



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 698 OF 2015

MUSEE NGUTHI.....CLAIMANT

VERSUS

SHABIBY TRANSPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this Suit on 8.9.2015 claiming terminal dues plus compensation for unfair termination of his contract of service by the Respondent on 21.2.2015. In total the Claimant seeks to recover Kshs.168,600, Certificate of Service, Costs and interest. The Respondent has however denied the alleged unfair termination of the Claimant's contract of service and averred that the termination was done after strict compliance with the law and payment of salary in lieu of notice. She therefore prayed for the suit to be dismissed with costs.

2. The twin issues for determination are whether the termination of the contract of service was unfair and whether the reliefs sought should be granted. The parties agreed to dispense with the hearing and instead adopted the pleadings, written statement by the witnesses and the documentary evidence on record and then filed written submissions to dispose of the suit.

Claimant's Case

3. The Claimant stated in his witness statement that he was employed by the Respondent as a Turn Boy on 5.1.1995 for weekly salary of Kshs.1,200 and worked continuously until 21.2.2015 when he was terminated without just reason. He explained that in February 2015, he sought and obtained four off days from his supervisor to attend the burial of his uncle but when he reported back, he found that another person had been employed to replace and the driver of the lorry referred him to the respondent's manager. When he went to see the manager, he was informed that he had been dismissed.

4. He has therefore submitted that termination was unfair because it was not founded on a valid reason and he was not accorded a prior fair hearing. He therefore prayed for one month salary in lieu of notice, compensation for unfair termination, salary arrears for January 2015 and severance pay for the 20 years served.

Defence Case

5. RW1 never filed any witness statement but chose to rely on the law. Through her written submissions, the respondent admitted that she dismissed the claimant summarily for absconding work for 4 days in February 2015. She contended that the claimant absented himself from work without leave for the 4 days

and as such she was entitled to dismiss him summarily under section 44 (4) of the Employment Act. According to her, absconding work was a valid reason for dismissing the Claimant without prior notice or hearing. She therefore denied liability to pay the damages sought and contended that she paid the Claimant one five days salary in lieu of notice after the termination. She therefore prayed for the suit to be dismissed with costs.

Analysis and Determination

6. There is no dispute that the Claimant was employed by the Respondent as Turn Boy from 5.1.1995 to 21.2.2015 when he was summarily dismissed from service by the Respondent. The issues for determination herein are:-

a) Whether the Claimant's contract of service was unfairly terminated.

b) Whether the Claimant is entitled to the reliefs sought.

Unfair Termination

7. The burden of proving unfair termination is placed by section 47(5) of the Employment Act on the employee who alleges that he was so terminated. Thereafter the burden shifts to the employer to prove and justify the reason for the termination and the fairness of the procedure followed before the termination. In this case the respondent has admitted that she summarily dismissed the Claimant for absconding work for 4 days. The Claimant has however denied the alleged absconding and explained that he sought and obtained 4 off days to attend his uncle's funeral only to find that he had been dismissed and replaced without prior notice, valid reason or fair hearing.

8. After a careful consideration of the evidence and the submissions by both counsel, I find that the Claimant has proved on a balance of probability that he was unfairly dismissed within the meaning of section 45 of the Act. He has proved that he never absconded duty but rather he was dismissed after he got 4 off days from his boss to attend his uncle's funeral. No evidence was tendered by the defence to contest the Claimant's evidence that he sought and obtained the 4 off days. Consequently, I find that the respondent has not proved and justified the reason for dismissing the claimant from service.

9. On the other hand, the respondent has admitted through her written submissions that she never invited the Claimant to any hearing before summarily dismissing him for absconding because the reason was valid and under section 44 of the Act she was entitled to terminate the employment without notice or with less notice than the one prescribed by the law or contract.

10. The foregoing view is correct only in relation to termination notice but not in relation to fair hearing. Fair hearing before terminating an employee for any misconduct under section 44 of the Act is mandatory. Section 41 of the Act provides in mandatory terms that before terminating the contract of service of an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the dismissal is decided.

11. Failure to accord the Claimant the said mandatory fair hearing rendered his termination procedurally unfair. Consequently, the employer herein having failed to prove a valid and fair reason for dismissing the claimant as required by section 43 and 45 (2) of the Act, and having admitted that the dismissal was done before according the Claimant any fair hearing, I proceed to hold that the summary dismissal of the claimant was unfair.

Reliefs

12. In view of the foregoing finding, and under section 49 of the Act I award the claimant Kshs. 4800,

being one month salary in lieu of notice plus 12 months' salary compensation, being Kshs 57600. In awarding the said compensation I have considered the length of his service and the fact that he did not contribute to the termination through any proven misconduct.

13. The claim for salary arrears of Kshs. 600 for January 2015 has not been disproved by records and therefore it is allowed as prayed. However the claim for severance pay is dismissed because the termination was not through redundancy.

14. Finally the claim for certificate of service is granted because it is the right of every employee subject to section 51 of the Act.

Disposition

15. For the reasons that the summary dismissal of the claimant was unfair, I enter judgment for him in the sum of Kshs.63,000 plus costs and interest.

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