



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 240 OF 2016

ISHUMAIL MCHOMBO IHA.....CLAIMANT

VS

BADAR HARDWARE LIMITED.....RESPONDENT

JUDGMENT

Introduction

- 1. By his Memorandum of Claim dated 8th February 2016 and filed in court on 29th March 2019, the Claimant has sued the Respondent for wrongful and unfair dismissal.
- 2. The Respondent filed a Response on 16th June 2016 but did not avail any witness. The Claimant testified on his own behalf.

The Claimant’s Case

- 3. The Claimant states that he was employed by the Respondent as a heavy commercial truck driver from 1st June 2012 until 15th May 2015. He was not issued with a written contract of employment. As at the time of leaving employment, the Claimant earned a monthly salary of Kshs. 20,000.
- 4. On 15th May 2015, the Claimant was issued with a letter of summary dismissal on allegations of knowingly driving an untested motor vehicle, being truck registration number KBQ 173S and crashing into the company gate. The Claimant denies the said allegations and states that his dismissal was wrongful and unlawful.
- 5. The Claimant states that over the entire period of his employment, he was not allowed to take leave or rest day. He adds that he was kept at work for 24 hours each day of the week.
- 6. The Claimant avers that from 1st June 2012 until sometime in 2014, the Respondent did not remit his National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues. He also claims to have been underpaid.
- 7. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 25,381.59
- b) Underpayment.....170,597.35
- c) Unpaid rest days worked157,376.40
- d) Unclaimed public holidays.....28,578.30
- e) Unpaid overtime.....916,873.20
- f) Unpaid house allowance.....111,400.19
- g) Leave pay for 2 years and 11 months.....59,861.81
- h) Service pay.....42,758.43

i) Compensation for wrongful dismissal.....304,579.08

J) Certificate of service

K) Costs plus interest

The Respondent's Case

8. In its Response dated 10th June 2016 and filed in court on 16th June 2016, the Respondent denies the Claimant's claim and puts him to strict proof regarding the date of employment, position held, salary earned and termination.

9. The Respondent states that if there was any termination or summary dismissal, then it must have been occasioned by the Claimant's acts of negligence and/or recklessness incompetence.

Findings and Determination

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

a) Whether the Claimant has made out a case of wrongful dismissal;

b) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

11. The Claimant was dismissed by letter dated 15th May 2015 stating as follows:

"Dear Ishmael

Summary Dismissal from service

Following the incident in which you drove the truck assigned to you and rammed into the front gate. You alleged that it was the vehicles breaks failure (sic).

You were on 14th May 2015 asked to explain, to the undersigned with the union shop steward present, why you drove out of the yard a vehicle that had not been tested for functionality of breaks after the same had been worked (sic).

You state that the mechanic refused to test the vehicle and left.

You still decided to take the vehicle to the road, you confirm, after you tested the truck at a short distance which you also confirm that it was less than adequate distance to test such a truck for breaks functionality.

You clearly did not take due precaution before taking the truck to the road.

This could have caused a serious accident which could have resulted in serious injuries if not death and extensive property damage.

The management has no option but to summarily dismiss your services (sic) for gross negligence.

You will collect your dues after due clearance and handing over of company property.

For: Badar Hardware Ltd

(Signed)

Fredrick E.M. Ondako

Human Resource Manager"

12. This letter accuses the Claimant of taking an untested truck to the road and thus causing an accident. Prior to the dismissal, the Claimant had been issued with a show clause letter dated 1st April 2015 in the following terms:

"Dear Mchombo

RE: Show Cause

On the 1st April 2015 you are noted to have driven truck assigned to you being KBQ 173S and rammed into the main gate.

On being questioned you said the vehicle lost the breaks.

You are served with this letter to show cause why you should not be dismissed from duty for driving a truck without breaks.

Kindly note you have 24hrs to respond.

However you will proceed on 21 days leave with immediate effect.

Thank you

For: Badar Hardware Ltd

(Signed)

Fredrick E.M. Ondako

HRM

13. In his response to the show cause letter, the Claimant states that before driving the subject truck out of the yard, he called the mechanic, one Mr. Jaji who assured him that the truck was in good order. The Claimant further states that upon applying breaks they failed and the truck therefore rammed on the main gate.

14. In his testimony before the Court, the Claimant stated that on 1st April 2015, he was instructed by the Respondent's Sales Manager, Abdulrahman and Director, Omar to drive the truck to Mariakani.

15. In its response, the Respondent generally denies the Claimant's claim. The Respondent did not however call any evidence to counter the Claimant's account of the events leading to his dismissal. The Respondent's mechanic and officers who were mentioned by the Claimant by name were crucial witnesses that the Respondent did not bother to call.

16. Moreover, there was no evidence that the Claimant's response to the show cause letter was ever given any consideration by the Respondent. Indeed, the show cause letter dated 1st April 2015 also served to send the Claimant on 21 days' compulsory leave.

17. It seems to me therefore that the Respondent did not subject the Claimant to the mandatory disciplinary procedure established under Section 41 of the Employment Act, 2007. The allegations against the Claimant were therefore untested and unproved and the Respondent failed to establish a valid reason for dismissing the Claimant.

18. Flowing from the foregoing, I have arrived at the conclusion that the Claimant's dismissal was substantively and procedurally unfair and he is entitled to compensation.

Remedies

19. In light of the foregoing findings, I award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the dismissal process. I further award the Claimant one (1) month's salary in lieu of notice.

20. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

21. The Respondent did not provide any evidence to show that the monthly salary paid to the Claimant was inclusive of house allowance. I therefore allow the claim thereon at 15% of the basic salary and adopt the resultant figure of Kshs. 23,000 as the Claimant's monthly salary for purposes of this claim.

22. Apart from the 21 days' compulsory leave documented by the show cause letter, there was no evidence that the Claimant was allowed

normal annual leave. He is therefore entitled to leave pay. Similarly, there was no evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF). The claim for service pay therefore also succeeds and is allowed.

23. The claims for underpayment, rest days, public holidays and overtime were not proved and are dismissed.

24. Finally, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 138,000
b) 1 month's salary in lieu of notice.....	23,000
c) House allowance for 34 months @ Kshs. 3,000.....	102,000
d) Leave pay for 2 years (23,000/30x21x2).....	32,200
e) Prorata leave for 10 months (23,000/30x1.75x10).....	13,417
f) Service pay for 2 years (23,000/30x15x2).....	<u>23,000</u>
Total.....	331,617

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

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

27. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Mbuya for the Claimant

No appearance for the Respondent