



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI

CAUSE NO. 352 OF 2016

BETWEEN

NELSON MUMO MUTISYA.....CLAIMANT

VERSUS

SECURITY GROUP LIMITED..... RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Kongweno & Bubi Advocates LLP, for the Claimant.

T.K. Kariba Mbabu & Company Advocates for the Respondent.

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th March 2016. He states, he was employed by the Respondent as a Driver, attached to the Dog Section, on 15th May 2006.
2. On 31st January 2015, he had been assigned Motor Vehicle registration KBV 478 V. He was asked to hand over this Motor Vehicle by the Respondent, and assigned another Motor Vehicle KAT 511U. The latter had brake problems. The brakes were adjusted by Respondent's Mechanic.
3. The result is that the Claimant was involved in an accident after the brakes failed. He was injured and advised by his Doctor to take light duties. The Respondent however, suspended the Claimant on 2nd February 2015, pending investigation of the accident. He was not involved in the said investigation. The Respondent, in disregard of the Employment Act and the Work Injury Benefits Act, suspended and subsequently unlawfully dismissed the Claimant. The Claimant states he suffered a dog bite in the course of employment, and was not compensated. N.S.S.F deductions were made on his salary but not remitted. He was denied his Certificate of Service.
4. He prays for Judgment as follows: -
 - a. Treatment costs at Kshs. 250,000.
 - b. Unremitted N.S.S.F dues at Kshs. 16,800.
 - c. Severance pay at Kshs. 300,748.
 - d. Dog bite treatment at Kshs. 25,000.
 - e. Work injury compensation for dog bite at Kshs. 70,000.
 - f. Compensation for injury sustained through the traffic accident at Kshs. 1,000,000.
 - g. 12 months' salary in compensation for unfair termination at Kshs. 314,220.

h. Kshs. 100,000 for failing to issue Certificate of Service.

i. Reinstatement as a Driver.

j. Costs.

k. Interest.

l. Any other suitable relief.

5. The Respondent filed its Statement of Response on 15th May 2016. It is not disputed that the Claimant was employed by the Respondent as a Driver. While driving the assigned Motor Vehicle registration KAT 511U, the Claimant rammed onto the rear of another Motor Vehicle, causing extensive damage to Respondent's Motor Vehicle. The accident was reported to Industrial Area Police Station. Police Officers who visited the scene blamed the Claimant for the accident.

6. The Respondent suspended the Claimant. He was instructed to be reporting daily pending investigation. He did not report. The Respondent looked for the Claimant, for purposes of giving him a disciplinary hearing. He could not be traced. He did not pick calls made by the Respondent. The Respondent consequently issued the Claimant a letter of termination. No injury was reported to the Police following the accident. The Respondent denies that the Claimant was injured and recommended for light duties by any Doctor. His prayers are misplaced. The Respondent prays the Court to dismiss the Claim with costs.

7. The Claimant and Respondent's Dog Handler and Manager, David Elaini, gave evidence for the respective Parties on 29th January 2021, closing the hearing.

8. The Claimant adopted the contents of his Statements of Claim and Witness on record, as summarized above. He added that he did not have a formal contract of employment. He was issued confirmation letter and employment number S1417. He was to pick dogs and return them to their kernel. He had other chores which included washing of the vehicle. The vehicle had a trailer. He explained that on the material day, he encountered a Toyota Probox Vehicle which was overlapping. The Claimant braked to avoid the Probox. His trailer broke loose. The brakes were faulty. He knocked the car ahead of him. He was injured and the car he was driving written off. The Claimant informed the Respondent that he had sustained injuries and was undergoing treatment. The Respondent would hear none of this, and ordered the Guards at the gate not to allow the Claimant in. The Claimant told the Court that he did not wish to pursue the prayers relating to Work Injury Benefits Act. N.S.S.F was remitted inconsistently.

9. On cross-examination, the Claimant told the Court that he did not know his N.S.S.F registration number off-head. He did not have his Statements of Account. Deductions were made but not remitted. His salary was Kshs. 15,000 monthly. It varied over the period of service. As of January 2015, his salary was Kshs. 16,602 monthly. He was issued a letter of suspension, dated 2nd February 2015, and instructed to continue reporting. He complied, but after a few days, was denied entry. He did not disappear until April 2015. He was not issued a letter of termination. The Respondent's business owner issued a circular to all Managers, advising that he did not wish to see the Claimant again. He knocked another car along Lusaka Road. The Respondent's car was extensively damaged. The Claimant had not been involved in any accident before this. He was not under the influence of alcohol. Police Officers went to the scene. The Claimant was threatened. The Police abstract states it was a no-injury accident. The car was not inspected. The Claimant obtained P3 form and attended Mbagathi Hospital. He was not attended to. He reported to the Respondent in the month of April 2015. The Respondent alleged that the Claimant had not reported back. He was not given a chance to explain his position. Redirected, the Claimant told the Court that he received the letter of suspension. He continued reporting, but was eventually locked out. He did not drive drunk. No alcohol test was carried out.

10. Dog Handler and Manager, David Elaini adopted his Witness Statement on record. The Claimant was Elaini's colleague. The Claimant was involved in a traffic accident. It was reported to the Police and abstract issued. The Claimant was suspended and later summarily dismissed. He was not locked out. He did not report as instructed after suspension. He was inaccessible after the accident. Cross-examined, Elaini told the Court he works at Dog Section, which is different from Human Resource Section. The Claimant deserted. Employees on suspension are required to report daily. The Respondent called him and called his wife. They were unreachable. There was no hearing, because the Claimant was unreachable.

The Court Finds: -

11. The Claimant was employed on 15th May 2006 by the Respondent [or its predecessor], as a Driver, attached to the Dog Section.

12. He was involved in a traffic accident while in the course of duty on 31st January 2015, along Lusaka Road Nairobi. The vehicle he was driving, registration number KAT 511 U, rammed onto another vehicle, and by the accounts of both Parties, was extensively damaged. The Claimant described Respondent's vehicle as being a write-off.

13. On 2nd February 2015, the Claimant was suspended to allow the Respondent space to investigate the accident. He was advised to be reporting to the Respondent daily. He does not appear to have heeded this instruction, because the next time he reported was in April 2015. He told the Court on cross-examination that, "I went to the Company in the month of April."

14. It is not consistent for the Claimant to testify that he was locked out. He appears to have fled, after occasioning the accident, leaving the Respondent with a wrecked vehicle. The photographs of the mangled wreckage are graphic.

15. He gave unconvincing narratives concerning the accident, with the intention of shifting focus and blame from himself to others. He testified that the brakes to the vehicle he was assigned were faulty. He did not explain why he agreed to drive a vehicle with faulty brakes. He

sought to shift blame to a speeding and overlapping Probox as the cause of the accident. He also appeared to blame the trailer to his vehicle. He blamed everything else and everyone else, apart from himself. Police Officers who visited the scene put the blame on the Claimant. He alleged that he was injured and sought treatment at Mbagathi Hospital. The Hospital did not attend to him, he testified. The abstract from the Police on the accident, states that the accident was a no-injury accident. He then went to Kangundo Hospital in Machakos County, bypassing hospitals at Nairobi, and obtained a report, to the effect that he was injured in the accident and needed to be placed on light duties. There is no evidence that this report was presented to the Respondent, or that the Respondent was at any time aware that the Claimant suffered injuries.

16. The Claimant stretched his grievances against the Respondent too far, to include alleged dog bite, which took place way back in the year 2008.

17. To his credit, he withdrew during his evidence, prayers relating to work injuries.

18. Left to be determined is whether the Claimant merits compensation for unfair termination; refund of unremitted N.S.S.F dues; severance pay; Kshs. 100,000 for failure to issue Certificate of Service; reinstatement; costs; and any other suitable relief.

19. Was termination unfair? As suggested above, the Claimant has not established that termination was at the instance of the Respondent, and that it was unfair. Section 47 [5] of the Employment Act requires that the Employee establishes unfair termination or wrongful dismissal has occurred, with the burden of justifying the reason or reasons for the decision placed on the Employer.

20. There was no proof that the Claimant was locked out. There would be no reason to require the Respondent to show reason or reasons for termination, as the Claimant did not show his contract was unfairly terminated. The Claimant occasioned a serious accident, damaging the Respondent's vehicle, and placed himself beyond the reach of the disciplinary process. He was away without lawful cause or leave of the Respondent between the date of the accident and April 2015 when the Respondent issued the letter of dismissal.

21. The prayer for compensation has no support in evidence and is declined.

22. The Claimant did not supply his Statement of Accounts from the N.S.S.F to support the prayer for refund of unremitted deductions. He prays for refunds over an unspecified period of 42 months. He seeks refund of Kshs. 400 per month. His pay slips show a deduction of Kshs. 200 monthly. The prayer is declined.

23. He prays for severance at Kshs. 300,748. He did not leave employment under Section 40 of the Employment Act. His prayer is declined.

24. Employers who fail to supply Certificate of Service are under Section 51 [3], are liable to a fine not exceeding Kshs. 100,000. The Claimant confuses the fine for a benefit to be conferred upon him, for failure by the Respondent to supply the Certificate of Service. The proceedings herein are not in the nature of a criminal trial. The Respondent is not on trial for failure to supply the Certificate of Service. The Respondent has not been tried and convicted in a criminal jurisdiction. When and if that happens, any amount paid in fine is the property of the Government of Kenya, not transmissible to the Claimant. The prayer is declined. The Claimant has the liberty to collect his Certificate of Service from the Respondent.

25. The prayer for reinstatement is inconceivable. The Claimant has not established unfair termination. The remedy even had the Claimant shown that he was unfairly dismissed, would not be reasonable, practicable or within the statutory limit of 3 years from the date of termination, set under Section 12 [3] [vii] of the Employment and Labour Relations Court Act. He left employment 6 years ago. It is rejected.

26. No order on the costs and interest.

27. There is no other suitable order, capable of being made in favour of the Claimant.

IT IS ORDERED: -

a. The Claim is declined in its entirety.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 11TH DAY OF JUNE 2021.

JAMES RIKA

JUDGE