



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 723 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2019)

STEPHEN KIPIEGO MARTIM.....CLAIMANT

VERSUS

MURGIAN TRANSPORT (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim on 29th April 2015. He avers that he was employed by the Respondent as a Heavy Machine Vehicle driver until his termination on 23rd April 2014. He contends that his termination was unlawful termination as it was in total breach of the terms of his employment contract. He therefore seeks the following reliefs:-

a) Damages for unlawful termination of employment contract

b) Payment in lieu of notice

c) Severance Pay

d) Payment for leave days

e) Interest

f) Any other or further relief that this Honourable Court may deem fit and just to grant.

2. The Respondent filed its Statement of Reply on 4th June 2015 denying the Claimant's averments. It contends that the Claimant was negligent in the course of his duties and that he willingly accepted liability or the losses incurred and was willing to compensate it.

3. The Respondent denies having agreed to settle the labour dispute and avers that the Claimant had caused it through its directors to be prosecuted in Labour Case No. 1412 of 2014 which proceedings were intended to exert undue pressure on the Respondent to settle the disputed sums.

4. The Respondent raised a Counter-claim against the Claimant for the sum of Kshs. 59,006.30 for the amounts owed to it in relation to the shortfall in the delivery of goods to its customers.

5. Though the Respondent filed a Statement of Defence it neither appeared during the hearing of the cause nor filed submissions.

Claimant's Case

6. The Claimant, CW1, adopted his Witness Statement filed on 29th April 2015 as his evidence in chief.

7. It was his case that he had worked for the Respondent since 2004 and on 23rd April 2014 he was issued with a termination letter terminating him with immediate effect.

8. He stated that the Respondent issued him with a Statement of claim indicating that he had incurred transit losses but the statement did not take into account that he had made transit profits and the machines used had errors. He testified that the Respondent dismissed him after 10 years and that he did not owe the Respondent anything.

9. He states that the Respondent refused to pay his dues despite holding a conciliation meeting at the Labour offices.

Claimant's submissions

10. The Claimant submitted that the Respondent dismissed him for non-existent reasons. He submitted that Section 41 of the Employment Act is mandatory and where an employee fails to follow these mandatory provisions the process is bound to be unfair. He submitted that he was never given any chance to present his case.

11. In respect of his entitlement to the reliefs sought, he submitted that Section 37 of the Employment Act entitles him to a minimum notice period, which is the equivalent of 30 days. He submitted that he is further entitled to 12 months compensation for being unfairly terminated.

12. In relation to leave he submitted that the Respondent did not produce any evidence showing that the Claimant was granted any leave days and Section 28 of the Employment Act provides that the Claimant is entitled to annual leave for the years worked. In conclusion, he submitted that he is entitled to costs of the suit and urged the Court to have the Respondent compensate him accordingly.

13. I have examined all the evidence of the Claimant on record. I note that the Claimant's case remained uncontroverted because the Respondents though served with a hearing notice failed to attend Court for the hearing of this case and therefore this case proceeded ex parte on 22/5/2019.

14. The Claimant in his evidence established that he was an employee of the Respondent having been employed as per the appointment letter dated 17/11/2004. His gross pay was Kshs.25,382/= as at January 2014.

15. On 23/4/2014, he was terminated and the reason given in the termination letter was that he was being terminated for lack of business. There was no misconduct alluded in the said letter.

16. In this Court's view, lack of business would mean a redundancy situation. The Claimant was not issued with any notice nor was he paid his severance pay. Provisions of Section 40(1) of Employment Act were not followed.

17. Section 40(1) of Employment Act states as follows:-

(1) "An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

18. It is my finding that the Claimant has established his claim as required and I allow the claim and award him as follows:-

1. 1 month salary in lieu of notice = 25,382/=

2. Severance pay equivalent to 15 days salary for each year worked = $\frac{1}{2} \times 10 \times 25,382 = 126,910/=$

3. 10 months salary as compensation for unlawful termination = $10 \times 25,382 = 253,820/=$

Kshs.406,112/=

TOTAL =

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 16th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wesonga holding brief Anyoka for Claimant – Present

Njenga for Respondent – Present