



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 764 OF 2017

JOHN ODUOR OSUR.....CLAIMANT

VS

BIG ROAD ENTERPRISES.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 30th June 2017 and filed in court on 21st September 2017, the Claimant sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Statement of Response on 21st November 2017.

2. At the trial, the Claimant testified on his own behalf and Ismail A. Hassan testified for the Respondent. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a truck driver at a monthly salary of Kshs. 20,000 from December 2016 until 10th June 2017. He was not issued with a formal contract of employment and was not issued with a pay slip.

4. The Claimant avers that he was instructed by the Respondent's Manager, one Mr. Ismail to go home and wait to be called back. He deemed this to be unlawful and unfair termination of his employment.

5. The Claimant claims that he was underpaid, in addition to the Respondent making unauthorized deductions from his salary. He further states that he was not paid house allowance.

6. The Claimant therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 24,719.50
- b) House allowance for 6 months.....22,247.55
- c) Underpayment for 6 months.....28,317.00
- d) Prorata leave pay.....9,975.00
- e) Unlawful salary deductions.....82,639.00
- f) 12 months' salary in compensation.....296,634.00
- g) Costs plus interest

The Respondent's Case

7. In its Statement of Response dated 20th November 2017 and filed in court on 21st November 2017, the Respondent admits having employed the Claimant but denies the effective date of December 2016. The Respondent states that the Claimant's employment commenced

on 15th January 2017. He was issued with a written contract of employment of the same date as well as a drivers' duties and responsibilities agreement dated 21st January 2017, which he duly executed.

8. The Respondent avers that sometime in June 2017 the Claimant failed to report to work for a period of 21 days. The Respondent adds that at this time the Claimant was serving probation.

9. The Respondent states that prior to absconding duty, the Claimant grossly misconducted himself by:

- a) Engaging in unlawful pilferages of oil from the Respondent's motor vehicle;
- b) Illegally loading an empty container without express consent of the Respondent ;
- c) Carrying goods without prior consent of and/or knowledge of the Respondent;
- d) Negligently driving the Respondent's motor vehicle thus causing damage to it.

10. The Respondent goes on to state that upon arrival in Mombasa on 9th June 2017, the Claimant was arrested and booked at Changamwe Police Station on the ground that the container guarantee he had had expired. On 10th June 2017, the Claimant wrote a letter confirming that he had engaged in unlawful and illegal activities that were prohibited by the Respondent.

11. The Respondent adds that the Claimant had previously been warned and advised to desist from misbehaviour and misconduct but the Claimant had not heeded the advice.

12. The Respondent denies terminating the Claimant's employment and further denies the claim for underpayment and states that the Claimant was paid a consolidated salary. The Respondent also denies the claim for unlawful salary deductions.

Findings and Determination

13. The first issue for determination in this case is whether at the time of leaving the Respondent's employment, the Claimant was on probation. In advancing its position in this regard, the Respondent relied on a contract of employment dated 15th January 2017.

14. The Claimant denied knowledge of this contract but the Court did not believe him mainly because he was equivocal about the effective date of his employment. While in his Memorandum of Claim, he states that he was employed by the Respondent from December 2016, he testified before the Court that his employment commenced on 15th January 2017, the same date contained in the contract of employment he disowned.

15. The Court therefore reached the conclusion that the Claimant's employment was documented by the employment contract dated 15th January 2017. The said contract expressly states that the Claimant was to be on probation for a period of six months. Taking 10th June 2017 as the effective date of termination, it is evident that at the time of exit the Claimant was serving probation. Under Section 42 of the Employment Act, 2007 the Claimant was not entitled to the procedural fairness requirements established under Section 41 of the Act. Indeed, the only thing he was entitled to was seven (7) days' notice or wages in lieu.

16. The claims for compensation and one month's salary in notice pay are therefore without basis and are dismissed.

17. Regarding the claim for house allowance I have this to say; the Respondent did not provide any evidence to show that the Claimant earned a consolidated salary. 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. The Claimant is also entitled to prorata leave for the period served.

18. The claims for underpayment and unlawful salary deductions were not proved and are dismissed.

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

- a) 7 days' salary in notice pay (23,000/30x7).....Kshs.5,367
- b) House allowance for 5 months (3,000x5).....15,000
- c) Prorata leave pay for 5 months (23,000/30x1.75x5).....6,708
- Total.....27,075**

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

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

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

LINNET NDOLO

JUDGE

Appearance:

Mr. Muganda for the Claimant

Mr. Khalid for the Respondent