



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 169 OF 2018

JOHN MDOE DENA.....CLAIMANT

VERSUS

MULJI DEVRAJ & BROTHERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by John Mdoe Dena against his former employer, Mulji Devraj & Brothers Limited.
2. The claim is documented by a Memorandum of Claim dated 26th March 2018 and filed in court on 27th March 2018. The Respondent filed a Response on 17th May 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Transport and Logistics Manager, Mehboob Abdulrazak. The parties further filed written submissions.

The Claimant's Case

4. The Claimant claims to have been employed by the Respondent as a Turnboy in February 2007.
5. The Claimant further claims that his employment was unlawfully terminated in February 2018.
6. The Claimant's case is that the termination of his employment was without valid reason and in violation of due procedure. He therefore claims the following:

- a) 12 months' salary in compensation.....Kshs. 194,420.00
- b) 1 month's salary in lieu of notice.....16,201.70
- c) Accrued leave allowance from January 2017 to January 2018
- d) Certificate of service
- e) Costs plus interest

The Respondent's Case

7. In its Response filed in court on 17th May 2018, the Respondent states that the Claimant was employed as a Turnboy vide a contract of employment dated 8th May 2012.
8. The Respondent contends that it was an express term of the Claimant's employment contract that his functions and/or duties would be altered at the discretion of the management.

9. The Respondent avers that on 19th February 2018, the Claimant was assigned duties by his supervisor to paint one of the Respondent's trucks but the Claimant declined, stating that it was not his work.

10. The Respondent further avers that on the same day, the Claimant was summoned by the Human Resource Department and issued with a letter dated 19th February 2018, requiring him to show cause why disciplinary action should not be taken against him, for insubordination. The Respondent adds that the Claimant refused to receive the show cause letter and left the office, in a very rude manner.

11. The Respondent states that from 19th February 2018, the Claimant did not report back to work and the Respondent was thus forced to summarily dismiss him by letter dated 26th February 2018, for absconding work without proper leave or lawful cause.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

13. The Respondent filed a letter dated 26th February 2018 addressed to the Claimant as follows:

"Dear John,

RE: ABSCONDING

The above matter refers.

It has come to the notice of the Management that you have been absconding work since Monday 19th February 2018 to date. In accordance to (sic) the Employment Act No. VI Section 44.4 (a) which states that, if an employee absents him/herself from work without proper leave or other lawful cause, the employer has the right to summarily dismiss them.

In view of the above, the company has no choice but to summarily terminate your services with immediate effect.

Yours faithfully,

(signed)

D.P. HALAI

Director"

14. This letter, which the Claimant denies having received, gives the reason for termination of the Claimant's employment as unauthorised absenteeism.

15. If indeed it is true that the Claimant had absented himself from work without lawful cause, the Respondent was required to subject him to a disciplinary process, as set out under Section 41 of the Employment Act.

16. There was no evidence of any such process and the charge levelled against the Claimant was unproved.

17. In the circumstances of this case, I find and hold that the termination of the Claimant's employment was unlawful and unfair and he is entitled to compensation.

Remedies

18. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

19. I further award the Claimant one (1) month's salary in lieu of notice.

20. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

21. Finally, I enter judgment in favour of the Claimant as follows:

a) 12 months' salary in compensation.....	Kshs. 193,308
b) 1 month's salary in lieu of notice.....	16,109
c) Leave pay for 1 year (16,109/30*21).....	<u>11,276</u>
Total.....	220,693

22. This amount will attract interest at court rates from the date of judgment until payment in full.

23. The Claimant is also entitled to a certificate of service plus costs of the case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mr. Wachenje for the Claimant

Mr. Gakuo for the Respondent