



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 331 OF 2017

TSUMA MWAMTA MTORO.....CLAIMANT

VS

MULJI DEVRAJ & BROTHERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim has been brought by Tsuma Mwamta Mtoro against his former employer, Mulji Devraj & Brothers Limited. The claim is by way of a Memorandum of Claim dated 24th April 2017 and filed in court on 25th April 2017. The Respondent's defence is contained in a Response dated 7th June 2017 and amended on 13th June 2017.
2. At the trial, the Claimant testified on his own behalf. When the matter came up for defence hearing on 30th May 2019, the Respondent's Counsel asked that the witness then on the stand, Nahum Dishon be stood down to allow for preparation of a witness statement.
3. The Court allowed the Respondent's request. However, when the matter came up for further hearing on 9th October 2019, neither the Respondent nor its Counsel was in court. The Court therefore closed the Respondent's case and directed the parties to file final submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Tipper Driver on 5th October 2005, initially as a casual employee earning a daily wage.
5. By the time of termination of his employment on 7th October 2016, the Claimant earned a monthly basic pay of Kshs. 25,300 plus a house allowance of Kshs. 5,060.
6. The Claimant was not given a written contract of employment but was issued with monthly pay slips.
7. The Claimant states that the Respondent always delayed payment of salaries and on 5th October 2016, the Claimant, in the company of other employees, approached the Respondent's Manager and enquired about their unpaid salaries.
8. The Respondent's Manager, being unhappy with the action of the employees, who were picketing to demand their salaries, issued the employees with a warning and stated that he would terminate the employment of long serving employees, without service pay.
9. The Claimant states that his employment was terminated verbally on 7th October 2016 without notice. The Claimant adds that he was among the oldest employees of the Respondent.
10. The Claimant further states that he was not paid his terminal dues.
11. The Claimant submits that the Respondent's decision to terminate his employment without notice and without cause amounts to unfair termination within the meaning of Section 45 of the Employment Act.
12. The Claimant further submits that the decision to terminate his employment because of his long service and for demanding salary arrears amounts to a violation of Article 41 of the Constitution, which guarantees fair labour practices.

13. He also submits that the refusal to pay his terminal dues violates the provisions of Section 18 of the Employment Act.

14. The Claimant now claims the following:

- a) One month's salary in lieu of notice.....Kshs. 25,300
- b) 12 months' salary in compensation.....303,600
- c) 23 days' salary from 7th – 30th October 2017.....19,397
- d) Punitive and exemplary damages assessed at Kshs. 500,000
- e) Service pay for long service
- f) Costs

The Respondent's Case

15. In its Response as amended on 13th June 2017, the Respondent states that it had employed the Claimant as a Tipper Driver until 7th October 2016, when his services were lawfully terminated.

16. The Respondent avers that the Claimant committed acts and omissions which amounted to gross misconduct under the provisions of Section 44(4)(e) of the Employment Act.

17. The Respondent claims that the Claimant knowingly failed and/or refused to obey a lawful and proper command which was within the scope of his duty to obey, issued by the Respondent and persons placed in authority over him by the Respondent.

18. The Respondent states that the Claimant was given an official warning against getting involved in an unprotected strike but he declined to acknowledge receipt of the warning letter.

19. The Respondent adds that the Claimant refused to show cause why disciplinary action should not be taken against him.

20. The Respondent denies issuing the Claimant with a warning after he and other employees had demanded their salaries and avers that it served the Claimant with a warning letter dated 5th September 2016, after he joined other employees in an unprotected strike on the same day.

21. The Respondent states that the Claimant was paid salary for the days worked in October 2016, house allowance and leave pay.

22. The Respondent submits that the Claimant's employment was lawfully terminated for gross misconduct and insubordination.

23. The Respondent further submits that the Claimant was given adequate opportunity to be heard.

Findings and Determination

24. 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

25. The Claimant claims that his employment was unlawfully terminated after he and his colleagues demanded payment of their accrued salary arrears.

26. In response, the Respondent states that the Claimant's employment was lawfully terminated for participating in an unprotected strike. The Respondent further states that the Claimant was issued with a warning letter and a notice to show cause, which he refused to acknowledge.

27. In his testimony before the Court, the Claimant denied participating in any industrial action. He added that after the employees asked for their salaries, the Respondent invited officials from the Labour Office. The employees were summoned and instructed to sign a document whose contents the Claimant did not understand as he does not know how to read.

28. The Claimant further testified that he asked for time to get an explanation on the contents of the document but he was asked to sign it immediately, which he did not. It is at this point that the Claimant's employment was terminated.

29. Among its list of documents, the Respondent filed a warning letter dated 5th September 2016 and a show cause letter dated 27th September 2016 none of which were received by the Claimant. At the reverse side of these letters, there are handwritten notes to the effect that the Claimant refused to sign the letters in acknowledgement of receipt.

30. The authors of the handwritten notes were however not called to explain to the Court the circumstances under which the Claimant refused to sign the two letters.

31. In fact, the Respondent did not call a witness to produce any of its documents. The Respondent's averments that the Claimant committed acts of gross misconduct and that he was subjected to disciplinary proceedings were therefore unsupported and unproved.

32. In the final submissions filed on behalf of the Claimant on 17th January 2020, reference was made to the decision in **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** where the Court of Appeal stated the following:

“It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee’s conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.”

33. In the circumstances of the case now before me I find and hold that the Respondent not only failed to demonstrate a valid reason for the termination as required under Section 43 of the Employment Act but also did not convince the Court that the Claimant was availed the procedural fairness requirements set under Section 41 of the Act.

34. As a result, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

35. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent as well as the Respondent's unlawful conduct in the termination transaction.

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

37. From the evidence on record, the Claimant was paid salary for the days worked in October 2016. The claim thereon is therefore without basis and is disallowed.

38. No basis was established for the claim for exemplary and general damages. Further, having been a contributing member of the National Social Security Fund (NSSF), the Claimant is not entitled to service pay.

39. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 12 months' salary in compensation.....	Kshs. 364,320
b) 1 month's salary in lieu of notice.....	<u>30,360</u>
Total.....	394,680

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

41. The Claimant will have the costs of the case.

42. It is so ordered.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF MAY 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.

LINNET NDOLO

JUDGE Appearance:

Mr. Bwire for the Claimant

Mr. Olwande for the Respondent