discharge voucher dated 22nd July 2016. Copies of the documents were filed together with the list of documents.

6. The Respondent also filed a witness statement by one Gloria Endekwa, dated 9th September 2016 and filed in Court on 16th September 2016.

7. When the suit came up for hearing on 6th March 2018, the Claimant testified, both in chief and under cross examination:-

a) that the Claimant was employed by the Respondent as a driver in 2010/2011, earning a monthly salary of ksh.30,000, which was being paid in cash, and that no contract /letter of appointment or payslips were given.

b) that the Claimant used to deliver flour to customers.

c) that in June 2016, the Claimant fell off the motor vehicle and injured his leg. That he reported the matter to his supervisor, who gave him a letter to go to hospital. The Claimant was subsequently given a one week sick off.

d) that the Claimant asked for leave in order to go and recover, giving reasons for the leave application, and was allowed sixteen (16) days.

e) that upon resuming duty on 5th July 2016, the Claimant was assigned to deliver goods to Mshomoroni (which is within town) and upon return, he was instructed to deliver goods at Kaloleni, which is far and with traffic.

f) that the Claimant said that he was still in pain, and was told that another driver would deliver. That there were more than forty (40) drivers.

g) that the Claimant was given a Show Cause letter dated 7th July 2016, accusing him of misconduct; to which he responded on the same date and explained his situation.

h) that he, the Claimant, was dismissed on 9th July 2016 and was paid ksh.15,000 being his last salary.

i) that there was no valid reason for dismissal, and the Claimant, who had no prior disciplinary issues, was not called for any disciplinary hearing.

j) that even after (receiving) the notice to show cause (on 7th July 2016), the Claimant went to the hospital on 8th July 2016.

8. The Claimant produced in evidence the documents referred to in paragraph 3 of this judgment, which were marked as the Claimant's exhibits. The hearing was then adjourned on the Respondent's application, and the case was fixed for defence hearing on 31st May 2018. The hearing was again adjourned at the Respondent's instance on 31st May 2018, and was fixed for 17th October 2018. The Court's record does not show what happened on the said date.

9. Record shows that on 8th July 2021, the Court's Deputy Registrar issued a notice to show cause under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016, calling upon both parties herein to attend court on 19th July 2021 and show cause why the suit could not be dismissed for want of prosecution.

10. On 19th July 2021, the Court fixed the suit for defence hearing on 1st December 2021. This was done in the presence of counsel for both parties. The Respondent and its counsel did not, however, attend Court on 1st December 2021.

11. Counsel for the Respondent successfully applied for closure of the Respondent's case. Counsel further waived his right to file submissions and invited the Court to write a judgment on the matter.

12. The Respondent did not call any witness to testify. The claimant's evidence on record stands wholly unchallenged and uncontroverted. Defence counsel's cross-examination of the Claimant on 6th March 2018 did not yield rebuttal of any part of the Claimant's evidence.

13. In view of the Claimant's pleadings and evidence on record, the only issues that fall for my determination are as follows:-

a) whether the Claimant's dismissal was based on any valid reason.

b) whether termination of the Claimants employment was fair.

c) whether the Claimant is entitled to the reliefs sought.

14. On the first and second issues, the Claimant, who was employed by the Respondent as a driver, pleaded and testified that he fell off the motor vehicle in June 2016 and injured his leg, upon which his employer (the Respondent) gave him a letter to go to hospital. The Claimant was given a one week off, and thereupon applied for leave so that he could go and recover. The Respondent allowed him sixteen (16) days, during which he continued with treatment. Indeed, the Claimant's application for annual leave, dated 13th June 2016, reads in part:-

"I kindly request your esteemed office to allow me to go for annual leave 2015 from 14/6/2016 to 1/7/2016. Sir, I got a minor accident while I was in duty, I slide down from a stationary vehicle and got dislocation on my right knee, need to visit a specialist for my better health."

15. The application for leave was approved by the Respondent on the same date (13th June 2016) and the Claimant was allowed the sixteen (16) leave days sought. The Claimant produced in evidence both the leave application and approval documents. The Claimant also produced in evidence a clinical/treatment note/record indicating that as at 8th July 2016 (a day after the claimant received a show cause letter), the Claimant was still in pain and undergoing treatment, and that the clinician/doctor was advising light duty (for the claimant) to assist the healing of the limb. The Respondent did not question the authenticity of the said document.

16. The show cause letter dated 7th July 2016 reads in part:-

"...it was reported that you were given instructions by your immediate supervisor on 5th July 2016 to make a delivery at Kaloleni but you openly and rudely declined and claimed that your leg was swollen and could not drive all the way.

...refusal to take instructions given to you by a person placed in authority amounts to insubordination and that is gross misconduct as stated in the Employment Act 2007, which can lead to dismissal.

It is now demanded that you show cause within 48 hours why you should not be summarily dismissed for your actions."

17. The Claimant responded to the show cause letter on the same date (7th July 2016), and his response reads, in part:-

"...sir, it was nearly two months ago when I accidentally fell down from a stationary vehicle while I was trying to set for driving and got down, hurting my right knee which got swollen permanently till now. I went to seek for medical checkup, given treatment and advised to come back. Am still on medical treatment and my knee still paining with no improvement..."

18. The Respondent never disputed the fact that the Claimant had accidentally sustained injury/dislocation on his right knee while on duty in June 2016, and that the injured knee was still swollen and paining at the time of termination of the Claimant's employment. Nonetheless, the Respondent went ahead and summarily terminated the Claimant's employment on 9th July 2016. The dismissal letter reads, in part:-

"...when asked, you claimed that you were in pain and could not drive since your leg was aching..."

19. It is my finding that termination of the Claimant's employment on account of his inability to drive to Kaloleni and make a delivery due to an injury on his right knee, of which the Respondent was fully aware, was not based on a valid reason. The allegation of insubordination and hence misconduct levelled against the Claimant and subsequent summary dismissal was not proved, and was not based on valid reason.

20. Section 45(1) & (2) provides:-

- (1) *"no employer shall terminate the employment of an employee unfairly.*
- (2) *A termination of employment by an employer is unfair if the employer fails to prove*
 - (a) *That the reason for the termination is valid;*
 - (b) *that the reason for the termination is a fair reason*
 - (i) *related to the employee's conduct, capacity or compatibility, or*
 - (ii) *based on the operational requirements of the employer and*
 - (c) *that the employment was terminated in accordance with fair procedure.*

21. As already stated in paragraph 19 of this judgment, the Respondent's reason for terminating the Claimant's employment was not valid, and the termination was therefore unfair.

22. Termination of the Claimant's employment also fails the procedural test in that the Respondent did not comply with the procedural requirements of Section 41 of the Employment Act. The Respondent served a Show Cause letter on the Claimant, but never gave him an opportunity to be heard in the manner mandatorily set out in Section 41(2) of the Employment Act, which provides:-

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

No appearance for Claimant

No appearance for Respondent