



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 57 OF 2018

PETER OKOTH MBARE.....CLAIMANT

VERSUS

MIGWEL ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. Peter Okoth Mbare (the Claimant) sued Migwel Enterprises Ltd (the Respondent) on 9 March 2018, alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Response and Counterclaim on 4 July 2018, and the Claimant filed a Reply to the Response and Response to the Counterclaim on 28 September 2018.
3. The Cause was heard on 6 May 2019, when the Claimant testified, and on 9 February 2021, when the Respondent's witness, a turn-boy, testified.
4. The Claimant filed his submissions on 15 November 2021 (should have been filed/served before 17 July 2021), while the Respondent filed its submissions on 3 November 2021 (should have been filed before 17 August 2021).
5. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

6. The Claimant was employed by the Respondent as a driver in 2010, and he testified that the Respondent dismissed him without notice sometime in July 2017.
7. According to the Claimant, he was involved in an accident on 8 March 2017, wherein he was injured, and upon returning to work after recovering, a Manager based in Usenge instructed him to go and see the Manager based in Nairobi. However, the latter sent him back to the Usenge based Manager, but he was not given any firm instructions, and therefore he resumed work until July 2017 without any salary.
8. In the Response, the Respondent pleaded that the Claimant disappeared after the accident.
9. The witness presented by the Respondent did not disclose in the filed witness statement that the Claimant absconded from work after the accident.
10. During cross-examination, the witness stated that the Claimant was dismissed but was not given a dismissal letter.
11. Section 35(1)(c) of the Employment Act, 2007 requires an employer to give written notice of termination of employment.
12. The Respondent did not demonstrate that it issued such a notice to the Claimant if he, in fact, absconded from work after the accident.
13. The witness produced by the Respondent was not a supervisor of the Claimant. He could not have been privy to whether the notice contemplated by the law was given. The Managers named by the Claimant were not called to testify.

14. The Respondent did not discharge the burden expected by section 41 of the Employment Act, 2007.

15. The Court finds that the Claimant's employment was terminated without due process.

Substantive fairness

16. By virtue of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to not only prove but prove as valid and fair the reasons for terminating the Claimant's employment.

17. The Respondent did not present any supervisor of the Claimant to demonstrate that the Claimant *disappeared from work without a trace* after the accident.

18. The Court finds that there were no valid and fair reasons to terminate the Claimant's employment.

Compensation

19. The Claimant served the Respondent for about 7-years, and he was earning Kshs 15,000/- per month.

20. Considering the length of service, the Court is of the view that the equivalent of 7-months gross salary as compensation would be appropriate.

Salary in lieu of notice

21. Having found that the Claimant's employment termination was unfair, the Court will allow a 1-month salary in lieu of notice.

Breach of contract

Unpaid salaries

22. The Claimant's testimony that he was not paid salaries for 7-months was not rebutted/controverted by production of pay records, and the Court allows the head of claim in the sum of Kshs 105,000/-.

Unpaid leave

23. The Claimant's testimony on leave was not controverted, and considering section 10(3) and (7) of the Employment Act, 2007, the Court will allow this head of the claim in the sum of Kshs 105,000/-.

Overtime

24. The Claimant did not disclose the contractually agreed/ prescribed minimum hours of work in the sector the Respondent operated in to qualify for overtime, and therefore relief is declined.

Severance pay

25. The Claimant's case was not one of redundancy, and therefore he is not eligible for severance pay.

Certificate of Service

26. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 30-days.

Counterclaim

27. The Respondent did not lay an evidential foundation to the counterclaim, and the same is dismissed.

Conclusion and Orders

28. The Counterclaim was not proved, and the same is dismissed with no order on costs.

29. The Court finds and declares that the Respondent unfairly terminated the Claimant's employment and further that the Respondent was in breach of contract.

30. The Claimant is awarded:

(i) Compensation Kshs 105,000/-

(ii) Salary in lieu of notice Kshs 15,000/-

(iii) Unpaid leave Kshs 105,000/-

TOTAL Kshs 225,000/-

31. Respondent to issue a Certificate of Service within 30-days.

32. Claimant did not file submissions within agreed timelines and is denied costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 8th day of December 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Geoffrey O. Okoth & Co. Advocates

For Respondent K'Owinoh & Co. Advocates

Court Assistant Chrispo Aura