



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1211 OF 2015

JOHANA NGENO KIMTAI

CLAIMANT

V

DPL FESTIVE LIMITED

RESPONDENT

JUDGMENT

1. This Cause was heard on 29 October 2019. Johana Ngeno Kimtai (Claimant) testified and was cross-examined. DPL Festive Ltd (Respondent) opted not to call any witness.

2. The Claimant filed his submissions on 14 November 2019 while the Respondent filed its submissions on 26 November 2019.

3. The Court has considered the pleadings, evidence on record and the submissions and condensed the Issues for Determination as examined hereunder.

Constructive dismissal

4. The Claimant was employed by the Respondent on 5 August 2013 as a driver. He contended that he was *constructively dismissed* on or around 16 January 2015.

5. The Respondent's pleaded case was that the Claimant failed to report to work from 12 January 2015 without permission or lawful cause and that he was therefore dismissed through a letter dated 30 January 2015 on account of desertion.

6. In asserting *constructive dismissal*, the Claimant testified that around 10 January 2015 he fell ill and contacted one of the Respondent's Managers called Balala for permission to go seek medical attention and that the permission was granted.

7. According to the Claimant, when he resumed duty on 14 January 2015, the said Balala directed him to present medical evidence that he was ill, but that when he presented the medical note on 16 January 2015, he was issued with a final warning letter dated 13 January 2015 alleging absenteeism.

8. The Claimant further testified that he sought to be deployed to the day shift, but permission was declined and he was not assigned any duties for over a month and that this amounted to *constructive dismissal*.

9. The Claimant testified and was interrogated. His testimony that he got permission from the Transport Manager Balala on account of ill-health was not rebutted as the said Balala was not called to testify. The failure to call him to testify was also not explained.

10. The Claimant also produced medical evidence that he was indisposed at the material time.

11. The Respondent did not present any evidence to show that the Claimant deserted work or failed to attend work without lawful cause or permission.

12. In the circumstances, the Court finds the narration by the Claimant as more probable. He had permission to be away and even if there was no permission, there was lawful cause to be away from work as evidenced by the medical evidence produced.

13. Failure to report to work is misconduct warranting summary dismissal but after a hearing as contemplated by section 41(2) of the Employment Act, 2007. The Respondent did not even suggest that it attempted to contact the Claimant to explain why he was not reporting

to work if indeed he had no permission or lawful cause to be away from work.

14. Since the Respondent did not lead any other evidence contrary to that of the Claimant or prove that the Claimant deserted, the Court finds that this was a case of unfair termination of employment without compliance with the requirements of sections 35(1)(c), 41, 43 and 45 of the Employment Act, 2007 and not one of *constructive dismissal*.

Compensation

15. The Claimant served for about 3 years, and in light of the length of service, the Court is of the view that the equivalent of 3 months' salary as compensation would be fair (gross pay according to payslip produced by the Claimant was Kshs 22,911/-).

Pay in lieu of notice

16. Since there was no written notice, the Court agrees with the Claimant that he is entitled to a salary in lieu of notice (Claimant's basic pay was Kshs 17,739/-).

Salary for January 2015

17. The Claimant was dismissed through a letter dated 30 January 2015. He is entitled as of right to earned wages up to that date which he computed as Kshs 22,911/-.

Salary for February 2015

18. The Claimants contract was effectively determined from 30 January 2015. He cannot legally lay claim to wages after that date.

Leave

19. The Claimant sought Kshs 34,366/- on account of untaken/accrued leave.

20. The Respondent filed the Claimant's leave records.

21. The leave for 2014 was commuted and paid to the Claimant on 31 December 2014. He cannot validly claim for leave for 2015 as he served for only 1 month.

Security deposit

22. The records produced by the Respondent shows that the Claimant had paid a security deposit of Kshs 12,000/- by end of 2014.

23. The Claimant sought a refund of the deposit, and the Court finds that is what he is entitled to is a refund of Kshs 12,000/- and not Kshs 28,500/- as he was on a fixed-term contract of 1 year.

Conclusion and Orders

24. The Court finds and declares that the Respondent unfairly terminated the Claimant's employment and awards him

(a) Compensation	Kshs 68,733/-
(b) Pay in lieu of notice	Kshs 17,739/-
(c) Salary for January 2015	Kshs 22,911/-
(d) Security deposit	Kshs 12,000/-
TOTAL	Kshs 121,383/-

25. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 17th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent Mr. Kilonzo, Legal Officer, Federation of Kenya Employers

Court Assistant Fred