



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 571 OF 2017

JOHN MENZA.....CLAIMANT

VS

CHINA ROAD & BRIDGE CORPORATION (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 12th July 2017 and filed in court on 13th July 2017, the Claimant sued the Respondent for unlawful termination of employment and payment of final dues. The Respondent filed a Response on 19th September 2018.
2. When the matter came up for hearing, the Claimant testified on his own behalf. The Respondent elected not to call any witness. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 18th November 2014, in the position of Shovel Machine Operator. In August 2016, the Claimant was transferred to Nairobi and on 9th November 2016, he was transferred back to Mombasa. He pleads his monthly salary at Kshs. 50,021.
4. On 13th March 2017, the Claimant was operating the Shovel Machine along Mkupe Road, when he was involved in an accident. On the same day, his employment was terminated. The Claimant states that the termination of his employment was unlawful and unprocedural, in that there was no valid reason for it and he was not allowed an opportunity to be heard. Additionally, he was not paid his terminal dues.
5. The Claimant's claim against the Respondent is as follows:

- a) Salary for March 2017.....Kshs. 50,021
- b) One month's salary in lieu of notice.....50,021
- c) 12 months' salary in compensation.....600,252
- d) Costs plus interest

The Respondent's Case

6. In its Response dated 17th September 2018 and filed in court on the same date, the Respondent denies the Claimant's claim in its entirety. The Respondent states that the claim does not disclose any reasonable cause of action.

Findings and Determination

7. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case of unlawful termination;
 - b) Whether the Claimant is entitled to the remedies sought.

The Termination

8. The Claimant told the Court that his employment was terminated following a minor non-damage accident, involving a Shovel Machine under his care. The Respondent did not call any evidence to contradict the Claimant's account in this regard. Further, in the final submissions filed on behalf of the Respondent, the termination of the Claimant's employment on 13th March 2017 is listed as an undisputed fact.

9. From the evidence on record, the Claimant's employment was terminated on the same day of the accident and there was no evidence of any due procedure adopted in effecting the termination.

10. The allegations leading to the termination were not tested at the shop floor, with the result that Section 43 of the Employment Act, 2007 which requires an employer to establish a valid reason for termination was not satisfied. Additionally, the Claimant was not given an opportunity to explain himself as required under Section 41 of the Act.

11. The Court therefore finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

12. Flowing from these findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service, coupled with the Respondent's conduct in effecting the termination.

13. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for days worked in February/March 2017.

14. Before making the final award, I need to settle the issue of the Claimant's monthly salary, which was contested by the parties. The Claimant pegs his claim on the figure of Kshs. 50,021 which he duly admitted was inclusive of overtime compensation.

15. In calculating the monthly salary for purposes of a claim such as the present one, the amount paid in overtime should be discounted. With this in mind and taking the hourly rate of Kshs 136 as admitted by the Claimant, the Court arrives at a daily rate of Kshs. 1,088. Allowing for paid rest days, the Claimant's monthly salary would have been Kshs. 32,640.

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

a) 6 months' salary in compensation.....	Kshs. 195,840
b) 1 month's salary in lieu of notice.....	32,640
c) Salary for 24 days in February/March 2017.....	<u>26,112</u>
Total.....	254,592

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 26TH DAY OF SEPTEMBER 2019

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JUDGE

Appearance:

Miss Wambani for the Claimant

Miss Ngigi for the Respondent