



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 779 OF 2015

PIUS OWUOR OGAO.....CLAIMANT

VS

AUTO HAULIERS (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 16th October 2015, the Claimant filed a Memorandum of Claim seeking compensation for unfair termination of employment and payment of terminal dues. The Respondent replied to the claim by way of a Memorandum of Response dated 15th December 2015 and filed in court on 23rd December 2015.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its General Manager, Riaz Abdulrahman Ibrahim and Accountant, Joel Wambua Mbithuka. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as an Assistant Mechanic at a monthly salary of Kshs. 8,000 effective 1st February 2013 until 15th March 2015 when his employment was terminated.
4. The Claimant claims that the termination of his employment was unlawful and unfair. He therefore claims the following:
 - a) One month's salary in lieu of notice.....Kshs. 8,000
 - b) Leave pay for 3 years.....19,404
 - c) Public holidays.....18,480
 - d) 12 months' salary in compensation.....96,000
 - e) Costs plus interest

The Respondent's Case

5. In its Memorandum of Response dated 15th December 2015 and filed in court on 23rd December 2015, the Respondent admits having employed the Claimant but denies the accusations of unlawful and unfair termination.
6. The Respondent avers that the termination of the Claimant's employment was lawful and regular on account of the Claimant's continuous absenteeism from work, which was not compatible with the Respondent's business.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

8. The Respondent produced a termination letter dated 31st March 2015, addressed to the Claimant as follows:

“Dear Sir,

RE: TERMINATION OF SERVICE

The management has noted you Luck (sic) of interest in working with us, you have been absent for along (sic) time with no concrete explanation which leaves us no choice but to look for a replacement to carry on with your duties.

The company is therefore terminating your service immediately because Already your Absenteeism and silence means you are no longer interested in working with us.

We hope you will co-operate in this matter and hand over all your responsibilities and company properties in your possession to your immediate senior- Mr. Murtaza.

You can collect your dues from the Office after clearing with the workshop.

We wish you best of luck in your future endeavours.

Yours Faithfully,

(Signed)

RIYAZ ADMANI

GENERAL MANAGER”

9. This letter accuses the Claimant of absenteeism and lack of interest in his work. In his testimony before the Court, the Claimant stated that due to an injury sustained while at work, he was away for two weeks in March 2015. Upon reporting back to work on 15th March 2015, he was informed by the Workshop Manager that his position had been taken over by somebody else. He went to the Respondent's main office to inquire about his employment but was instead paid Kshs. 11,257 and subsequently sent away.

10. The Respondent's General Manager, Riaz Abdulrahman Ibrahim confirmed that the Claimant was injured at work and that he was given 5 days off. According to Ibrahim the Claimant came back to work after the 5 days but left immediately. The Claimant was therefore issued with a show cause letter through his co-worker, Patrick Oluoch.

11. The Claimant denied receiving any show cause letter from the Respondent and Patrick Oluoch who is said to have delivered the letter to the Claimant was not called as a witness. If indeed the Claimant deserted duty, then the Respondent was under an obligation to reach out to him with a view to putting him on notice that termination of his employment on account of desertion was being considered (see **James Namayi v Menengai Oil Refineries Ltd [2016] eKLR**). In the absence of evidence of any such efforts on the part of the Respondent, the Court finds and holds that the allegation of desertion was not proved. Conversely, the Court adopts the Claimant's assertion that his employment was terminated without justifiable cause and in violation of due procedure.

Remedies

12. Arising from the foregoing findings, I award the Claimant five (5) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's conduct in handling the Claimant's case.

13. From the evidence on record, the Claimant was paid one (1) month's salary in lieu of notice. The claim for notice pay is therefore misplaced.

14. In response to the claim for leave pay the Respondent produced a number of staff leave requisition forms bearing the Claimant's name. However only one requisition form dated 7th October 2013, by which the Claimant was granted 4 days' leave, was signed by the Claimant. According to the final dues tabulation sheet produced by the Respondent, the Claimant was paid 14.5 days' leave pay. Discounting the 4 days taken by the Claimant and 14.5 days paid at termination, the Claimant is entitled to 27 days' leave pay.

15. The claim for public holidays was not proved and is dismissed.

16. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 5 months' salary in compensation.....Kshs. 40,000

b) 27 days' leave pay (8,000/30x27)..... 7,200

Total.....47,200

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

18. The Claimant will have the costs of the case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

LINNET NDOLO

JUDGE

Appearance:

Miss Kitoo for the Claimant

Mr. Mulei for the Respondent