



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NUMBER 928 OF 2017

BETWEEN

CHARLES OLOO OMENGO.....CLAIMANT

VERSUS

BODERLESS TRACKING LIMITED.....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

J.M. Makau & Company Advocates for the Claimant

Arwa & Change Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 20th December 2017. He avers, he was employed by the Respondent in May 2016 as a Driver, on a salary of Kshs. 17,000 monthly. He was summarily dismissed by the Respondent on 23rd July 2017. He avers, no valid reason was given to him, to justify the decision; there was no notice; no hearing was conducted; and termination was against principles of natural justice and fair labour practices. He prays for Judgment against the Respondent for: -

- a. July 2017 salary at Kshs. 17,000.
- b. Unauthorized salary deduction at Kshs. 7,000.
- c. 1-month salary in lieu of notice at Kshs. 17,000.
- d. Service pay at Kshs. 11,442.
- e. Compensation for unfair termination at Kshs. 204,000.

Total... Kshs. 256,442.

- f. Declaration that termination was unfair.
- g. Certificate of Service to issue.
- h. Costs.

i. Interest.

2. The Respondent filed a Statement of Response, amended on 19th November 2018. Its position is that there is no legal entity going by the name of the Respondent, with a legal capacity to sue and be sued. The Claimant was involved in an accident, in the course of duty, on 22nd June 2016. He drove Respondent's vehicle recklessly, resulting in the said accident, and damage to Respondent's vehicle. He was issued a warning letter dated 22nd June 2016. He was later involved in various traffic violations. He failed to report to the Police Station as required, following two incidences that took place during the week of 17th to 23rd July 2017. He was invited to a disciplinary hearing on 24th July 2017. He attended the meeting. The charges were read to him. He denied the charges and was heard. The Disciplinary Committee considered all evidence, and concluded that the Claimant should be dismissed. He was advised to collect his terminal dues, which he did not. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and rested his case, on 11th March 2020. Regional Manager of the Respondent, Oscar Amuyunzu gave evidence on the same date, bringing the hearing to an end

4. The Claimant adopted his Statement of Witness in his oral evidence. This Statement is a replica of the Statement of Claim, which is summarized at paragraph 1 of this Judgment.

5. Cross-examined, he testified that he received a warning letter dated 22nd June 2016. A rickshaw had scratched the vehicle the Claimant had been assigned by the Respondent. The Respondent made deduction from the Claimant's salary over the incident, although there was no repair to the vehicle. In July 2017, Police Officers alleged that the vehicle the Claimant was driving had worn out tyres. He was bonded, taken to the Police Station, but was not locked in. He was not charged. He received the letter of dismissal from the Respondent after this. The Respondent demanded that the Claimant withdraws this Claim, before he could receive his terminal benefits. He was not given a specific tabulation of dues. Redirected, the Claimant reiterated that he was not given a disciplinary hearing. The Respondent deducted Kshs. 7,000 from the Claimant's salary without justification.

6. Oscar similarly adopted his Witness Statement on record as his oral evidence. The Witness Statement reflects what is contained in the Statement of Response, summarized at paragraph 2 of this Judgment.

7. Cross-examined, Oscar testified that the Claimant was dismissed for mishandling Respondent's vehicles. There was nothing to show that any of the Respondent's vehicles was repaired. The Claimant was given a hearing on 22nd July 2017. He was invited in writing. He was issued warning letter before. The Respondent did not forge Claimant's signature to imply that there was a disciplinary hearing. He was not paid salary for July 2017. He was advised to collect this with his terminal dues at the Head Office in Nairobi. Upon redirection, Oscar told the Court that disciplinary hearing took place on 22nd July 2017, as shown in the minutes exhibited by the Respondent. The Claimant was present. He replied to the charges. The reasons for dismissal were not the same as for the warning of 2016.

The Court Finds: -

8. The Claimant was employed by the Respondent as a Driver in May 2016. His salary was Kshs. 17,000 monthly. He was summarily dismissed through a letter dated 25th July 2017. The letter refers to Claimant's conduct and attitude to work, as the reasons which justified termination.

9. It was amplified by the Parties in their evidence, that the Respondent had been complaining about the way the Claimant drove the vehicle assigned to him, causing accidents and damaging the vehicle, and breaching traffic rules, inviting the involvement of traffic Police. The Claimant had been warned in 2016, shortly after he was employed. He acknowledged receiving the letter, while arguing elsewhere in his evidence, that the Respondent forged his signature to show he received the letter.

10. There is on record a Disciplinary Hearing Notification Form dated 22nd July 2017, showing that the Claimant was called to a hearing to take place on 24th July 2017. He is shown to have been present in the minutes recording the Disciplinary Hearing on 24th July 2017. He was presented with specific charges, which he is recorded to have denied. The Disciplinary Panel, in very brief observations and conclusions, found the Claimant guilty. It was recommended that his contract is terminated.

11. Whereas the Claimant disputes that he was involved in the disciplinary process, the letter of termination dated 25th July 2017, which the Claimant signed in acknowledging receipt, referred to a disciplinary process leading to termination. In his Witness Statement, he acknowledges that the Respondent claimed he was not serious with his work. When was he told this, if not at the disciplinary forum? Not being serious with his work, appears to this Court, to be a generalized version of the specific allegations which were made against the Claimant, at the disciplinary forum.

12. The Court is satisfied that the Claimant was involved in repeated acts of gross misconduct- driving Respondent's vehicles without due care; occasioning damage to the vehicles; and inviting by his conduct, the unwelcome attention of Traffic Officers. He was barely one year in employment, when different incidents, adverse to Respondent's business, took place through him.

13. He does not merit compensation for unfair termination. Termination was procedurally fair, and based on valid reasons.

14. The Claimant is however entitled to terminal dues, as proposed in the letter of termination, and in line with Section 18 [4] of the Employment Act 2007. The Respondent did not provide annual leave records, but **offered annual leave balance. Other items offered include salary for days worked in July 2017 and 1- month salary in lieu of notice.**

15. In addition, the Court is of the view that in the absence of evidence of active subscription to the N.S.S.F or other Pension or Provident

Fund, the Claimant merits service pay, under Section 35[5] of the Employment Act 2007. He worked for slightly over 1 year. **He is allowed the prayer for service pay, at the rate of 15 days' salary, over a period of 1 complete year of service, at Kshs. 9,807.**

16. **Certificate of Service to issue.**

17. **No order on the costs.**

IN SUM, IT IS ORDERED: -

a. The Respondent shall pay to the Claimant service at Kshs. 9,807; salary for the month of July 2017 at Kshs. 17,000; notice at Kshs. 17,000; and annual leave at the statutory rate of 21 days, calculated at Kshs. 13,730 – total Kshs. 52,537.

b. Certificate of Service to issue.

c. No order on the costs and interest.

Dated and delivered at Mombasa this 6th day of October, 2020.

James Rika

Judge