



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO.394 OF 2017

MENGANYI JOHNES.....CLAIMANT

VERSUS

INTEX CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 4th April, 2017 on 5th September, 2017 through the firm of M. Korongo and Company Advocates, claiming unfair termination and to be compensated for the alleged unfair termination.
2. The summary of the claimant's case is that he was employed by the Respondent sometimes in the month of October, 2011 as a driver earning a monthly gross salary of Kshs. 31,953.
3. That on 11th November, 2015 while the claimant was on duty driving between Marigat and Kabarnet he fell ill but persevered till 6 pm when he sought for medical attention at Marigat trading center. Consequently the doctor advised him not to drive while unwell and since it was evening he called his supervisor Mr.mutua who could not be reached leaving him with no option but to request a fellow colleague John Midigo to drive the vehicle the remainder of the distance to a site which was in Loruk. On reaching Meisori River there were flashflood which overpowered the vehicle sweeping it down stream.
4. The claimant together with his colleague were rescued and rushed to Kabarnet District Hospital where they were treated and discharged. The vehicle was recovered albeit damaged. They then reported the incident to the Police station.
5. On 27th November, 2015 the claimant was served with a Notice to Show cause on the basis of allowing another employee to drive the vehicle without authorization and for driving without a License. He then responded on the same day excusing himself for giving out the vehicle on the basis of his illness and explaining that his license was lost and he had already taken an abstract on 19th September, 2015 at Kabarnet Police Station. Subsequently that he recovered the said driving license but the same had expired and he promised to renew it.
6. The Respondent called the claimant to a disciplinary hearing held on the 21st December, 2015 where he was heard. However on 6th January, 2016 the claimant was served with a termination letter and his services came to an end. He then appealed the termination on the 8th January, 2016 but his appeal was also disallowed.
7. The claimant avers that he was not paid for the 23 days worked in December, 2015. Also that he had a balance of 13 leave days that he was yet to utilize for the year 2015 and at the time of termination he had worked for the Respondent for an aggregate of 5 years 2 months.
8. According to the claimant the reason for the notice to show cause was substantially explained and therefore the Respondent should not have terminated his employment. The claimant felt that he was unfairly terminated and therefore prayed for judgment against the Respondent for the following reliefs; -

1) Two months gross salary in lieu of notice based on CBA (1&II).

2) Salary for 23 days for December, 2015

3) 13 leave days balance for the year 2015

4) Gratuity

5) Compensation based on section 49 (1)(c) of the Employment Act.

6) Costs to be borne by the Respondent.

9. The Respondent entered appearance on the 25th April, 2019 and filed a response to the claim on even date. The Respondent conceded to employing the claimant and stated that the claimant failed to undertake his duties diligently as is required of him.

10. It was stated that the reason the claimant was dismissed from employment was on the basis that the claimant was negligent in the way he handled the flashflood that risked their lives and costed them a vehicle. It was stated that the claimant together with other drivers based in the North Rift and Northern Kenya had been trained on code of practices and safety rules including how to responded to flashflood and instead of the claimant waiting for the flashfloods in the seasonal river to subside they negligently crossed the said river causing them injuries and costing them their vehicle.

11. The Respondent avers that the Claimant being a driver was duty bound to inform his superiors of his illness who would have advised him on the way forward in such a situation.

12. It is the Respondent's case that they followed due procedure which was equally attested by the claimant before the said termination.

13. With regard to the claimant terminal dues, the Respondent stated that the claimant failed to clear with it to enable it process his dues nevertheless that they processed his dues less statutory deduction and any monies owing to the Respondent and drew a cheque which was never collected by the Claimant.

14. On the prayer for gratuity, the Respondent stated that it always remitted pension dues for the claimant therefore the prayer for gratuity is untenable. On the 13 leave days balance the Respondent contended that the claimant had utilized all his leave days for the year 2015.

Hearing

15. During hearing the claimant testified as CW-1 and adopted his stement dated 26.7.2021 which basically reiterated the claim herein.

16. Upon cross-examination by **Rapando Advocate**, CW-1 testified that he was dismissed from employment for allowing unauthorized person to drive the said motor vehicle and for driving without a valid license. He testified that he only allowed his colleague to drive because he was unwell and had been advised by the doctor not to drive. On the training, the witness stated that they were trained how to handle bandits and not flashfloods as alleged by the Respondent. He then testified that he was not paid anything as his terminal dues.

17. On re-examination he maintained that he informed his employer of his illness before handing over the vehicle to his colleague to drive.

18. The Respondent called one witness, **Peter Onywero Otuka**, as RW-1 who adopted his witness statement dated 24.4.2019 which basically reiterated the respondent's defence to claim and then produced the documents filed therein as Respondent's exhibits.

Respondents Submissions.

19. The Respondent submitted from the onset that the claimant's dismissal was justified because the Respondent demonstrated the reason for termination as negligence and went ahead to subject the claimant to a proper hearing which was not denied by the claimant. The Respondent supported their argument by citing the case of **Anthony Mkala Chitavi V Malindi Water & sewage Co limited [2013] eklr**.

20. It was argued that the claimant's action of allowing unauthorized person to drive a motor vehicle entrusted to him which was then involved in an accident, put their lives at risk and damaged the Respondents vehicle.

21. The Respondent then submitted that their decision was justified in the circumstances and therefore prayed that the claim be dismissed with costs.

22. The claimant did not file any Submission in support of his case.

23. I have examined the evidence and submissions of the parties herein. From the claimant's evidence he avers that he fell ill and then couldn't drive.

24. He allowed his turn boy to drive thus causing an accident. Indeed, the claimant was taken through a disciplinary process and he admitted that he gave the turn boy the key to drive. Having fallen sick, the prudent thing the claimant should have done was inform their employer who would have advised on the next cause of action.

25. The failure by the claimant to inform the respondent of his illness and allowing the turn boy to drive the vehicle was an action in disregard of rules of safety and not following instructions.

26. The claimant was also taken through a disciplinary process and it is therefore my finding that Section 45 (2) of the Employment Act 2007 was complied with and his termination was fair and justified.

27. In view of my finding above the only remedies the claimant is entitled to is for payment of his terminal dues which the respondent has

admitted are willing to pay.

28. I therefore find for claimant and award him as follows;

1. 15 days salary for December 2015 – 12,399/=

2. 13 pending leave days = 10,745.80/=

TOTAL = 23,145/=

Less statutory deductions

3. Each party will bear its own costs.

DATED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tanga holding brief for Korongo for Claimant – present

Rapando for Respondent – present

Court Assistant - Fred