



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 236 OF 2016

RONALD NYAMBU DAUDI.....CLAIMANT

VERSUS

TORNADO CARRIERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Ronald Nyambu Daudi against his former employer, Tornado Carriers Limited. The claim is captured in a Memorandum of Claim dated 8th February 2016 and filed in court on 29th March 2016. The Respondent’s defence is contained in a Reply dated 19th May 2017 and filed in court on 22nd May 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Workshop Supervisor, John Omenda Oloo. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a mechanic from 4th October 2011 until 28th October 2013 when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs.13, 500.

4. The Claimant claims that the termination of his employment was unlawful and unfair. He adds that the Respondent failed to remit his National Social Security Fund (NSSF) dues.

5. The Claimant’s claim is as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 15,525.00
- b) Leave pay for 2 years.....25,078.85
- c) Unremitted NSSF dues for 7 months.....2,800.00
- d) Unpaid travel allowance.....13,200.00
- e) 12 months’ salary in compensation.....186,300.00
- f) Punitive damages
- g) Certificate of service
- h) Costs plus interest

The Respondent’s Case

6. In its Reply dated 19th May 2017 and filed in court on 22nd May 2017, the Respondent admits having employed the Claimant as a mechanic. The Respondent however denies that the Claimant’s employment was unlawfully or unfairly terminated and states that it is the Claimant who absconded duty after being involved in instances of gross misconduct.

7. The Respondent further states that the Claimant had been issued with several warnings but had failed to improve. The Respondent states that the Claimant was a registered member of NSSF and denies failing to remit dues to his account.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the Claimant deserted duty or was unlawful terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

9. In its Reply to the Claimant's claim, the Respondent states that the Claimant himself deserted duty after being involved in several instances of gross misconduct.

10. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR*).

11. In his testimony before the Court, the Respondent's Workshop Supervisor, John Omenda Oloo accused the Claimant of careless performance of duty and reporting for duty while intoxicated. When put under cross examination, Oloo stated that the Claimant was terminated on account of poor performance.

12. With these conflicting accounts by the Respondent, the Court was unable to identify a specific reason for the termination of the Claimant's employment. At any rate, none of the grounds were established at the shop floor and the ensuing termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

13. In light of the foregoing findings, I award the Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's failure to observe the mandatory procedural fairness requirements set out under Section 41 of the Employment Act, 2007. I further award the Claimant one (1) month's salary in lieu of notice.

14. In the absence of leave records to show that the Claimant had exhausted his leave entitlement for period running from 4th October 2011 until 28th October 2013, the claim for leave pay succeeds and is allowed.

15. Regarding the claim for unremitted NSSF dues, the only thing to say is that any such dues would be payable to the statutory body not to the Claimant. The claim thereon is therefore without basis and is disallowed. The claims for travel allowance and punitive damages were not proved and are dismissed.

16. In the end, I enter judgment in favour of the Claimant as follows:

- a) 4 month's salary in compensation.....Kshs. 54,000
- b) 1 month's salary in lieu of notice.....13,500
- c) Leave pay for 2 years (13,500/30 X21X2).....18,900
- Total.....86,400**

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

18. The Claimant is also entitled to a certificate of service plus costs of the case

DATED SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Gitonga h/b Mr. Mbuya for the Claimant

