



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1679 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 4th March, 2019)

ZABLON KARIUKI KAHURA.....CLAIMANT

VERSUS

RAGOS TRADING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the instant Claim on 22nd August, 2015, through the firm of Namada & Company Advocates seeking damages for unfair and unlawful dismissal and non-payment of terminal dues and damages.

2. The Claimant states that he was employed by the Respondent as a Driver on 2nd January, 2013, earning a basic monthly salary of Kenya Shillings Twenty Eight Thousand Only. He further states that during his years in the Respondent's employment he neither proceeded on annual leave nor were any deductions remitted to his NSSF account.

3. The Claimant further states that on or about 5th April, 2015 he received a phone call from his boss informing him to park the Respondent's truck and leave duty and that he will be recalled on a later date. However, the Claimant was never recalled to work.

4. The Claimant avers that no reason was given to him for his dismissal.

5. He further avers that the Respondent's action to dismiss him was unfair for the following reasons:-

(i) No notice to dismiss him from employment was served upon him.

(ii) The Claimant had done nothing wrong to warrant the dismissal

(iii) No hearing ever took place before the alleged decision to dismiss the Claimant was reached

(iv) Due process was not followed in dismissing the Claimant

(v) The decision to dismiss the Claimant was extremely harsh, unwarranted and unjustified considering that he had served the Respondent without blemish.

6. In his Memorandum of Claim the Claimant prays for Judgment to be entered against the Respondent for:-

a) A declaration that the Respondent's dismissal of the Claimant from employment was unlawful, unfair and inhumane.

b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

c) An Order for the Respondent to pay the Claimant his due terminal benefits totalling to Kshs. 448,000/=.

d) Interest on (c) above from the date of filing suit until payment in full.

7. The Respondent in its Memorandum of Reply and Counterclaim dated 2nd March, 2016 and filed in Court on 9th March, 2016, in which they admit having engaged the Claimant herein as a driver from 1st January, 2013. However, the Respondent contends the Claimant failed to render his services diligently and to the Respondent's satisfaction as alleged.

8. The Respondent further contends that the Claimant was familiarized with and bound by the Respondent Company's policies, procedures and regulations as at the time of engagement.
9. The Respondent averred that it had valid reasons for terminating the Claimant's services as through the Claimant's actions of siphoning and reducing product qualities on transit, the Respondent suffered loss amounting to Kshs. 342,342.00/=.
10. The Respondent further avers that it did issue a notice to show cause to the Claimant through its letter dated 5th April, 2015 and the Claimant was invited for a disciplinary hearing on 30th April, 2015. However, the Claimant neither replied to the notice to show cause nor did he attend the hearing scheduled for 30th April, 2015.
11. The Respondent contends that the disciplinary hearing proceeded albeit in the Claimant's absence and the management resorted to summarily dismiss the Claimant with effect from 30th April, 2015. Further, a letter of termination as well as the certificate of service was duly issued to the Claimant.
12. The Respondent further contends that it did not pay the Claimant one month's salary in lieu of notice as the same was not due since the Claimant was summarily dismissed.
13. The Respondent avers that it made contributions to NSSF as required by law and that the Claimant is not entitled to gratuity as his terms of engagement do not provide for the same.
14. The Respondent further avers that the Claimant is entitled to payment in lieu of leave for 5 days in the year 2015 which translates to Kshs.6,666/- which amount the Respondent prays that it be set off from the amount owed to it by the Claimant. The Respondent contends that the Claimant owes it a sum of Kshs. 335,676/-
15. In conclusion, the Respondent urged the Court to dismiss the instant Claim with costs to the Respondent and Judgment in its favour for the sum of Kshs. 342,342.00 subject to set off.

Evidence

16. On 21st October, 2018, the Claimant (CW1) in his testimony stated that he was employed by the Respondent from 2nd January, 2013 as a driver earning a monthly salary of Kshs.28,000/-. CW1 further testified that at the time of appointment he was issued with a job ID card.
17. CW1 further testified that on 5th April, 2015 he was on duty at Nakuru when he was called by his boss Mr. Isaac Mohamed and that he informed him that he had been waiting for fuel for 2 weeks. He avers that Mr. Mohamed informed him to park the Motor Vehicle Registration Number KBQ 376. Further, he was later informed that his services were no longer needed.
18. CW1 averred that prior to his dismissal he was not issued with any letter of dismissal nor was he given the reason for his termination. CW1 further stated that he was not subjected to any disciplinary hearing prior to his termination.
19. CW1 further averred that during the time of his employment with the Respondent herein he never proceeded on leave and that he was not a member of NSSF.
20. It was the Claimant's testimony that once the product (fuel) was loaded on the trucks it was sealed and could only be opened once it was delivered to the Client by the Client's authorized officers.
21. CW1 further testified that fluctuations in fuel levels would be cause by prevailing weather conditions at the time and that the allegation by the Respondent of siphoning and/or loss of fuel are unfounded and unsubstantiated and are an attempt to cover the Respondent's action of unfair termination.
22. CW1 testified that the letters at page 11 and 13 of the Respondent's documents are not his as the signature appended thereto is not his. He further stated that he was not issued with any show cause letter.
23. CW1 further testified that following his dismissal he asked his Advocate on record to prepare and deliver to the Respondent herein a demand letter which is annexed to his claim and marked Appendix 2.
24. On cross-examination CW1 stated that he had been in Nakuru for 2 weeks waiting for fuel and that sometimes they would be forced to wait for fuel for up to 3 weeks and that he was with Motor Vehicle Registration Number KBQ 376.
25. On further cross-examination, CW1 stated that on 5th April, 2015 he was not issued with any show cause letter on siphoning of fuel. CW1 further averred that the letters allegedly written by him in the Respondent's documents are not written by him and that the signature appended thereto is not his.
26. CW1 contended that he was not a member of NSSF during the time he was engaged by the Respondent. He further stated that he has never absconded duty while under the Respondent's employment.
27. CW1 further contended that the Counterclaim by the Respondent is not true.

28. On re-examination, CW1 confirmed that the demand letter was done and delivered to the Respondent Company.
29. The Respondent put up one witness one Mr. Mohamed Isaack Abdi, the Managing Director of the Respondent's Company. RW1's written statement dated 30th August, 2018 was adopted by Court as his evidence in chief in which he reiterated the averments in the Memorandum in Response to the Claim.
30. RW1 in his statement states that the Claimant was terminated due to breach in his terms and conditions of work due to loss of fuel that was syphoned. RW1 further stated that the Claimant was issued with a notice to show cause dated 5/4/2015 and he failed to resume work until 30/4/2015 when the Committee sat and summarily dismissed the Claimant's services.
31. RW1 averred the Claimant absconded duty prior to his summary dismissal on 30/4/2015. He further urged the Court to allow the prayers in the Response filed hereto and the Counterclaim on record.
32. On cross-examination, RW1 stated that the Motor Vehicles are fitted with a computer tracking system. However, no records were availed to the Court to review what is available is the complaints made by the customers of the shortage in fuel.
33. On further cross-examination, RW1 confirmed that he had never reported the theft/siphoning of fuel to any police station. He further stated that the Respondent sat down as a committee and decided to dismiss the Claimant.
34. RW1 testified that there were minutes taken during the meeting but were not availed to the Court. He further stated that he issued the Claimant with the notice to show cause. However, the Claimant did not receive the same.
35. RW1 further testified that the Claimant did take leave during the subsistence of his engagement with the Respondent. However, RW1 admitted not having furnished the Court with such record for review.
36. On re-examination, RW1 stated that all records are available at the Respondent Company office. He further stated that the Claimant signed the shortage record and that the same is available at the Respondent's office.
37. RW1 further confirmed that the minutes of the disciplinary hearing were recorded and are available at the Respondent's Office.
38. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

39. The Claimant submitted that his termination from the Respondent's employment was unfair and unlawful as the Respondent failed to adhere to the provisions of **Section 41 and 45 of the Employment Act, 2007** while terminating his services.
40. The Claimant relied on the Authority of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers Vs Mombasa Sports Club, Cause No. 440 of 2013** where it was held that:-

“No employer shall terminate the employment of an employee unfairly... termination of employment is unfair by an employer if the employee fails to prove (a) that the reason for termination is valid: (b) that the reason for termination is a fair reason...”

41. The Claimant further relied on the case of **Donald Odeke Vs Fidelity Security Limited, Cause No. 1998 of 2011** where it was held:-

“That an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them... it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.”

42. The Claimant further submitted that he is entitled to the relief as sought in his Memorandum of Claim under the Provisions of Sections 28, 35 (5), 36 and 49 of the Employment Act, 2007.
43. The Claimant averred that he is entitled to be issued with a certificate of service as provided for by Section 51 of the Employment Act, 2007.
44. In conclusion, the Claimant submitted that the instant Claim be allowed as prayed and the counterclaim filed by the Respondent herein be dismissed with costs to the Claimant. The Claimant further prayed for costs and interest from the date of filing.
45. There are no submissions on record filed on behalf of the Respondent herein.
46. I have examined all the evidence on record by both parties and submissions filed herein. The issues for this Court's determination are as follows:-

- 1. Whether there were valid reasons to terminate the services of the Claimant.**
- 2. Whether the Claimant was subjected to due process before being terminated.**

3. What remedies to grant in the circumstances.

47. On the first issue, the Respondent avers that they terminated the Claimant for siphoning fuel. The Respondent herein admit that their vehicles were fitted with computer tracking systems. The Respondents also admitted that they did not have the evidence of the alleged siphoning.

48. Section 43 of Employment Act states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

49. The Respondents are therefore duty bound to prove the reasons for the dismissal, which they did not. I therefore find that there were no valid reasons to terminate the services of the Claimant.

50. On the 2nd issue, the law is clear that before termination of an employee, due process should be followed.

51. Section 41 of Employment Act 2007 states as follows:-

1) “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

52. The Respondent avers that they served the Claimant with a show cause letter, which he did not respond to. The Claimant denied ever receiving any show cause letter. The Respondent failed to prove service of such a show cause letter.

53. The Respondents further stated that the Committee sat and decided to terminate the services of the Claimant. The Claimant was never invited to the said committee meeting. He was never given an opportunity to defend himself or present his side of the story. He was therefore condemned unheard.

54. This is in breach of the express provisions of Section 41 of Employment Act 2007.

55. On the issue No. 3, the Respondent aver that the Claimant owed them Kshs.342,342/=. They did not give any evidence to show how they arrived at that conclusion. That claim therefore remains a mere allegation.

56. Since the Claimant was dismissed without valid reasons and without following due process, I find his dismissal unfair and unjustified. I therefore award him as follows:-

1. 1 month salary in lieu of notice = 28,000/=.

2. Leave pay for 1 year = 28,000/=.

3. Service pay at 15 days salary for each year of service = $\frac{1}{2} \times 28,000 \times 2 = 28,000/=$

4. Compensation equivalent to 8 months' pay for unlawful and unfair dismissal = $8 \times 28 = 224,000/=$

TOTAL 308,000/=

5. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 4th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochola holding brief Mulako for Claimant

Respondent – Absent