



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**MOMBASA**

**CAUSE NO. 239 OF 2016**

**FERDINAND MWAKIO MWEKE.....CLAIMANT**

**VERSUS**

**SHREEJI ENTERPRISE (K)LIMITED.....RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The Claimant brought this suit on 29/3/2016 claiming one month salary in lieu of notice, compensation for unfair termination, compensation for work related injury under the work Injury Benefit Act, medical expenses for the said injuries, certificate of service, costs and interest. The Respondent had denied the alleged unfair termination and averred that it is the Claimant who deserted work protesting the quantum of damages assessed to compensate him for his work related injuries and which is still willing to pay him. In addition, she has averred that she is willing to reinstate the Claimant to employment to perform light duties.

2. During the pre-trial conference the parties adopted their joint issues directions filed on 27.3.2017 by which they agreed that the Claimant was employed by the respondent from 19.11.2013 to March 2015. They however invited the court to determine whether the Claimant's salary was Kshs.28,215 or Kshs.25,415; whether the respondent is liable to for occurrence of the accident to the Claimant while in the course of his employment and the consequential injuries sustained by him; whether the claimant is entitled to any compensation, special or general damages pursuant to WIBA; and whether the Claimant is entitled to any terminal dues, and if so, which ones. The suit was heard on 11.10.2017 when the Claimant testified as CW1 and the respondent called her HR Manager as RW1. Thereafter both parties filed written submissions which have carefully considered herein.

**Claimants case**

3. The claimant stated that he was employed by the respondent in on 19.11.2013 as a Long distance driver earning Kshs.25,415 per month.

On or about 4.4.2014, and while in the course of his employment, he was involved in Road Traffic accident and suffered serious bodily injury. As a result, he incurred medical expenses amounting to Kshs.1,574,168 which he was forced to pay after the respondent refused to pay. The accident was reported under the Work injury Benefit Act and an assessment of compensation was made at Kshs.725,856 but again the respondent refused to pay. Instead on 15.1.2015, the then respondent's HR Manager Mr. Odera unfairly terminated his employment verbally by telling him that his services were no longer required. According to the claimant, the said termination was without any prior notice, for no valid reason and without according him a fair hearing. He therefore prayed for the reliefs sought in the suit.

4. On cross-examination CW1 stated that he was give a written contract after working for three months which provided for probation up to 30.4.2014. He admitted that he was injured during the probation period. He blamed the respondent for the accident for her failure to maintain the vehicle which led to brake failure and hence the accident. He further contended that before leaving Nairobi on the fateful day, he complained about the truck's brakes but he was ordered to drive it to Mombasa.

5. CW1 explained that after accident, he was unable to diver the truck and his doctor recommended that he be given light duties but the company said there were no light duties but retained him in her pay roll and continued to pay his full salary up to January 2015 when it stopped. He denied ever being given termination letter in March 2015 and contended that the HR manager only told him that he was not required as a driver but he was welcome to apply afresh for any other job even in the kitchen. He concluded by admitting that the employer paid only Kshs.200,000 for his medical bills.

**Defence case**

6. RW1 admitted that the Claimant was employed by the respondent as driver earning Kshs.25,415 per month. He further admitted that the claimant was involved in a road traffic accident on 4.4.2014 while in the course of his employment and got injured. He stated that the accident occurred during his probation period but they continued paying his salary up to March 2015 because he was injured in the course of his duty. RW1 explained that after the accident the Claimant was given a Notice of Intended Prosecution for the offence of Careless driving. Thereafter the vehicle was inspected by the Motor vehicles Inspector and his report was that the vehicle was serviceable before the accident.

7. RW1 testified that the Claimant disappeared after receiving his March 2015 salary and after being shown the calculation of his damages under the Dosh1 Form. He further stated that the Claimant protested that the assessment was too little and even declined an offer to do light duties. He accused the Claimant of deserting his employment and for declining payment of the damages assessed under WIBA, which he confirmed that the respondent is ready and willing to pay him even now.

8. On cross-examination, RW1 admitted that he was not an eyewitness to the Claimant's accident. He further admitted that the Respondent's Group HR Manager Mr. Odera is based in Nairobi and that he had no evidence that the Claimant was not terminated. He also admitted that he had no written evidence to prove that the Claimant was offered alternative light duties.

### **Analysis and determination**

9. After careful consideration of the evidence and the submissions filed I see no dispute regarding the Claimant's salary because he admitted in evidence that he was earning Kshs.25,415 per month. I also see no dispute concerning liability to pay the compensation assessed under the WIBA because the same is admitted by the respondent both in pleadings and evidence. Consequently the only issues for determination for determination are:

- a. Whether the Claimant deserted his employment or he was unfairly terminated;
- b. Whether the respondent is liable to reimburse the Claimant the costs incurred in treatment as a result of the said accident while in the course of his employment; and
- c. Whether the Claimant is entitled to the terminal dues sought.

### **Unfair termination or desertion?**

10. RW1 alleged in his evidence that the Claimant absconded duty from March 2015 after receiving his salary protesting against the quantum of compensation assessed under the WIBA and also refused to take light duties as recommended by the doctor. The Claimant on the other hand alleged that he was terminated in January 2015 by the Group HR Manager who refused to pay the compensation assessed under WIBA and further told him that there were no light duties in the company. However, on cross-examination, CW1 admitted that in March 2015, he was told by the HR manager that he could apply afresh for any other job in the company but not driving.

11. After careful consideration of the evidence before me, it is clear that the Claimant was not terminated on 15.1.2015 as he alleges in his pleadings and testimony but in March. Firstly, through the agreed issues filed on 27.3.2017, it is confirmed that the employment relationship ended in March 2015. Secondly, there are undisputed pay slips showing that salary was paid to the Claimant up to March. Thirdly, the Claimant admits that in the same March the HR Manager invited him to apply for any other job other than driving.

12. In view of the foregoing observations, I find that the Claimant's evidence inconsistent and actuated by material contractions especially regarding the date of the alleged termination and the last month his salary was paid. Consequently, I hold that he has failed to prove on a balance of probability that he was unfairly terminated by the respondent as required by section 47(5) of the Employment Act. On the other hand, I find the defence case consistent and truthful in proving that employment relationship was indeed terminated by the Claimant in March when he refused to take up light duties as recommended by the doctor and went away protesting against the quantum of damages assessed under the WIBA.

### **Reliefs**

13. In view of the foregoing finding that the Claimant's employment contract was not unfairly terminated by the respondent, I decline to award any damages under Section 49 of the Act and therefore I dismiss the claim for one month salary in lieu of notice and compensation for the unfair termination.

14. However the Claimant is awarded the Kshs.725,846.20 assessed under WIBA and admitted by the respondent as compensation for injuries sustained in the course of his employment. I have also considered the claim for the medical expenses incurred and the receipts produced as exhibits. It is clear that some expenses were incurred during and also after the termination of the employment. I however dismiss the entire claim for the medical expenses incurred because there is no evidence to prove that it was paid by the Claimant. Kshs.203,130 was paid by the respondent to Mewa Hospital on 23.4.2014 while the rest was paid by or through or courtesy of Kenya Ports Authority on diverse dates.

### **Disposition**

15. For the reason stated above, enter judgment for Claimant in the sum of **Ksh.725,846.20** plus costs and interest from the date of filing the suit. He will also have certificate of service.

**Dated and signed at Nairobi this 18th day of January, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 22nd day of February, 2018**

**LINNET NDOLO**

**JUDGE**