



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 287 OF 2014

(Before Hon. Justice Mathews N. Nduma)

SAMMY NJOROGE.....CLAIMANT

VERSUS

SHIVA CARRIERS LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

1. The suit is premised on an amended statement of claim dated 2nd November 2014 in which a declaration is sought that the termination of claimant's employment was unlawful and unfair and payment of terminal benefits.
2. The suit is defended by a response to the statement of claim by the 1st respondent filed on 8th May 2018 pursuant to leave of court.
3. The claimant testified as CW1 and told the court that he was employed by the respondent as a lorry driver on 17th August 2010 earning Kshs 20,000 per month. That the claimant was based in Mombasa and on 7th February 2012 he was arrested by police and taken to Makupa police station and charged for taking an under load. That the arrest followed a complaint by the respondent.
4. The respondent was transferred to Nairobi and was detained for 3 days in Embakasi, Nairobi and industrial Area police stations.
5. That he was taken to court the fourth day and released on Kshs 50,000 bond. That while in custody he was infected with a skin disease that took 2 years to cure. That the claimant was acquitted by the magistrate court, Makadara for lack of evidence. The respondent did not bring any witness to court. That all that time the claimant did not work.
6. The claimant has sued the 1st respondent for wrongful and unfair termination and the 2nd respondent with the 1st respondent for wrongful arrest and malicious prosecution.
7. That the claimant did not go on leave for 3 years and was not paid in lieu of leave. That the claimant incurred medical expenses for the dermatological condition contracted in the cells in the sum of Kshs 90,000. That the claimant incurred legal fees to defend himself in the Makadara Criminal case no. 716 of 2010 in the sum of Kshs 250,000; that he seeks payment of service gratuity for 3 years served in the sum of Kshs 80,000; unpaid salary for the period February 2012 to February 2014; overtime worked in the sum of Kshs 5,755,480.
8. The claimant seeks special damages set out under paragraph 12 of the amended statement of claim, compensation for the unlawful termination and grant of certificate of service, interest and costs.

Defence

9. The respondent called RW1, Nahid Omar who told the court that he was the Transport Fleet Manager of the 1st respondent. That the claimant worked as a truck driver for the respondent. On the material date, the claimant transported fertilizer from Mombasa to Nairobi. That the Truck was weighed upon departure from Mombasa. That upon arrival at the customer's premises in Nairobi, the truck was weighed and RW1 received a report that the cargo received was less than expected as per the order. The report came after two (2) days after arrival. RW1 reported the matter to the police in Nairobi, industrial area. The police took over the matter. The respondent recorded a police statement. The claimant did not attend work again after that date. RW1 told the court that they treated the claimant as an employee who had absconded work.

10. RW1 said that the respondent did not owe the claimant any terminal dues.

11. Upon cross examination by Mr. Anyul for the claimant, RW1 stated that he did not have weighing slips in court but same were presented to the police. RW1 stated that the claimant was charged for theft but RW1 was not a witness in the matter.

12. That the fleet manager at the time Mr. Abdul Azak recorded a statement with the police. RW1 said he was aware that the claimant was acquitted of the charge by the magistrate court. RW1 said the company had no policy on arrested persons and he added that he was not aware how long the claimant was in custody. RW1 was not employed by the respondent at the time the incident took place. RW1 did not have information on how much cargo was loaded and how much was delivered. RW1 said the company had many trucks but only one had shortage at the material time.

Determination

13. The issues for determination are:

- (i) Whether the claimant was dismissed from work or he absconded.
- (ii) If he was dismissed, whether the respondent had a valid reason to do so and if a fair procedure was followed
- (iii) Whether the claimant is entitled to the reliefs sought?

Issue i

14. The first issue for determination is whether the respondent dismissed the claimant from work and/or terminated his employment or the claimant absconded work.

15. The claimant in his testimony before court did not indicate that upon being arrested by the police at the industrial area police station and then charged before Makadara magistrate court he ever went back to work upon his release from custody on bond after four(4) days. The claimant did not adduce any evidence at all of his termination or dismissal by the respondent. No letter of dismissal or termination was produced by the claimant. To this end, the court believe the testimony of RW1 that the claimant never went back to work after his arrest and release by the court in Nairobi.

16. Accordingly, the claimant absconded work upon his release on bond and the allegation that he was unlawfully and unfairly dismissed has no factual basis and is dismissed. This disposes off issue (i) and (ii) as set out in the judgment.

Issue iii (a) – Medical fees

17. In the amended claim, the claimant seeks grant of special damages with respect to medical treatment for dermatological condition contracted in cells in the sum of Kshs 90,000. No medical report was produced by the claimant to prove that he suffered the skin disease and the cause of the same. Similarly, no medical bills and receipts were produced by the claimant in respect of the alleged treatment and medication. There is simply no nexus between the alleged illness and the respondents since no case of false arrest, imprisonment and malicious prosecution has been pleaded in the amended claim and evidence adduced in that respect. The claim for medical bills fail for want of proof. Equally, and on the basis of the reasoning above, the claim for legal fees incurred in the claimant's defence of the criminal case No. 716 of 2010 against himself has also failed for want of proof.

Unpaid Leave.

18. The claimant testified that he did not go on leave for 3 years and was not paid in lieu thereof. RW1 was unable to rebut this claim since he had no knowledge of the matter. The claimant earned Kshs 40,000 a month as at the time of separation. The court awards him three (3) months' salary in lieu of leave days not taken in the sum of Kshs 120,000.

Arrears salary and serviced gratuity

19. No evidence was adduced at all in support of the claim for non payment of salary between February 2012 to February 2014. Similarly there is no evidence at all in support of the claim for payment of service gratuity. The two claims lack basis and are dismissed.

Certificate of service

20. The claimant did not return to work upon being released from custody to collect his certificate of service. The respondent is bound by Law to provide the claimant with a certificate of service. The respondent is directed to provide one to the claimant accordingly.

21. In the final analysis he suit by the claimant against the respondents is dismissed except for the following award:

- (a) Kshs 120,000 in lieu of untaken leave days.
- (b) Grant of certificate of service within 30 days of judgment.

(c) Interest at court rates from date of filing suit till payment in full.

(d) Half ($\frac{1}{2}$) the costs of the suit.

Judgment Dated, Signed and delivered this 21st day of February, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Angu for Claimant

Mr. Yogo for 1st Respondent

MS Essendi for 2nd Respondent

Chrispo – Court Clerk