



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 507 OF 2015

PETER NZIOKA MUSEMBI.....CLAIMANT

VERSUS

ESQUIRE WHOLESALERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 31st March 2015, the Claimant filed a claim against the Respondent seeking compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Response on 13th May 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Operations Officer, Ashish Dinesh Halai and Administrator, Joseph Tabu Ondhong. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant pleads that he was employed by the Respondent as a driver at an initial monthly salary of Kshs. 15,553. The Claimant states that his salary fluctuated from Kshs. 41,812 in December 2013 to Kshs. 24,591 in February 2015.

4. On 14th March 2015, the Claimant was issued with a letter of summary dismissal, which he received but declined to sign.

5. The Claimant states that he was not allowed an opportunity to be heard prior to dismissal. He now claims the following:

- a) One month's salary in lieu of notice
- b) Salary for 14 days in March 2014.....Kshs. 16,259
- c) House allowance for 13 months @ 2,500 per month.....32,500
- d) 12 months' salary in compensation for wrongful dismissal
- e) Costs plus interest

The Respondent's Case

6. In its Memorandum of Response dated 13th May 2015 and filed in court on even date, the Respondent states that the Claimant was employed on 29th October 2012. He was paid weekly wages until 2nd January 2013, when he was confirmed.

7. The Respondent avers that the Claimant's fluctuating salary was on the basis of overtime worked. The Respondent adds that the salary for the month of December was enhanced by virtue of pay in lieu of leave.

8. The Respondent denies terminating the Claimant's employment and states that the Claimant became unruly at a meeting convened to discuss allegations of gross misconduct against him, whereupon he walked away never to return.

9. The Respondent further accuses the Claimant of misconducting himself by reporting to work late while intoxicated and defying lawful instructions.

Findings and Determination

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

- a) Whether the Claimant has established a case of wrongful dismissal;
- b) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

11. The Claimant produced an unsigned summary dismissal letter citing intoxication at work and failure to obey lawful instructions, as grounds for dismissal. The Respondent's Administrator, Joseph Tabu Ondhong admitted having prepared a draft dismissal letter but there was no evidence that the letter was properly issued to the Claimant. Indeed, the Claimant himself told the Court that he hastily left with the draft letter in order to engage the Respondent's Director. On his part, Ondhong testified that the Claimant grabbed the letter from him.

12. What is clear is that the circumstances under which the Claimant received the draft letter do not constitute issuance of a formal dismissal letter. That said, the next thing to do is to inquire into the Respondent's allegation that the Claimant absconded duty, which in itself would be a ground for dismissal.

13. The Respondent's witnesses told the Court that the Claimant walked out of a disciplinary meeting and did not return. It is now well settled that an employer alleging that an employee has absconded duty must show that the employee has been put on notice that termination of his employment on this ground is being considered (see *Godfrey Anjere v Unique Suppliers Limited [2015] eKLR*).

14. In the instant case, no such notice was issued to the Claimant and the Respondent cannot therefore come to court and say that the Claimant absconded duty. Ondhong admitted that the Claimant was no longer an employee of the Respondent and the Court having rejected the Respondent's line of defence that he absconded duty, the only conclusion to make is that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure.

Remedies

15. Flowing from these findings, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

16. I further award the Claimant one (1) month's salary in lieu of notice plus salary for 14 days worked in March 2015.

17. From his payslips, it is evident the Claimant was paid house allowance. The claim thereon is therefore without basis and is dismissed.

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

- a) 8 months' salary in compensation.....Kshs. 158,304
 - b) 1 month's salary in lieu of notice..... 19,788
 - c) Salary for 14 days in March 2015 (19,788/30x14).....9,234
- Total.....187,326**

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

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

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Ambaka for the Claimant

Miss Koki for the Respondent