



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.185 OF 2017

PATRICK BARASA.....PLAINTIFF

VERSUS

WESTERN EXPRESS COACH LIMITED.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. This judgment arises from the Memorandum of claim dated the 1st of February 2017 and filed on the 2nd February 2017. The claim proceeded for the hearing on the 15/11/2021 for the claimant's case whilst the Respondent had no witness. The matter was subsequently mentioned on the 15/12/2021 to confirm filing of the submissions following of which the Court gave judgment date.

The Respondent filed his response dated 16th February, 2018 was filed on 18th February, 2018.

CLAIMANT'S CASE

2. It is stated for the Claimant that he was employed by the Respondent herein on or about 1/12/2014 as a bus driver. His gross salary was Kshs.30,000/=. He says that whilst on duty on or about October 2016 he realized that the speed governor on the bus he was driving was faulty and for safety purposes reported the same to the Manager. A technician was thereafter called who informed the manager in his presence that the bus had faulty power supply.

3. He says the manager accused him of interference with the speed governor, and did not ask him for his side of the story. He was then asked to stay at home for a few days. The manager later called him to inform him that his letter, which turned out to be a termination letter, was with one Oketch.

4. The Claimant avers that the termination was unfair and seeks the following remedies;

(a) One month's salary in lieu of

Notice Kshs.30,000/=

(b) Unpaid salary for December 2016 Kshs. 30,000/=

(c) 1 year's unpaid leave Kshs.30,000

(d) Severance Pay (15,000 x 2)= Kshs.30,000/=

(e) 12 months' salary compensation for

wrongful dismissal Kshs.360,000/=

5. The Respondent entered appearance through the firm of Ameli Inyangu & Partners and filed a memorandum of Response dated the 16th February 2018. The Respondent says that the Claimant tampered with the speed governor of the Respondent's bus whose registration was KCG 270N leading to the dismissal.

6. The Respondent avers that the claimant's calculations as respects leave and severance pay are not based on the principles of section 28 and 35 of the Employment Act. The Respondent further says that the Claimant has an outstanding loan of ksh 30,000/= that he has not settled to date. The Respondent says that the Claimant's termination was fair and urges that the suit be dismissed with costs.

CLAIMANT'S CASE. CW1

7. The Claimant Patrick Omoso Barasa gave sworn testimony and adopted the undated witness statement as well as the statement of claim dated the 1st February 2016 as part of his evidence in chief. He also adopted the undated list of documents filed on the 2nd February 2017 and marked as Claimant's exhibits 1-3. He says that he no longer works for the Respondent and prayed to be paid his dues as per his claim.

8. Upon cross examination by Mr Ochiel Advocate for the Respondent he stated that he was employed by the Respondent from Dec 2014 to January 2017. The witness states that before 30th November 2015 he was employed on contract. He said that the letter of termination he got on the 2/1/2017 accused him of tampering with a speed governor.

9. He conceded that tampering with the speed governor was violation of Company policy but maintained that he never interfered with it. He answered that he did not know who spoilt the speed governor but says he was in charge of the bus. He says he informed the manager the speed governor was spoilt.

10. On re-examination he said that he was employed as a driver and not a mechanic or electrician. He answered that it was normal for a car to get spoilt. He added that he started working in December 2014 and got a contract from 2014. He said that he was not given any chance to defend himself and was not paid his dues.

SUBMISSIONS

11. The Claimant contends that a reading of section 45 as read with section 42 of the EA renders termination unlawful if the employer had not previously given a warning letter, did not give notice as required or did not grant the Claimant an opportunity to be heard. The Claimant argues that the foreshadowed requirements were not adhered to, and the Respondent did not table any document to prove that for the 3 years that the claimant worked for the Respondent he had breached any term of the employment contract.

12. The Claimant argues that the allegations against him are false as he was not a mechanic nor electrician and the issue could have easily been dealt with had the Respondent given him a chance to defend himself. The Claimant relied on the case of **Donald Odeke versus Fidelity Security Ltd (2012) eKLR** where Ndolo J. held that failure to accord the employee a hearing renders termination of employment unfair. The Claimant prays for the reliefs as particularized in the statement of claim. He has also stated the basis upon which he believes the reliefs are founded. The Court has had the opportunity of going through the same.

RESPONDENT'S SUBMISSIONS

13. The Respondent on its part contends that the claimant's contract of employment was terminated by invoking the contractual clause of terminating the contract which allowed either party to terminate the contract by issuing one month notice or by paying one month salary in lieu thereof. The Respondent argues that this right can be invoked under section 35 and 36 of the Employment Act without assigning reasons for terminating the contract of employment.

14. The Respondent further submits that the letter of termination letter dated the 1st December 2016 had given the reasons for the termination as tampering with the speed governor which is a valid reason under section 45 of the Employment Act. The Respondent states that sometimes in October 2016 the claimant was found tampering with the speed governor in the Respondent's bus which is gross misconduct warranting summary dismissal under section 44 of the Employment Act. The Respondent says that the Claimant was not able to explain how the equipment had allegedly failed to work. The Respondent relied on the authority of **Kenya Plantation & Agriculture Workers Union versus Sotik Highlands Tea Estate Limited (2016) Eklr** to argue that the Respondent's case outweighs that of the Claimant and the case of the claimant should accordingly fail. The Respondent says that the Claimant has failed to prove a case of unfair termination.

15. On the damages, the Respondent relied on, inter alia, on the case of **DK Marete versus Teachers Service Commission Cause No. 379 of 2009** for the proposition that remedies for termination of employment ought to be proportionate to the economic injuries suffered by employees, and should not be aimed at facilitating unjust enrichment of the employees. The Respondent further relied on the Court of Appeal decision in **CMC Aviation Limited versus Mohammed Noor Civil Appeal No. 199** where it was stated that *'The respondent was serving a two year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation. The trial court awarded that, albeit at a higher rate of US\$9000 instead of US\$5,075 plus twelve months salary amounting to US\$108,000. We hereby set aside the award of US\$9000 as one month's pay in lieu of notice and substitute therefor US\$5075. The award of US\$108,000 is set aside in its entirety'* The Respondent submits that granted there was fixed term contractual relationship, salary in lieu of notice is apt instead of compensation under section 49(1) of the EA.

16. The Respondent submits that the claimant failed to collect his dues after his termination but chose to go to his lawyers and alleged wrong computations. The Respondent urged the Court to disallow the prayer for the 12 months' compensation as the Respondent has demonstrated that the termination was fair and in accordance with the law.

ISSUES FOR DETERMINATION

- a. Whether the termination of the claimant was unlawful
- b. Whether the claimant is entitled to the remedies sought
- c. Whether the termination was unlawful

17. Section 45 (1) and (2) of the Employment Act 2007 decrees the following provisions regarding unfair termination of employment– “(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.**” Section 47(1) (5) of the Employment Act 2007 **provides that For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

18. The Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** in applying the above enactment observed that “*There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.*”

19. The above requires that there be both substantive and procedural compliance on the termination of an employee. In the instant case, the termination letter dated the 1st December, 2016 alludes to the decision to terminate the employee having been taken on account of a report alleging interference by the Claimant of speed governor of the Respondent bus that was being driven by the claimant. This is the same reason for termination referred to in paragraph 5 of the Respondent’s memorandum of response dated the 16th February 2018.

20. It is common ground that the Claimant’s Contract of Employment was to take effect from 1st December 2014 to 30th November 2015. The Claimant, however, continued to serve the Respondent until Jan 2017. He also received salary for the months he served except for the Dec 2016 which he claims to not have been paid. The Court will accordingly be proceeding on the footing that the contract was constructively renewed.

21. The Claimant through the witness statement adopted as evidence in Court has denied having tampered with the speed governor of the Respondent bus as alleged in the letter of termination. He says that he is not a mechanic nor electrician and did not know how the speed governor became spoilt but that it was normal for a car to develop faults. In the witness statement, the witness said that they used to rotate between different buses owned by the Respondent Company. He maintains that he was not the only one using the bus and that ground of tampering with the speed governor cannot therefore be used as the basis of termination.

22. The Court notes that whilst the termination letter speaks of the decision to terminate being made following a report of tampering with the speed governor, it says nothing as to how the said report came into being, or the person who gave it. This, alongside the explanation given by the claimant, goes to show that there was indeed wrongful dismissal which necessitated justification of the grounds for termination by the employer as envisaged by section 47(1)(5) of the Employment Act.

23. No evidence was set in Court by the Respondent to rebut the claimant’s testimony or expound on the mentioned termination letter. Instead, the Respondent in the submissions belatedly appears to be saying that the Claimant’s contract of employment was terminated by invoking the contractual clause of the contract which allowed either party to terminate the contract by the giving of one month notice. No mention of the same is made in the termination letter or memorandum of Response, and there was no evidence led to that effect. Nor was the issue put to the witness in the cross-exam during the hearing.

24. Madan J in **Civil Application Nairobi No 12 CMC Aviation Ltd versus Cruise Air Ltd (1)(1978)** had the following to say in relation to pleadings and evidence given in Court; “**The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven**”. The Court associates itself with the above authority and holds that the submissions alone could not be the basis of making any finding without evidence as relates to the issue before Court. The Court holds that the Claimant has proven that unfair termination did occur.

25. Section 41(1) provides that ‘**Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation**’. There was no explanation or documentation demonstrating that the claimant was heard before the decision to terminate him was made. The letter dated 1st December 2016 simply states that the claimant was being given a notice to terminate and does not mention anything to do with a hearing or notice or at all.

26. This lends credence to the Claimant’s un rebutted testimony that there was no hearing before the decision to terminate was made. The Claimant in the witness statement also explains that the said letter of termination was given in January 2017 but was back dated to December 2016. Again, the Respondent did not lead any evidence on this issue at the hearing. The Court accepts the explanation by the Claimant and holds that there was no due notification as required under the law. It follows that in addition to the decision to terminate being unfair, it did

not comply with the procedural requirements laid down under section 41 of the Employment Act. The court is well convinced Respondent failed the fairness test in terminating the Claimant's employment. Judgement is therefore entered in favour of the Claimant.

REMEDIES

27. I turn to look at what the Claimant is entitled to be paid, if at all;

(a) In relation to prayer of one month's salary in lieu of notice, the letter dated the 1st December 2016 was expressed to take effect in a month. The Claimant in the witness statement, however, says that he was given the letter on 01/01/2017 which appeared to have the earlier date of 1st December 2016. The Respondent in the response simply denied the allegation. In the absence of evidence by the Respondent, the Court accepts the claimant's assertion that the letter was handed over on 01/07/2017. The Claimant gave no payslips in evidence. He has, however, given sworn testimony that he was earning gross salary of ksh 30,000 but was never issued with any payslips. The Court awards ksh 30,000 as payment in lieu of notice.

(b) Unpaid salary for December, 2016 is due Kshs.30,000/=.

(c) In relation to prayer (b) and (c) the Respondent has not brought before the court any documents or records to prove he paid leave to the Claimant. The burden was on him. Claimant is awarded Kshs.30,000/= for unpaid leave.

(d) In relation to prayer (d) in the Memorandum, it is unclear whether the Claimant is seeking severance pay which legally is payable on redundancy or service pay mentioned in the submissions. The Court, however, notes that there is no basis laid for either of the claims in the witness statement adopted as evidence. The service pay is only mentioned in the submissions which in itself cannot be used by the Court to make the award. The same is disallowed.

(e) In relation to compensation under section 49(1) of the Act, taking into account the 2 years the Claimant had served the Respondent, the fact that the Claimant cannot be said to have contributed to the termination and the conduct of the Respondent, two years gross salary compensation would in my view be appropriate. I award him Kshs.60,000/= for wrongful termination.

28. In the final analysis, I find and hold that the termination of the Claimant's contract on the 1st Jan 2017 was unfair and unlawful and enters judgment against the Respondent for and award him a total of Kshs.150,000/=.

29. If he legitimately owes the Respondent Kshs.30,000/= the same to be deducted from the sum total and balance paid to him together with interest at court rates from the date of judgement till final payment.

30. Costs are also awarded to the Claimant.

31. Certificate of service to be issued to the Claimant within 30 days from today's date.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgements and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE