



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.141 OF 2017

ANDREW KIPLIMO RONO.....CLAIMANT

VERSUS

ROSOGA INVESTMENETS LIMITED..... RESPONDENT

JUDGEMENT

The facts herein are that on 1st September, 2008 the claimant was employed as a driver by the respondent at a wage of ksh.8,000 per month and which was increased over time and on 11th November, 2015 when employment terminated the claimant was earning Ksh.17, 920 per month and a house allowance of ksh.3, 300 gross being Ksh.21, 220 per month.

On 11th November, 2015 the respondent terminated the claimant's employment on allegation of engine breakdown of truck registration number KAH 258C.

The claim is that On 28th September, 2015 the finance manager, Shadrack Too coerced the claimant through the phone to resign from his employment or else he would be faced with termination of his employment. The finance manager drafted a message for him through his cell phone but the claimant declined to do so and he was then issued with termination notice.

The claim is that there was unfair termination of employment contrary to section 41 of the Employment Act, 2007 (the Act) as due process was not followed. There was violation of section 43 of the Act as there was no reason existing to justify termination of employment and the summary action taken had no basis.

The allegations that the claimant had broken the engine of truck Registration Number KAH 258C was malicious and calculated to result in termination of employment as there was no evidence of damage, no show cause notice or any matter relating to the allegations made.

The claimant is seeking for a declaration that his employment terminated unfairly; there be issuance of certificate of service and his dues as follows;

- a) Notice pay at Ksh.26,562.40;
- b) Compensation;
- c) Service pay Ksh.96,288.70;
- d) Leave pay for 2012, 2011;
- e) House allowance from 1st September, 2008 to 31st December, 2011;
- f) Overtime dues from 1st September, 2008 to 11th November, 2015;
- g) Underpayments from 1st May, 2010 to 11th November, 2012; and
- h) Costs.

The claimant he was employed as a lorry driver and on 11th November, 2015 he was issued with letter dated 29th September, 2015 being notice of summary dismissal from his employment on allegations that he had broken the lorry crankshaft. There was no notice or hearing

before the summary dismissal. The allegation made were not true as on 25th August, 2015 the subject vehicle KAH 258C had no driver and he was using a different vehicle, KAX 622L and Langat was driving KAH 258C.

The driver of KAH 258C was away and the claimant was asked to move it. He did not know where the crankshaft is located and it was not possible to break such an item as he has been a driver for over 22 years. on the day he moved the vehicle as directed he informed the supervisor, Charles Kiplagat that it was making noise and should be checked.

The claimant also testified that he was issued with a notice to show cause, to which he replied on 22nd September, 2015. The allegations that the respondent had done investigation and pre-analysis of vehicle KAH 258C is not true.

On 25th September, 2015 the finance manager Mr Too called him with direction to resign and he drafted a text message for him to use but he declined to do so. He was then issued with letter of summary dismissal which was unfair and without foundation.

The claimant also testified that in the year 2015 he went on annual leave but did not take annual leave in the years before and the filed records are a forgery and claim the leave pay due.

The defence is that the claimant was employed in September, 2008 as a driver until the year 2015 when there were lapses in the performance of his duties and on 25th August, 2015 when he was assigned duties to transport using company vehicle, he later reported that the truck had developed an unusual sound from the engine prompting the truck to be stopped on the mechanic's recommendation.

The vehicle was assessment on 26th August and 3rd September, 2015 and noted it had developed breakdown of engine and the crankshaft had broken into two and which resulted in huge financial implication to the company.

Through a pre-analysis of the performance of the truck for a period, it was noted that the mechanical efficiency was good and the breakdown depicted improper machine operation resulting in the breakdown.

As a result of the vehicle breakdown the claimant was suspended from duty and issued with a show cause notice dated 22nd September, 2015. The response was found unsatisfactory and the claimant invited to a disciplinary hearing on 28th September, 2015 but he failed to attend as directed thus frustrating the disciplinary process.

The defence is also that the claimant had previously been involved in misconduct and had been issued with cautionary letters. As a result the claimant was issued with letter terminating employment with one month pay in lieu of notice. the claims made are without merit and should be dismissed with costs.

Shadrack Too the manager testified that on 25th August, 2015 the claimant was allocated transport duties and his allocated truck broke down and upon assessment by the mechanic it was noted that this resulted from the handling by the claimant who was careless and this caused a lot of financial loss to the company.

The claimant was suspended and issued with a show cause notice on 4th September, 2015. There was no response and instead the claimant wrote letter dated 22nd September, 2015. The claimant was invited to attend disciplinary hearing on 28th September, 2015 but he failed to attend and his employment was terminated by summary dismissal. the claimant took all his annual leave, he made an application and this was approved.

Mr Too also testified that when the claimant was invited to attend disciplinary hearing and failed to attend, since he comes from the same location, he called him and informally advised him to resign from his employment. The claimant was fair and he was not served with the disciplinary hearing notice but he called him and made him aware of the hearing date.

The claimant was issued with a notice to show cause why his employment should not be terminated following a breakdown of the motor vehicle he was using on 25th August, 2015. The respondent alleged that the claimant had been assigned the vehicle KAH 258C to transport hard-core for general improvement of the company infrastructure at Total from Kedowa quarry and later that evening the claimant reported the truck had developed unusual sounds.

The claimant did not reply within 48 hours as directed but by his letter dated 22nd September, 2015 he denied the allegation made against him. the claimant also noted that this was the first time he was using vehicle KAH 258C and when he heard unusual sounds he made a report to the supervisor. That he had been assigned such vehicle and the logs show it was in use at night.

The claimant was suspended.

Mr Too the manager testified for the respondent that the claimant was not issued with the letter inviting him for the disciplinary hearing. The filed letter dated 25th September, 2015 never reached the claimant. Indeed this letter through directed to the claimant it has no address.

Where the claimant was on suspension, I take it that he was out of the office and the invitation to attend disciplinary hearing should have either been issued personally, by post or the claimant called back to the office to receive it.

In **Fredrick Odongo Owegi versus CFC Life Assurance Limited [2014] eKLR** the court held that a suspension is just but an administrative action removing the employee from the shop floor to allow for investigations. The employee may be called back to respond to

allegations or resume duty. Such is an administrative action, the employee is not yet found culpable. See **ELRC Petition No.19 of 2018 Dr Benjamin Kipkech Koskei versus Governor Nakuru County & others (Nakuru)**. to therefore fail to issue the claimant with a hearing notice following his suspension, then have the manager Mr Too invite the claimant to resign through his text message with a draft of the possible letter of resignation is to act in bad faith, it is contrary to fair labour relations and an unfair labour practice. the resulting notice dated 29th September, 2015 issued to the claimant on 11th November, 2015 while he was still on suspension and had not been invited to the disciplinary hearing and there were efforts to compromise his employment by being led to resign are found both substantively and procedurally unfair. The actions by the respondent go contrary to the provisions of section 41, 43 and 45 of the Act. even where the respondent was willing to pay the claimant in lieu of notice, termination of employment should abide the mandatory provisions of section 41 and 43 of the Act. there must be a hearing and there must exist a genuine, valid and reasonable cause to justify termination of employment.

On the unfair termination of employment compensation is due under the provisions of section 45 and 49 of the Act. however, under section 45(5) of the Act, the court is required to look at the work record of the employee. The claimant had several cautionary notices with regard to his work performance. accordingly, these put into account, a compensation of three (3) months gross wage is found appropriate.

On the last paid gross wage at ksh.21, 220 per month the claimant are awarded ksh.63, 660 compensation.

On the letter terminating employment, the claimant was offered notice pay and pay for accrued leave days.

With regard to leave pay, the claimant testified that he had taken his annual leave for the year 2015 but he had not taken his annual leave for the rest of the years. The respondent has fled various leave application forms signed by the claimant who contested these as forgeries.

The claimant plead that he did not take his annual leave;

The year 2012 for 30 days;

The year 2011 for 30 days;

The year 2011 for 30 days; and

The year 2011 for 30 days.

Section 28 of the Act allow for 21 days of annual leave. There is no letter of employment enhancing the annual leave days from the statutory minimum at 21 days.

A naked look at the signatures appended to the leave application forms for the years 2013, 2013, 2014 and the signatures of the claimant in his Verifying Affidavit in support of his claims are strikingly similar. Further, where employment terminated on 29th September, 2015 and the claimant had taken his annual leave for the year, 2015 where there was no annual leave taken in the previous years, such being continuous injury ought to have been addressed within the meaning of section 90 of the Act. the claims for unpaid annual leave are declined.

On the claims for service pay, the claimant has attached several payment statements over the years. there are statutory deductions. Service pay is not due.

On the claim for house allowance from 1st September, 2008 to 31st December, 2011 these are not continuous injuries and where the claims go back to 31st December, 2011 these are lost within the meaning of section 90 of the Act.

On the claims for overtime pay, though pleaded, the claimant did not testify as to how these claims arose. The claims are general and where true relate to the claimant working for the entire period of his employment for 12 hours each day for 6 days each week and including time he was on his annual leave. There is an obvious exaggeration of these claims even where the respondent failed to submit the work records. Being truthful in making claims is imperative. To award the claims are tailored would be to visit injustice upon the respondent.

On the claims for underpayment of wages, the claimant was employed as a driver (truck) and the respondent is situate in Nakuru. The claimant has made an analysis of the applicable Wage Orders;

in May, 2010 the claimant was entitled to Ksh.10, 520 and he was paid Ksh.8, 400 less by Ksh.2, 100 and for the 11 months is entitled to ksh.23, 320; from May, 2011 the claimant was entitled to ksh.13, 264 and was paid ksh.8, 820 less ksh.4, and 444 and for 12 months is entitled to ksh.53, 328;

from May, 2012 the claimant was entitled to a wage of Ksh.15,001.60 and was paid ksh.10,000 less by Ksh.5,001.60 and for 12 month all due is Ksh.60,019.20;

from May, 2013 to April, 2015 the claimant was entitled to a wage of Ksh.17, 101.60 and was paid ksh.19, 000 which is an overpayment; and

from May, 2015 to September, 2015 the claimant was entitled to Ksh.19, 154 and was paid ksh.21, 220 and overpayment.

The underpayment due is hence Ksh.136, 776.20.

A certificate of service should issue accordingly as the claimant has since cleared with the respondent.

Accordingly, judgement here hereby entered for the claimant against the respondent in the following terms;

- (a) A declaration that the respondent terminated the claimant's employment unfairly;**
- (b) Compensation awarded at ksh.63,660;**
- (c) Underpayments awarded at Ksh.136,776.20;**
- (d) The claimant shall be issued with a certificate of Service;**
- (e) Costs of the suit.**

Dated and delivered electronically this 21st May, 2020 at 0900 hours

M. MBARU

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 the Order herein shall be delivered to the parties via emails.

Dated and delivered this 21st May, 2020 at 0900 hours

M. MBARU

JUDGE