



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2107 OF 2014

NICHOLAS KIRIMI.....CLAIMANT

V

SBI INTERNATIONAL HOLDINGS AG (KENYA).....RESPONDENT

JUDGMENT

1. SBI International Holdings AG (Kenya) Respondent offered Nicholas Kirimi (Claimant) employment as a driver on 19 January 2013.
2. The relationship hit the rocks for on 21 August 2014, the Respondent wrote to the Claimant to notify him of the termination of his employment.
3. The Claimant was aggrieved and he launched legal proceedings against the Respondent on 24 November 2014 alleging unfair termination of employment and breach of contract.
4. The Respondent filed a *Response* on 20 February 2015 denying the pleas by the Claimant.
5. The Cause was heard on 18 October 2018 when the Claimant testified and closed his case, and on 4 March 2019 when the Respondent's Accountant testified on its behalf and had its case closed. The 2 witnesses adopted their written witness statements.
6. The Claimant filed his submissions on 15 March 2019 while the Respondent filed its submissions on 22 March 2019.
7. The Court has considered the pleadings, evidence and submissions and adopted the Issues for determination as set out in the Respondent's submissions (Claimant did not expressly identify the Issues for determination in his submissions) being
 - i. Whether there were valid reasons to warrant summary dismissal of the Claimant
 - ii. Whether due process was accorded to the Claimant before dismissal and
 - iii. Whether the reliefs sought by the Claimant should be granted.

Unfair termination of employment

Procedural fairness

8. Section 35(1)(c) of the Employment Act, 2007 demands the giving of *written notice of termination of employment* of at least 28 days (in cases where salary is paid by the month), unless in case of summary dismissal.
9. Apart from the *written notice of termination*, which may serve as a *show cause*, section 41 contemplates affording the employee an opportunity to make representations before termination of employment is effected.
10. Although denying that he received the *show cause*, the Claimant did not explain how he got a copy of the *show cause* produced in Court.
11. The Respondent's witness however explained that the Claimant took the *show cause* but refused to acknowledge receipt.

12. Both parties produced copies of a *show cause* dated 13 August 2014 setting out the allegations the Claimant was required to confront and further inviting him to an oral hearing on 14 August 2014.

13. In the view of the Court, it is more probable that the Claimant was served with the *show cause*, but declined to acknowledge receipt considering that he did not offer an explanation as to how he got a copy of the *show cause*.

14. The Claimant did not testify as to whether he attended the hearing on 14 August 2014 or rebut the Respondent's witness testimony that he attended the hearing.

15. The Court will find that the Claimant attended the hearing, after which a decision to terminate his employment was taken and a letter dated 21 August 2014 issued.

16. The Court is satisfied that the Respondent was in compliance with the requirements of procedural fairness as envisaged by sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

17. In terms of sections 43 and 45 of the Employment Act, 2007, it is the duty of an employer to demonstrate that the reasons for termination of a contract are valid and fair.

18. The reasons given for the termination of the Claimant's contract were

Carelessly and improperly performed your work

and

Arrested for an offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise set at liberty.

19. It was common that the Claimant was arrested for speeding on 12 August 2014, was arraigned in Court and pleaded guilty to the traffic charge of speeding.

20. The Claimant was fined upon his own plea of guilty.

21. The Respondent had a Drivers and Operators Code of Practice which at clause 18 expressly forbade *over speeding* while on duty.

22. By pleading guilty before the Traffic Court, the Claimant was admitting that he was not only in breach of the traffic laws but the terms of his contract with the Respondent.

23. The Court therefore has no hesitation in finding that the Respondent had valid and fair reasons to terminate the Claimant's employment.

Breach of contract

24. Annual leave is a statutory right. It is also provided for in most contracts, and therefore where an employer declines to allow an employee to take annual leave, the employer would be in breach of both statute and contract.

25. During testimony, the Claimant stated that he had 23 accrued leave days by time of separation, for which he sought Kshs 45,795/-.

26. The Respondent produced a schedule indicating the terminal dues owing to the Claimant, and among the item heads was Kshs 4,769/- in respect of leave 6 leave days.

27. The Court is inclined to accept the record from the Respondent that the Claimant had 6 accrued leave days.

Conclusion and Orders

28. From the foregoing, the Court finds and holds that the termination of the Claimant's employment was not unfair and, that the Respondent was not in breach of contract.

29. The Cause is dismissed with no order as to costs.

30. The Claimant is free to collect the terminal dues as computed by the Respondent.

Delivered, dated and signed in Nairobi on this 31st day of May 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onyango instructed by A.I. Onyango & Co. Advocates

For Respondent Mr. Kamande instructed by Prof. Albert Mumma & Co. Advocates

Court Assistant Lindsey/Stella