



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 648 OF 2017

ALI MBWANA OTEMBO.....CLAIMANT

VERSUS

CROWN BUS SERVICES LTD.....RESPONDENT

JUDGMENT

1. This is a claim against the Respondent for unlawful termination. The Claimant's case is that the Respondent terminated his contract of service without valid reason and without due process. He therefore seeks for compensation against the Respondent.
2. The Respondent denies liability for the claim. In the Respondent's view, the Claimant was lawfully terminated for gross misconduct. The claim is therefore without basis and ought to be dismissed with costs to the Respondent.
3. Both parties filed their respective pleadings. For the Claimant, he pleads that he was employed in 2011 as a conductor in the Respondent's buses. That his salary was Ksh. 10,560/=. That he worked diligently until 4th November 2016 when the Respondent unfairly terminated his contract of service.
4. The Claimant states that the genesis of the problem was an incident on 31st October 2016 when one of the Respondent's inspectors got onto a bus under the care of the Claimant and found passengers on board who did not have bus tickets. According to the Respondent's regulations, all passengers aboard its buses must have tickets.
5. The Claimant asserted that the inspector came onto the bus soon after the passengers in issue had just boarded the bus but before they were issued with receipts. It was his case that he was waiting for the passengers to settle before he could issue them with receipts. Therefore and in the Claimant's view, termination in so far as it was based on this ground was unjustified.
6. The Claimant also stated that he was not given a chance to ventilate his case before the decision to terminate him was taken. This, in his view was in violation of the law.
7. He pleads that after his summary termination, the Respondent failed to pay him his dues. The Claimant asserts that he was subjected to degrading and inhumane treatment when he was made to keep visiting the Respondent's office to pursue his terminal benefits which were eventually not paid. He therefore claims for the several reliefs set out in the Statement of Claim.
8. On its part, the Respondent states that the Claimant was lawfully dismissed. That the Claimant was involved in a series of misconducts which eventually led to his summary dismissal. The Respondent points to fuel theft and ferrying passengers without issuing them with receipts as some of the transgressions the Claimant was involved in.
9. In the Respondent's view, ferrying of unauthorized passengers exposed the rest of the passengers on the bus to danger. Besides, the Respondent lost income through such acts.
10. The Respondent contended that the Claimant's termination was only after he had been issued with several warnings but failed to change. He was summarily dismissed in line with section 44 of the Employment Act. The Respondent therefore prays for the dismissal of the claim with costs.
11. The parties filed their witness statements which they adopted. They also filed lists of documents with copies of documents they wished to rely on in support of their cases. These were also produced in evidence.
12. At the close of their cases, the parties filed written submission. The submissions fortify their respective positions in the matter.
13. I have carefully analyzed the evidence on record. To my mind only two issues present themselves for determination. These are:-

a) Whether the Claimant's contract of service with the Respondent was unfairly terminated.

b) Whether the Claimant is entitled to the reliefs set out in the claim.

14. On the first issue, the Respondent asserts that this was a case of summary dismissal. RW1 testified that on 31st October 2016 the Claimant was caught ferrying passengers without tickets. This was contrary to company regulations.

15. RW1 referred to document number 2 on the Respondent's list of documents which sets out the job description of bus conductors in the Respondent's employment. One of the requirements in the document is that conductors were forbidden from receiving cash from passengers without issuing them with receipts.

16. The witness also referred to an incident when the Respondent's bus which was under the care of the Claimant broke down at Salgaa and the Claimant allegedly siphoned fuel from it. According to RW1, the Claimant had a series of misconducts which had earned him several warnings culminating in the decision to summarily terminate him. RW1 also said that this termination was in line with the provisions of section 44 of the Employment Act.

17. On his part, the Claimant asserted that although it was true that he was found with passengers without receipts on board a bus that was under his care, these individuals had just boarded the vehicle. He was giving them time to settle before he could collect their money. That before he could pick the money and issue receipts, a bus inspector came on board the bus and upon inspection accused him of ferrying unauthorized passengers. The Claimant asserts that the inspector proceeded to collect money from the passengers a sign that the Claimant had not collected but failed to account for the cash. Therefore, there was absolutely no justification in the Respondent terminating his contract of service on this basis.

18. A careful analysis of the evidence on record shows that there are other incidents when the Claimant was caught with unauthorized passengers on board buses under his care. This happened for instance on 21st July 2016 aboard bus registration number KBX 127T. The Claimant is said to have written a note apologizing. This was produced in evidence by the defense. There are also a series of letters of warnings to the Claimant by the Respondent.

19. Although the Claimant flatly denied that he was the author of the letters of apology to the Respondent, he admitted that he had at one point been terminated and applied to be re-engaged. The application dated 14th July 2012 indicates that the Claimant was apologetic for some misconduct he did not disclose. He only promised to be more accountable and honest at work.

20. All these documents and evidence point to a man who was problematic at his workplace. I tend to believe the Respondent that the Claimant's character was wanting. Otherwise, what can explain his request to be pardoned for some undisclosed misconduct when he sought to be hired a fresh?

21. That said, I think that the Respondent did not follow the strict provisions of the law in terminating the Claimant's contract. The Claimant rightly asserts that fair play was disregarded in the process that led to his termination.

22. Section 41 of the Employment Act provides as follows in respect of summary termination:-

'Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.'

23. The law is clear that even in cases for summary dismissal, the employer is obligated to hear the employee and his witnesses. The Claimant asserts that he was not afforded this opportunity. In response, the Respondent appears to suggest that because this was a case for summary dismissal, this requirement did not arise. In any event, the Respondent asserts that it had engaged the Claimant earlier through the several warnings it had issued to him.

24. I do not think that this suggestion by the Respondent is the correct interpretation of the law on summary dismissal as set out in paragraph 22 above. The employer has no luxury of overlooking the duty to hear the employee before such termination. Accordingly, I find that the Respondent failed to adhere to the procedure on due process in the journey that resulted in the termination of the Claimant.

25. Is the Claimant entitled to the reliefs sought in the claim? The Claimant prays for the following remedies:-

a) General damages for wrongful termination.

b) Loss of salary and allowances at Ksh. 20,000/= per month from the date of the dismissal to the date to be determined by the court.

c) Salary in lieu of notice.

d) Special damages.

e) Costs of the suit and interest thereon.

26. On the prayer for general damages, the law is that they are not awardable for wrongful termination (see **Kenya Broadcasting**

Corporation v Geoffrey Wakio [2019] eKLR). However, they may be awarded for other violations in the context of employment law such as violation of a party's right against discrimination. The prayer for general damages is therefore declined.

27. The claim for special damages appears unsupported by the Claimant's pleadings. No special damages were pleaded or proved. Thus, this claim is declined.

28. I will award the Claimant compensation for wrongful termination in the context of section 49 of the Employment Act. As I have observed above, the Respondent may have had grounds to have reasonably believed that the Claimant was involved in some malpractices in the course of executing his work that may amount to gross misconduct. However, the Claimant was entitled to a hearing. Therefore, I consider that the Respondent would have lawfully terminated the Claimant but for its missteps in the process of handling the matter. By this, I mean to say that the conduct of the Claimant may warrant a denial of the award of the full amount of compensation equivalent to 12 months of his gross salary. I will therefore award him compensation equivalent to 6 months' gross salary. This works to Ksh. 63,560/=.

29. I also award the Claimant costs and interest at court rates on the amount in paragraph 28 above.

30. The award is subject to statutory deductions that may be applicable.

31. Summary of the Award

- a) The Respondent's termination of the Claimant's contract is declared unlawful.**
- b) The Respondent to pay the Claimant compensation for unfair termination fixed at Ksh. 63,560/=.**
- c) The Claimant is awarded interest on the amount above at court rates.**
- d) The Claimant is awarded costs of the Claim.**
- e) The award is subject to the applicable statutory deductions.**

DATED, SIGNED AND DELIVERED ON THIS 13TH DAY OF SEPTEMBER, 2021

B O M MANANI

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE