



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1333 OF 2016

RICHARD MWENDWA MUTHAMA.....CLAIMANT

VERSUS

LADDER CONSULTING COMPANY LTD.....1ST RESPONDENT

MARTIN NGUNGA.....2ND RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 6.7.2016 stating that he was employed by the respondent as a Driver on 14.8. 2013 earning gross salary of Kshs. 20,000 per month and worked until 14.2.2014 when his employment was terminated by the employer. He averred that the termination was unlawful because it was not grounded on a valid reason and he was not accorded any prior hearing. He also averred that he never went for any annual leave during his employment and he was not paid his salary for January 2014 plus 14 days worked in February 2014. He therefore seeks the following reliefs: -

a) Compensation for unlawful termination of employment equivalent to 12 months' salary being Kshs. 240,000.

b) Salary for January 2014 plus 14 days in February 2014 equalling to Kshs. 30,000

c) Leave earned in seven months.

d) Costs and interest.

2. The Respondent never entered appearance after being served with summons and such the suit proceeded by formal proof on 29.6.2020 when the claimant sought and obtained leave of the court to dispose of the by written submissions on the basis of the material on record.

3. In brief the claimant's case is that he was employed as stated in the summary of pleadings above and his written statement annexed to the Statement of Claim. He further produced a Copy of his Contract of Employment dated 14.8.2013 as proof of the said employment relationship. It was further his case that on 14.2.2014, he was verbally informed by the 1st respondent's Receptionist, Ms Josphine, that his employment had been terminated. Despite his repeated request even in writing, he was not issued with any termination letter or Certificate of Service.

4. He maintained that the termination of his employment without any valid reason and without being accorded any hearing was unlawful and as such he is entitled to compensatory damages, unpaid salary and accrued leave as prayed in his pleadings.

5. In his written submissions, he contended that the facts of his case have not been contested by the 1st respondent including the fact that he was employed by the respondent until 14.2.2014 when his services were unfairly terminated without prior notice as required under section 35(1) of the Employment Act, without being given a hearing as required under section 41 of the Act and without any valid reason as required under section 45 of the Act. He relied on a number of binding and persuasive authorities including **Alphonse Mghanga Mwachanya v Operation 680 Limited [2013] eKLR** and **Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR** were this court and the Court of Appeal, respectively, held that for termination to be fair, the employer must have a valid reason and the employee must be heard on the cited reason.

Issues for determination and analysis

6. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent from 14.8.2013 to 14.2.2014 when the employment was terminated by the employer. The issues for determination are:

a) Whether the termination was unfair and therefore unlawful.

b) Whether the claimant is entitled to the reliefs sought.

whether the summary dismissal unfair and wrongful.

7. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests on the employee. The claimant stated in his written statement that he was dismissed by the employer and the decision was verbally communicated to him by the 1st respondent's Receptionist on 14.2.2014. He further produced his letter dated 12.4.2014 stating that he was verbally dismissed and repeating his earlier request for a termination letter. The letter also demanded for his outstanding salary plus compensation for unlawful termination. The demand was not honoured and he brought this suit.

8. The foregoing facts were not contested and therefore I find that the claimant has proved on a balance of probability that he was dismissed for no valid reason and without being accorded any hearing as required under section 41 and 45 of the Employment Act.

9. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

“1. No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

i) related to the employee's conduct, capacity or compatibility; or

ii) based on the operational requirements of the employer; and

iii) that the employment was terminated in accordance with fair procedure.

10. On the other hand, Section 41 of the Employment Act provides that: -

(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

(2) Notwithstanding any other provision on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make."

11. Having found that the facts and the evidence by the claimant herein has not been controverted by the respondent, I now hold that the claimant has proved on a balance of probability that his dismissal was unfair within the meaning of section 45 of the Employment Act. I gather support from the precedents cited by the claimant above.

Reliefs

12. In view of the foregoing holding, I am satisfied that the claimant is entitled to compensatory damages under section 49 of the said Act. I award him 3 months' salary compensation for the unfair dismissal. In awarding the said compensation, I have considered the fact that he served for just 7 months and also the fact that he did not contribute to the termination through misconduct.

13. The claim for leave is granted at the rate of 1.75 days per month on prorated basis equalling to 12.25 leave days. This award is based on the contract of employment dated 14.8.2013.

14. I further award the claim for unpaid salary for January plus 14 days worked in February 2014 equalling to 45 days.

15. In conclusion, I enter judgment for the claimant against the respondents as follows: -

Compensation	<u>kshs 60,000.00</u>
Unpaid salary for 45 days	kshs. 30,500.00
Leave of 12.25 days	<u>kshs. 9,423.07</u>
Total	<u>kshs 99,923.07</u>

The said award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated and delivered at Nairobi this 29th October, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE