



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 673(A) OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SIMON GITHUKA MAINA.....CLAIMANT

VERSUS

EPCO BUILDERS LIMITED.....RESPONDENT

JUDGMENT

Vide his statement of claim dated and filed on 23rd April 2014, the claimant avers that his employment was unfairly terminated by the respondent, a registered limited liability company in the construction industry.

His case is that he was employed by the respondent on or about 15th January 2015 as a heavy commercial vehicle driver. He was originally engaged on casual terms at a daily wage of Kshs.450/= per day which increased to Kshs.550/= per day from 1st October 2008. From 1st February 2009 he was engaged on a three (3) months' contract at a monthly wage of Kshs.15,600 which was on 1st May 2009 increased to Kshs.15,835. In My 2010 the salary increased to Kshs.16,510 and in May 2011 to Kshs.17,000 per month.

The claimant avers that his employment was terminated unfairly on 16th November 2013. At the time he was earning salary of Kshs.20,020 per month. His salary was consolidated.

The claimant testified that he first worked in Nairobi before he was transferred to Olkaria in Naivasha where the respondent had a project. That while at Olkaria he was driving a concrete mixer.

That on 14th November 2013 he was informed that four pairs of safety boots were found in the motor vehicle and he was accused of intention to steal the same. That evening he was called by a Mr. Suresh, the Site Manager who told him to report to the Transport Manager in Nairobi. He testified that he reported to Nairobi on 16th November 2013 and reported to the Transport Manager, Mr Kasam who asked him to explain what happened in Naivasha, which he did in writing and left in the Transport Manager's in-tray as directed.

He testified that on 17th November 2013 he went to the office of the Human Resource Manager, Mr. Owino (RW1) to inquire about his case. He testified that he asked for his letter since he already knew that his employment had been terminated. He was thereafter given a letter of dismissal.

It is his case that the termination was unfair as he did nothing wrong.

The claimant prayed for 16 days' salary Kshs.15,619.50/= 31.5 days leave Kshs.30,750.00, Notice of two months Kshs.50,763, 50 weekly rest days at Kshs.53,130/=, seven (7) public holidays at Kshs.7,435 and underpayments of Kshs.143,384.20. In total he prayed for Kshs.605,629.10. He further prayed for 12 months' salary as compensation, certificate of service, costs and interest and any other relief the court may deem fit to grant.

Asked during cross examination about the boots found in the vehicle he stated that they were kept there by the casual labours for safety. He further stated that he was not asked to write a statement until 16th November 2013 at Nairobi.

The respondent filed a statement of defence on 29th May 2014 in which it states the claimant worked as a driver in its transport department from January 2008 until 25th November 2013, that the claimant exhibited untrustworthy character and negligence in the performance of his work. According to the respondent the claimant was originally paid Kshs.500 daily wage which was increased to Kshs.550 per day. His last wage was Kshs.770/= per day translating to Kshs.20,020 per month. The respondent states it paid wages in line with legal notices of

minimum wages.

BERNARD OWINO, the respondent Human Resource Manager who testified on its behalf, relied on his witness statement. He testified that he knew the claimant who was employed as a driver, that the claimant was reckless and the vehicle the claimant drove broke down frequently.

He testified that on 14th November 2013 there was a call from the Transport Manager who reported that the claimant had been found with four pairs of safety boots in the cabin of his truck. He was asked to explain how the boots got into the cabin but refused and disappeared from site in Naivasha. The claimant never showed up prompting the respondent to report the matter to Kongoni Police Station in Naivasha. When the claimant did not show up after 7 days, he was issued with a letter of summary dismissal dated 28th November 2013.

Under cross examination Mr. Owino testified that he was not aware the claimant prepared a statement. He further stated that the claimant was called for a hearing by a verbal notice on 28th November 2013.

He testified that the respondent did not work on weekends and public holidays and that if anyone worked they were paid overtime.

He stated he was not aware if the claimant went on annual leave, that the respondent did not pay NSSF and NHIF for the claimant.

He testified that the claimant was paid on weekly basis and was paid all money due to him.

Determination

I have considered the pleadings, the evidence adduced by the claimant and the respondent's witness and the written submissions. The issues arising for determination are whether the claimant's employment was unfairly terminated and if he is entitled to the remedies sought.

It is not contested that the cause of the dismissal of the claimant was the safety boots found in the cabin of the vehicle assigned to him. It is clear from the evidence on record that the claimant was never accorded a hearing as envisaged under Section 41 of the Employment Act. The claimant's explanation that the safety boots were kept in the cabin of his vehicle by the casuals for safety can therefore not be faulted.

I therefore find the dismissal of the claimant unfair.

On the remedies sought by the claimant the respondent did not file any proof that the claimant was paid for the 16 days he worked in November 2013.

The claimant further prayed for underpayments of Kshs.143,348.20/=. The underpayments are based on the wages of a driver of a heavy commercial vehicle in Nairobi. The respondent did not deny that the lorry that the claimant drove was a heavy commercial vehicle. I will therefore base the claimant's payments on the salary of a heavy commercial driver.

I will further limit the underpayments to three years that is from 1st November 2010 to November 2013 when the claimant was terminated.

I award the claimant underpayments as follows –

From November 2010 to April 2011 Kshs.998.40 epr month for six months – Kshs.5,990.40.

From May 2011 to April 2013, 12 months at Kkshs.2,685.70 per month – Kshs.32,228.40.

From 1st May 2012 to April 2013, 12 months at Kshs.4,064.50 per month Kshs.48,774/=.

From 1st May 2013 to October 2013 at Kshs.2,244.50 x 6 = Kshs.13,467/=.

I award the claimant a total of Kshs.100,459.40 as underpayments.

The claimant is further entitled to leave of 31.5 days. RW1 testified that he was not sure if the claimant took any leave during the period the claimant worked for the respondent. I award him leave at Kshs.30,750.80/=.

The claimant prayed for two months' notice. He is whoever only entitled to one month's notice which I award him at Kshs.25,381.60 being one month's salary in lieu of notice.

The claimant did not prove that he worked on rest days or public holidays for which he was not paid. The claim for the same are dismissed.

Taking into account the claimant's length of service and all other relevant factors, I award him 7 months' salary as compensation in the sum of Kshs.177,671.20/=.

In summary therefore I award the claimant the following –

- 1.. Salary for 16 days worked in November 2013..... Kshs.15,619.50
- 2.. Underpayments..... Kshs.100,459.40
- 3.. Leave..... Kshs.30,750.80
- 4.. Notice..... Kshs.25,381.60
- 5.. Compensation..... Kshs.177,671.20

Total Kshs.349,882.90

The claimant is further entitled to certificate of service.

The respondent shall pay claimant's costs for this suit.

Interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE