



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 69 OF 2018

OMAR NDARO ZUMA.....CLAIMANT

VERSUS

MODERN COAST EXPRESS.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 7th February 2018 and filed in court on 9th February 2018, the Claimant has sued the Respondent for unfair termination of employment.
2. By the time the matter came up before me for pre-trial on 9th October 2018, the Respondent had not filed any response. I therefore set it down for formal proof.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a bus conductor from September 2013 until 30th September 2017 when his employment was terminated. He avers that there was no justifiable cause for the termination and that he was not afforded an opportunity to be heard.
4. The Claimant adds that he was not given notice and was not paid his salary for September 2017. Further, the Claimant claims that the Respondent did not make regular remittances to his National Social Security Fund (NSSF) account and did not allow him to go on leave.
5. The Claimant’s claim is as follows:

- a) Salary for the month of September 2017.....Kshs. 16,369
- b) 1 month’s salary in lieu of notice.....16,369
- c) 12 months’ salary in compensation.....196,428
- d) Service pay for 1 year.....8,184
- e) 3 years leave pay.....49,107
- f) Public holidays.....24,769

g) Punitive damages

h) Certificate of service

Findings and Determination

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

a) Whether the Claimant has proved a case of unlawful termination of employment;

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

Unlawful Termination?

7. Section 47(5) of the Employment Act, 2007 provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

8. The import of Section 47(5) of the Employment Act is that an employee alleging unfair termination or wrongful dismissal must lay before the Court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say ‘my employment was unfairly terminated’. They must prove ingredients of the unfair termination or wrongful dismissal.

9. In his pleadings and witness statement, all the Claimant says is that his employment was unfairly terminated. From this statement, the Court was unable to draw any conclusion of unfair termination. The Claimant failed to prove his case as required by Section 47(5) of the Employment Act and his claims for compensation and notice pay are therefore without basis.

Other Claims

10. In the absence of records to the contrary, the claims for salary for September 2017 and leave pay succeed and are allowed.

11. The claims for service pay, public holidays and punitive damages were not proved and are dismissed.

12. I therefore enter judgment in favour of the Claimant as follows:

a) Salary for September 2017.....Kshs. 16,369

b) Leave pay for 3 years (16,369/30x21x3).....34,375

Total.....50,744

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

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

DATED SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF MARCH 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

No appearance for the Respondent