



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 52 OF 2018

JOSEPHAT RANDA NYATIENO.....CLAIMANT

VS

VYAS HAULIERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 24th January 2018 and filed in court on 26th January 2018, the Claimant seeks compensation for unlawful termination of employment and payment of terminal dues.
2. The Respondent filed a Reply on 15th May 2018 but did not attend the trial in spite of due notification. In reaching my decision however, I have considered the Respondent's Reply on record.
3. The Claimant testified on his own behalf and further filed written submissions.

The Claimant's Case

4. The Claimant states that he was engaged by the Respondent on 5th June 2016 in the position of Mechanic at a monthly wage of Kshs. 20,000.
5. The Claimant further states that at the time of engagement, there was a mutual understanding between himself and the Respondent that he would be paid Kshs. 20,000 at the end of the month of May 2016 and thereafter be paid as per the statutory Wages Order. The Respondent however did not perform this agreement.
6. The Claimant avers that in mid May 2017, he reminded the Respondent about his demand for wage increment but he did not get any positive response. On 30th November 2017, the Claimant's employment was terminated verbally, in violation of due procedure.
7. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice.....Kshs. 25,233.70
- b) Underpayment from 1/6/2016-30/4/2017.....15,229.30
- c) Underpayment from 1/5/2017-30/11/2017.....36,635.90
- d) 12 months' salary in compensation.....302,804.40
- e) Certificate of service
- f) Costs plus interest

The Respondent's Case

8. In its Reply dated 15th May 2018 and filed in court on the same date, the Respondent admits having employed the Claimant but denies ever agreeing to enhance the Claimant's salary.

9. The Respondent further denies the allegations of unlawful termination of employment made by the Claimant and states that the Claimant's employment was lawfully terminated.

10. The Respondent states that the Claimant was afforded an opportunity to be heard. The Respondent concedes that the Claimant's employment was terminated verbally but adds that this decision was arrived at in consultation with the Directors because the Claimant did not have a written contract of employment.

11. The Respondent goes on to state that the Claimant was subjected to a disciplinary process before a Disciplinary Committee which found him guilty of insubordination, neglect of duty, breach of confidentiality, use of abusive language and absenteeism.

Findings and Determination

12. 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

13. It is not in contest that the Claimant's employment was terminated verbally. The Claimant states that his employment was terminated without justifiable cause and in violation of due procedure.

14. In its defence, the Respondent states that the termination was lawful and fair in that the Claimant was guilty of misconduct and he was allowed an opportunity to be heard.

15. In its Reply, the Respondent accuses the Claimant of a litany of administrative offences ranging from insubordination to absenteeism. These charges would, if proved, constitute gross misconduct exposing the Claimant to summary dismissal.

16. However, no details as to the exact nature of the charges were provided and there was no evidence that the Claimant was ever given a chance to respond to any of these charges

17. The charges against the Claimant were therefore unverified and unproved as required under Section 43 of the Employment Act. In addition, the Respondent did not provide any evidence that the Claimant was subjected to the procedural fairness requirements set out under Section 41 of the Act.

18. As a result, I find and hold that the Claimant has made out a case of unlawful termination of employment and he is entitled to compensation.

Remedies

19. I therefore award the Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's failure to observe the law in bringing the Claimant's employment to an end.

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

21. The Claimant claims underpayment on the basis that he was paid a monthly salary below the minimum wage applicable to Artisan Grade III. He however did not avail any certificate to prove his qualification for this Grade. The claim for underpayment was thus not proved and is dismissed.

22. In the ultimate, I enter judgment in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation.....Kshs. 80,000
- b) 1 month's salary in lieu of notice.....20,000
- Total.....100,000**

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

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

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

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 March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Miss Katu for the Claimant

No appearance for the Respondent