



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 855 OF 2017

NELSON ERICK MZEE.....CLAIMANT

VS

PANAL FREIGHTERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. This claim arises from the termination of the Claimant’s employment on 6th March 2017. The claim is contained in a Memorandum of Claim filed by the Claimant on 14th November 2017.
2. The Respondent filed a Memorandum of Defence on 4th July 2018 but did not attend the hearing in spite of due notification. The Claimant testified on his own behalf and further filed written submissions.
3. In arriving at its decision, the Court has taken into account the Respondent’s defence on record.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Heavy Commercial Driver from 1st July 2015 until 6th March 2017 when his employment was terminated. He earned a monthly salary of Kshs. 25,381.
5. The Claimant’s case is that the termination of his employment was unlawful and unfair in that there was no valid reason for it and he was not afforded an opportunity to be heard.
6. The Claimant now claims the following:

- a. One month’s salary in lieu of notice.....Kshs. 25,381.00
- b. Leave pay.....15,374.99
- c. Service pay @ 15 days for every completed year.....25,381.00
- d. 12 months’ salary in compensation.....304,572.00
- e. Overtime worked.....85,658.04
- f. Public holidays.....7,809.52
- g. Certificate of service
- h. Costs plus interest

The Respondent’s Case

7. In its Memorandum of Defence dated 3rd July 2018 and filed in court on 4th July 2018, the Respondent admits having employed the Claimant from 1st July 2015 until 6th March 2017.

8. The Respondent maintains that if at all the Claimant's employment was terminated, the termination was effected regularly within the law.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

10. On 6th March 2017, the Respondent wrote to the Claimant as follows:

“Dear Nelson,

RE: TERMINATION OF SERVICE

The biometric report indicates that you have habitually not been reporting to work on time, which is a gross violation of the terms and conditions of your employment contract. This has resulted in your low performance, which during the disciplinary hearing you were unable to explain. During the disciplinary hearing you failed to give any reasonable excuse for your habitual lateness.

It is also in record (sic) that you have demonstrated negative attitude towards maintenance of the truck assigned to you and the general duties assigned to you. Consequently you have been unable to adhere to instructions and timelines given for assignments, which contributed to your already low performance.

As per the terms and conditions of the employment contract, Clause 11 (a), if you are at any time found to be guilty of neglecting to perform your duties to the satisfaction of the Company, the Company may forthwith terminate your services without any notice or compensation whatsoever. The management have given you several chances and severally discussed the matter with you but you have shown no interest to improve your approach to duty.

Your failure to perform to the required company level, to adhere to instructions, and your habitual late reporting to work, amount to gross misconduct according to the Employment Act, 2007, Section 44 (4a and c),

“(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work, (c) an employee wilfully neglects to perform any work which was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;” which render you liable for summary dismissal.

However, the management have opted to only terminate your services with effect from 7th March 2017.

You will be paid one-month's salary in lieu of notice, days worked in the month of March, and pending leave days, if any. Notwithstanding that all payments will be subjected to statutory deductions, and any other advances that may have been made to you, including any debts accrued by you and any days that you were absent.

You will be issued with your certificate of service upon clearing with all relevant departments.

Yours faithfully,

For & on Behalf of

Panal Freighters Limited

(signed)

Margaret Juliet.

(signed)

Mr. Ahmed Shimbwa, Mcom.

Human Resource Administrator Chairman-PFL GROUP OF COMPANIES

11. The termination letter accuses the Claimant of habitual lateness and negative attitude towards duty. These charges, if proved, would fall within the broad category of misconduct.

12. Section 41 of the Employment Act, 2007 establishes the following procedure for handling cases of misconduct:

- a. That the employer explains to the employee in a language the employee understands the reasons why termination is being considered;
- c. That the employer allows a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- d. That the employer hears and considers any explanations by the employee or their representative.

13. Although the termination letter refers to a disciplinary hearing, the Respondent did not provide details as to date, venue and substance of any such hearing. What is more, the Claimant told the Court that he was not given any opportunity to be heard. The charges against the Claimant were therefore not tested at the shop floor as required under Section 41 of the Employment Act.

14. The Respondent did not call any witness. The Claimant's testimony remained unchallenged and the Court found no reason to disbelieve the Claimant.

15. For these reasons, I find and hold that the Claimant has proved a case of unlawful termination of employment and he is entitled to compensation.

Remedies

16. As a result, I award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service. I have also considered the Respondent's failure to follow the law in terminating the Claimant's employment.

17. I further award the Claimant one (1) month's salary in lieu of notice.

18. In the absence of leave records to the contrary, I allow the claim for leave pay.

19. From the evidence on record, the Claimant was a contributing member of the National Social Security Fund. He is therefore not entitled to service pay.

20. The claims for overtime and public holidays were not proved and are dismissed.

21. Ultimately, I enter judgment for the Claimant as follows:

- a. 5 months' salary in compensation.....Kshs. 126,905
 - b. 1 month's salary in lieu of notice.....25,381
 - c. Leave pay for 1 year (25,381/30x21).....17,767
 - d. Prorata leave pay for 7 months (25,381/30x1.75x7).....10,364
- Total.....180,417**

22. This amount will attract interest at court rates from the date of judgment until payment in full.

23. The Claimant is also entitled to a certificate of service plus costs of the case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY FEBRUARY 2020

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JUDGE

Appearance:

Mr. Ngonze for the Claimant

No appearance for the Respondent