



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 832 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th January 2018)

SAMUEL KIRIGHA NYANGE.....CLAIMANT

VERSUS

CITY CENTRE CABS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 17th May 2012 through the firm of Kitonga and Company Advocates. It is the Claimant's case that he was employed by the Respondent as a cab driver with effect from 21st July 2011 under a contract dated 21st July 2011 (Appendix 1). That on 10th November 2011, the Respondent terminated his services without giving him any notice.

2. He avers that he was being paid Kshs.13,972/= against the minimum of 18,000/= for the period he worked and was thus underpaid by a total of Kshs.14,630/=.

3. He avers that he is also entitled to notice pay and overtime pay for the excess hours he worked including weekends and public holiday. He annexed Appendix 2 showing the overtime which he claim to be Kshs.716,400/=.

4. He also states that he is entitled to leave amounting to 1,350/=. He seeks to be paid a total of Kshs.766,550 as enumerated in his claim plus costs of this suit and interest at Court rates.

5. The Respondent filed their Statement of Defence on 9th July 2012 through the firm of Gaita & Company Advocates. They deny the Claimant's averments. They aver that the Claimant was fully paid for all overtime worked and is not owed anything by the Respondent. The Respondent want this Court to dismiss the claim with costs to them.

6. The Claimant and Respondents employees gave oral evidence in Court. The Claimant stated in his oral evidence that he was terminated after an accident he was involved in with another vehicle.

7. The Respondents witnesses gave evidence and stated that the Claimant was involved in an accident with another vehicle and he abandoned the vehicle on the road. The parties also filed their written submissions.

8. I have examined the evidence of the parties plus the submissions filed. The issues for determination are as follows:

1. Whether the Claimant was on probation or confirmed in employment at the time of termination.

2. If there were valid reasons to terminate the Claimant.

3. If the Respondent followed due process before terminating the Claimant's services.

4. What remedies if any to grant.

9. On the 1st issue, the Claimant was employed vide a contract of service dated 21st July 2011. Paragraph 3 and 4 of this contract stated as follows:-

1) "The contract period will be three months, during which termination of service can be effected with prior notice.

2) On completion of the probation period you will be confirmed to a one year contract subject to satisfaction of quality of your services by the management”.

10. By virtue of this provision, the probation period ended on 21st October 2011 after the 3 months period. There was no communication to the Claimant confirming he is in employment. In any case the Respondent was the one responsible for this communication. Their silence cannot be used to suggest that the Claimant was never confirmed in employment. In this case the Claimant was confirmed in employment on 22nd October 2011 after the expiry of the 3 months probation period.

11. In that case, for any termination of this contract to be effect, the provisions of the Company Staff Policy Manual were to be invoked. In the absence of the Staff Manual being presented to Court, Section 41 of employment Act are to be invoked. This would require a formal oral hearing before termination. The Claimant was however terminated without this formal hearing and in this case, the termination did not follow due process.

12. In terms of the reasons for termination, the Claimant was orally terminated and no written termination letter was issued. It is therefore impossible to discern the reasons for this termination.

13. In the premise, I find the termination was effected without valid reasons and without due process and this is contrary to Section 43 of Employment Act which states that no contract should be terminated without valid reasons.

14. Section 45(2) of Employment Act 2007 on other hand states as follows:-

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

15.. In this case, due to absence of valid reasons and lack of observance of procedure, I find the termination of the Claimant unfair and unjustified.

16. In terms of remedies sought, I find that the Claimant is entitled to the following:-

1. 1 month salary as notice = 13,972/=.

2. On overtime pay, the Claimant is entitled to 4 hours overtime pay daily as the contract states he will work on a 12 hour shift. There is no proof that he was paid overtime as alleged by the Respondents. This amount was tabulated by the Claimant in his Appendix 2 but Respondent never addressed the same. They also never produced their muster roll to dispute that Claimant worked as tabulated. I therefore find for Claimant on the overtime pay as pleaded as Kshs.716,400/=.

3. I also award him prorata leave for the period worked = 1,320/=.

Total = 731,692/=

4. The Respondent will also 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 **30th day of January, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Respondent

No appearance for the Claimant