



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1177 OF 2014

TOMASI AGENYA SAVA.....CLAIMANT

VERSUS

CYBER COACH.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 15.7.2014 contending that his contract of employment was terminated by the respondent on 11.1.2014 and prayed for the following reliefs:

- a. The Respondent's action be declared as Constructive dismissal and same is unfair, unlawful and hence null and void.
- b. The Respondent do re-engage all the Grievant/Claimant in work comparable to that in which the Grievant/Claimant were employed prior to their dismissal or other reasonably suitable work at the same wages with no loss of benefits together salaries and allowances in arrears for both the period they have been working and out of office/work.
- c. Reinstate the Grievant/Claimant and treat him in all aspects as if the Grievant/Claimant employment had not been terminated.

In the alternative to the demand for reinstatement of the Grievant/Claimant demand for monetary compensation as under:-

- a. The Respondent be ordered to pay the Grievant/Claimant terminal dues as enumerated under clause No. 2(i) sum of Kshs.435,333.33
- b. Interest on clause 2(i) from date of termination until payment in full at Court rates.
- c. Any other statutory entitlements.
- d. The Respondent do issue the Grievant with Certificates of Service.
- e. The Respondent to pay legal costs in this suit.

2. Despite service with the claim and summons, the respondent never entered appearance or filed defence to oppose the claim. Consequently the suit proceeded by formal proof on 26.9.2018 when the court granted the claimant leave to dispose of the suit by written submissions of the basis of the pleadings, written, statement and filed documents.

Claimant's Case

3. The claimant stated that he was employed by the respondent as a Bus Driver on 31.12.2012 for a salary of Kshs.20,000 per month. He produced the appointment letter marked Appendix 1 as an exhibit.

4. The claimant further contended that he worked honestly and diligently and with no record of indiscipline. That from July 2013 to December 2013 his salary was withheld and when he raised the issue with the respondent, the Director, verbally stopped him from working.

5. The claimant contended that the failure to pay this salary amounted to intolerable working condition which amounted to constructive dismissal. He further submitted that the said termination was unfair because it was without any lawful cause or preceded by any notice.

Analysis and Determination

6. After careful consideration of the evidence and the submissions, I found no dispute in the fact that the claimant was employed by the respondent. The issues for determination are:

- a. Whether the employment contract was unfairly termination by the respondent.
- b. Whether the relief sought should be granted.

Unfair constructive termination

7. The claimant’s evidence that his salary was unpaid for 6 consecutive months from July – December 2013 was not rebutted. Likewise his evidence that he was stopped from working by the Director for demanding the said salary arrears was not rebutted. I therefore find that the claimant’s employment was constructively terminated by the respondent through failure to pay his salary for six months and by stopping him from continuing to discharge his duties after he demanded his salary arrears. The said conduct by the employer amounted to constructive termination of claimant’s service.

8. Under section 45(2) of the Employment Act, termination of the employee contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after a fair procedure. In this case the claimant contended that the termination was not a justifiable cause and it was not preceded by any notice. The respondent never filed defence or tendered any evidence and as such, she never discharged her burden of proving that the termination of the claimant’s services was fair. Consequently I return that the termination was unfair for lack of a valid and fair reason and because and because it was done without following a fair procedure,

Reliefs

9. In view of the foregoing, and he provisions of section 49 of the Employment Act, I award the claimant one month’s salary in lieu of notice plus one month salary compensation for the unfair termination. In awarding the said compensation, I have considered the fact that he served for only one year.

10. I further award him Kshs.120,000 being salary arrears for July – December 2013 as prayed. I also award him 21 days leave being Kshs.20,000 x 21/30 equaling Kshs.14,000 as prayed.

11. However, the claim for service pay is discussion because the claimant was a contributor to the NSSF as per the payslip produced by the claimant as exhibit. Similarly, the claim for travelling allowance is dismissed for lack of particulars and supporting evidence.

Conclusion and Disposition

12. I have found that the claimant’s services were constructively terminated by the respondent. I have also found that the terminal was unfair within the meaning of section 45 of the Employment Act. Consequently for the claim in the following terms:-

- a. Notice20,000
- b. Compensation.....20,000
- c. Salary arrears.....120,000
- d. Leave.....14,000

154,000

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The claimant will also have costs and interest but the decreed sum will be paid less statutory deduction.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE