



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 192 OF 2016

(Originally Milimani Chief Magistrate's Court Civil Case No. 2660 of 2006)

EDWARD KABUCHU THUKU

CLAIMANT

V

WARREN ENTERPRISE LIMITED

RESPONDENT

JUDGMENT

1. This Cause has been in the Court docket for about 13 years and at one point in time, the Court issued a *Notice to Show Cause* to the Claimant to explain why the Cause could not be dismissed for want of prosecution.
2. On 25 April 2019, the Court gave the Claimant another chance to prosecute the Cause after he gave a satisfactory explanation in response to the *Notice to Show Cause*.
3. The Cause was heard on 8 October 2019. Edward Kabuchu Thuku (Claimant) testified (the Court declined an application by the Claimant in the course of hearing for an adjournment).
4. Despite being served with a hearing notice on 3 June 2019, Warren Enterprises Ltd (Respondent) and its advocate were not in Court.
5. The Claimant should have filed submissions by 18 October 2019 but by this morning the submissions were not in the file.
6. The Court has considered the pleadings and evidence on record and condensed the Issues for determination as examined hereunder.

Summary dismissal

7. The Claimant stated that he was employed by the Respondent as a driver on 6 April 2001 and that on 16 August 2004 he was dismissed allegedly for being responsible for the theft of a battery from the vehicle at a Kambu market on the Mombasa highway.
8. The Claimant denied being responsible for the theft of the battery. He explained that he waited for the Respondent to send a team to rescue him/tow the vehicle for about 10 days and that the battery was stolen during that wait.
9. The testimony was not challenged, and the Court finds it plausible as the Claimant could not have been on guard 24 hours a day due to the exigencies of life. The termination of employment was wrongful and not justified.

Damages

10. In 2004, the remedy for wrongful dismissal was damages, equivalent to the notice (or reasonable notice) the employee was entitled to.
11. The Claimant was on an oral contract and did not prove that the notice period was 2 months.
12. The Court will allow the equivalent of 1 month salary as damages for wrongful dismissal in the sum of Kshs 11,130/-.

Leave

13. The Claimant sought Kshs 32,889/- being equivalent of accrued leave for the period of employment. There was a mere denial of this head of claim in the Response. The Court will allow the claim.

Severance pay

14. The Claimant did not produce a copy of *any collective bargaining agreement* between the Respondent and the Union he pleaded he was a member of to support the claim for severance pay.

15. In any case, *severance pay* is an entitlement in redundancy cases. The instant case was not one of redundancy.

Underpayments/Overtime

16. The Claimant testified that he was on a daily rate of pay, but did not prove that the rate was either below the prescribed minimum daily rates, or any other sums agreed in a contractual document.

17. Further, this head of the claim was in the nature of special damages. The Claimant did not specifically prove it.

Transport allowance

18. The Claimant did not lay any evidential, contractual or legal foundation to the head of the claim for payment of transport allowance of Kshs 14,390/- and relief is declined.

Counterclaim

19. The Respondent did not attend the Court to prosecute its Counterclaim. It is dismissed.

Conclusion and Orders

20. The Court finds and holds that the dismissal of the Claimant was wrongful and awards him

(a) Pay in lieu of notice Kshs 11,130/-

(b) Leave Kshs 32,889/-

TOTAL **Kshs 44,019/-**

21. The Court finds no merit on the other heads of the claim(s).

22. No order as to costs.

Delivered, dated and signed in Nairobi on this 1st day of November 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kivinyo instructed by Njenga Mbugua & Nyanjua Advocates

For Respondent B.M. Quadros & Co. Advocates (did not appear at the hearing)

Court Assistant Lindsey