



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

CAUSE NO. 374 OF 2015

MARTIN WANJALA WASIKE CLAIMANT

v

AMICABRE TRAVEL SERVICES LTD RESPONDENT

JUDGMENT

1. On 13 March 2015, Martin Wanjala Wasike (Claimant) instituted legal proceedings against Amicabre Travel Services Ltd (Respondent) alleging unfair termination of employment and breach of contract.
2. In a *Memorandum of Defence* filed through the Federation of Kenya Employers on 21 March 2016, the Respondent contended that the Claimant was dismissed for violation of procedures and breaching the employment contract.
3. The Cause was heard on 4 December 2018.
4. The Claimant and the Respondent's Human Resources Assistant testified.
5. Although the Court directed that the parties file and exchange submissions, the Claimant's submissions were not on file by this morning while the Respondent filed its submissions on 8 February 2019.
6. The Court has considered the pleadings, evidence and submissions on record and condensed the Issues for Determination as
 - (a) Whether the dismissal of the Claimant was unfair
 - (b) Whether the Respondent was in breach of contract and
 - (c) Appropriate remedies/orders.

Unfair termination of employment

Procedural fairness

7. The Claimant was appointed as a driver by the Respondent with effect from 19 May 2014. The contract was a 1 year fixed contract and was subject to 6 months' probation.
8. On 30 July 2014, the Respondent wrote to the Claimant informing him that it had been decided to summarily dismiss him from employment.
9. The reasons given for the dismissal were in brief violation of traffic laws; diverting official vehicle from normal route without permission; carrying unauthorised passengers and altering a sick sheet (these would constitute misconduct).
10. By dint of section 42(1) of the Employment Act, 2007, an employer contemplating terminating an employment contract during *probation* is not expected to set out allegations against the employee or afford the employee an opportunity to be heard if the grounds for termination are based on *misconduct, performance or physical incapacity*.
11. However, the section envisages the giving of 7 days' notice or pay in lieu of notice.

12. Although the statute does not contemplate a hearing, the Respondent issued a show cause notice to the Claimant on 24 July 2014 but he declined to acknowledge receipt. The notice was issued in the presence of witnesses.

13. Despite not acknowledging the notice, the Claimant served the Respondent with a letter on 24 July 2014, purporting to explain the incidents of 13 July 2014 up to 23 July 2014.

14. After considering the response, the Claimant was invited through a letter dated 25 July 2014 to attend a disciplinary hearing on 30 July 2014 and a summary dismissal letter followed on the same day.

15. The Claimant attended the hearing, but asserted in Court that the hearing was not a disciplinary hearing.

16. The procedural fairness of the dismissal of the Claimant is therefore not an Issue for determination herein as the determination of contract was during *probationary* phase.

17. However, in terms of section 42(4) of the Employment Act, 2007, the Claimant would be entitled to 7 days' pay in lieu of notice.

Substantive fairness

18. Section 42 of the Employment Act, 2007 while exempting an employer from affording an opportunity to the employee to be heard before termination of contract during probation is silent on whether the employer is required to prove the reasons for terminating the contract or whether such reasons are valid and fair as contemplated by sections 43 and 45 of the Employment Act, 2007.

19. Therefore in the view of this Court, where there is a legal challenge to the termination of a contract during probation, the employer is under a duty to satisfy the test set out in sections 43 and 45 of the Employment Act, 2007.

20. The Court has already adverted to the reasons advanced for the dismissal of the Claimant.

21. It is not in dispute that the Claimant was arrested by the Police and was charged with a traffic offence to which he pleaded guilty.

22. In the view of the Court, the plea of guilt by the Claimant leads to a logical conclusion of careless performance of duty.

23. Apart from the principal reason, the Claimant was dismissed for having been found carrying unauthorised passengers.

24. The Claimant did not deny in Court that on 17 July 2014, a team of the Respondent's senior employees while on a mission to track the vehicle he had been assigned found him with unauthorised passengers around Umoja estate.

25. Another reason for the dismissal was that the Claimant altered a sick off to show that he had been given sick off up to 23 July 2014 instead of up to 22 July 2014.

26. The Claimant did not offer any explanations as to the alteration of the date in the sick off certificate.

27. In the view of the Court, the Respondent had and has proved that there were valid reasons to dismiss the Claimant.

Breach of contract

Salary for July 2014

28. The Claimant was dismissed on 30 July 2014 and would be entitled as of right to the earned wages up to date of dismissal. He computed the salary as Kshs 16,930/-.

29. Since the Respondent offered the salary, nothing turns on this head of claim.

Accrued leave

30. The Claimant served for about 2 months and would be entitled to *pro rata* leave in terms of section 28(2) of the Employment Act, 2007.

Lost income

31. The Claimant did not lay any contractual, evidentiary or legal foundation for this head of claim for Kshs 169,300/- being salary he would have earned to expiry of the contract.

Compensation

32. Compensation is a discretionary remedy. With the conclusion on the fairness of the dismissal, it is not available to the Claimant.

33. The Court observed the demeanour of the Claimant at length during his testimony.

34. He was extremely hesitant to answer questions during cross examination and where cornered, not only became evasive but went completely off tangent by answering unasked questions.

35. The Claimant did not appear credible at all.

Conclusion and Orders

36. The Court finds and holds that though the summary dismissal of the Claimant from employment was for valid and fair reasons, the Claimant is entitled to and is awarded.

(a) July 2014 salary Kshs 16,930/-

37. No order as to costs.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Juma instructed by Julius Juma & Co. Advocates

For Respondent Ms. Kanyiri, Federation of Kenya Employers

Court Assistant Lindsey