



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 101 OF 2015

DAVID LUSWETI WEKESA.....CLAIMANT

v

RISHI HAULIERS LIMITED.....RESPONDENT

JUDGMENT

1. The evidence of David Lusweti Wekesa (the Claimant) was taken on 12 February 2018.
2. When the case for Rishi Hauliers Ltd (the Respondent) was called out on 16 June 2018, the Respondent sought an adjournment. The Court granted the last adjournment, and the hearing was rescheduled to 17 October 2018.
3. On 17 October 2018, the Respondent sought another adjournment. The Court declined the application, and the Respondent's case was closed.
4. On 29 January 2019, the Respondent applied to have the hearing reopened and to be allowed to call witnesses. The Court allowed the application, and the Respondent's case was fixed for 3 October 2019. The Court did not sit on the scheduled date, and the hearing was pushed to 3 June 2020. The Court did not sit.
5. It was not until 14 December 2020 that the file was placed before the Court. The Respondent called its Managing Director and closed its case.
6. The Claimant filed its submissions on 13 January 2021, while the Respondent filed its submissions on 15 February 2021.
7. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

8. The Respondent employed the Claimant in 1998. On 4 October 2014, he was arrested by the Police. However, he was released on 5 October 2014 on cash bail before he was charged with malicious damage to property on 7 October 2014. The case was withdrawn.
9. On 8 October 2014, the Claimant's Manager verbally told him to leave, and on 21 October 2014, he was served with a show-cause to explain why he had disobeyed instructions by the General Manager to go to the Respondent's offices in Kisumu.
10. The Claimant stated he went to Kisumu accompanied by a lawyer, but a Director declined to see them. On reporting back to the place of work on 24 October 2014, the Claimant stated, the Manager verbally told him that his services were no longer required.
11. Considering that the Claimant admitted that he was issued with a show-cause notice and that he went to the Respondent's Kisumu offices accompanied by an advocate and that the presence of an advocate is ordinarily not required during a routine disciplinary hearing, the Court is satisfied that the Respondent afforded the Claimant an opportunity to be heard, but he snubbed the opportunity.
12. The Respondent cannot be faulted.

Substantive fairness

13. It was incumbent upon the Respondent to prove that the Claimant did not report back to work after being issued a show-cause letter, thus repudiating the contract by failing to report at the designated place of work.

14. The Claimant was based in Mumias. The Respondent did not present any witness from Mumias depot to rebut the Claimant's evidence that the Manager based in Mumias verbally told him that his services were no longer required.

15. The failure to call the Manager was not explained.

16. Further, if the Claimant absconded from duty, the Respondent should have issued a show-cause calling upon him to explain why he was not reporting to work. There was no evidence that such a notice was issued.

17. The Court finds that the Respondent did not discharge the burden placed on it by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Salary in lieu of notice

18. With the conclusion that the Respondent did not discharge the burden expected of it, the Court will award the equivalent of 1-month salary in lieu of notice (Kshs 12,849/-) by dint of section 35(1)(c) of the Employment Act, 2007.

Compensation

19. The Claimant did not pray for compensation but rather exemplary damages. Exemplary damages are awarded where the Court finds that a defendant acted maliciously or oppressively.

20. The Court made no such finding and, therefore, it will not award exemplary damages, or compensation, a discretionary remedy.

Lost prospective income

21. The Claimant prayed for the income he would have earned had he served his contract to 55 years of age.

22. The Claimant did not prove that the agreed retirement age was 55 years, and even if he had, the Court would not have granted this relief.

23. In this respect, the Court endorses the decision of the Supreme Court of Uganda in *Bank Of Uganda v Tinkamanyire* (2008) UGSC 21 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Conclusion and Orders

24. The Court finds and declares that since the Respondent did not discharge the burden expected of it by sections 43 and 45 of the Employment Act, 2007, the termination of the Claimant's employment was unfair.

25. The Claimant is awarded:

(i) Salary in lieu of notice Kshs 12,849/-

26. The Claimant only succeeded partially. The Court makes no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 31ST DAY OF MARCH 2021.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

For Claimant Musiku & Co. Advocates

For Respondent Bruce Odeny & Co. Advocates

Court Assistant Chrispo Aura