



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 153 OF 2016

ADERO CHARLES.....CLAIMANT

VERSUS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the Claimant's employment by the Respondent on 6.10.2015. It is the Claimant's case that his termination was without any valid reason and it was done in breach of mandatory procedure provided by the law. The Respondent has denied the alleged unfair termination and averred that the termination was justified for the reason that he was misusing her property, namely security surveillance vehicle, by ferrying goods and people in total breach of the terms of his contract of employment. She further avers that the termination was procedurally fair because it was done in accordance to section 35(i) of the Employment Act and the Claimant was paid all his dues on 16.10.2015.

2. The suit was heard on 12.6.2017 and 29.6.2017 when the Claimant testified as CW1 and one of Respondent's security Guards, Mr. Andrew Kimani to testify as RW1. Thereafter both parties filed written submissions which I have carefully considered herein.

Claimant's Case

3. CW1 testified that he was employed by the Respondent as Supervision Commander on 8.11.2013 earning Kshs.15,600 per month. On 1.10.2015 the Respondent's Manager, Mr. Michael Kigen, served him with a letter dated 30.9.2015 which gave him 2 weeks off duty to pave way for an internal investigations on his service delivery and some lost company properties. Before the end of the 2 weeks, the Manager called him back and gave him to fill form for 2 weeks unpaid leave but he refused and he was sent away.

4. On 5.10.2015, the Manager called CW1 again to the office but on arrival a guard directed him to the HR Manager who served him with a termination letter and a clearance form. Upon enquiring as to the reason for the termination, the HR Manager told him that he was acting on instructions from Mr. Kigen. He was not told the reason for his termination and he was not served with any prior termination notice. He further denied the allegation by the defence that he was misusing company vehicle and maintained that he always used it with the permission from the security manager. He therefore contended that the termination was unfair and prayed one month salary in lieu of notice plus compensation or unfair termination.

5. He further prayed for accrued annual leave because he never went for any during his whole period of employment. He also contended that he use to work on public holidays and receive the normal pay of Kshs.600 per day instead of double rate. He therefore prayed for difference.

6. He further contended that throughout his employment he was deducted NSSF contributions but the same was never remitted. He therefore prayed for refund of the unremitted NSSF deductions. He however admitted that after the termination he was paid Kshs.31,300 but he was not given any particulars for the same.

7. On cross examination, CW1 contended that there were 4 Security Supervisors who used the company car in rotation. He was served with letter dated 30.9.2015 giving him off to pave way for investigations but on 7.10.2015 he, was served with dismissal letter. He admitted that the dismissal letter stated that he was entitled to accrued leave and off days and refund of Sacco as at August 2015. He further admitted that he used to have one day off per week but he was working from 6.00 a.m. to 6 p.m.

Defence Case

8. RW1 testified that CW1 was his boss as the Crew Commander. He explained that CW1 and the crew used the company car to attend to emergencies and visit guards at their assigned sites. On 30.8.2015, the Claimant misused the Company car by ferrying passengers and their cargo from the market and he reported him to the overall boss Mr. Michael Kigen. Thereafter the Claimant was suspended and later dismissed but he was paid Kshs.31,300.

9. On cross examination RW1 contended that CW1 was terminated for misusing company patrol car. He however admitted that he was not present during any hearing of the Claimant's case after the investigations. He admitted that he did not know which procedure was followed to terminate the Claimant's services because it is Mr. Kigen who dealt with him.

Analysis and determination

10. There is no dispute that the Claimant was employed by the Respondent until on or about 6.10.2015 when he was terminated. The issues for determination are:-

- (a) Whether the termination was unfair;
- (b) Whether the reliefs sought should be granted.

Unfair termination

11. Under section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case the reason for termination was misconduct, namely misuse of company car and the procedure followed was suspension for 2 weeks followed by termination letter before the lapse of the suspension period.

Reasons for the termination

12. Although the termination letter dated 7.10.2015 purported to terminate the services of the Claimant under section 35 and 36 of the Employment paragraph 4 of the defence states that the reason the termination was that the Claimant was misusing her security surveillance car by ferrying people and goods contrary to terms of his contract of service. The said pleading was supported by the RW1 in his testimony when he contended that he was indeed the one who reported the said misconduct to the boss.

13. The question that follows is whether the said reason was valid and fair to warrant termination. The Claimant has denied that he misused the vehicle. He has however not specifically denied that on 30.8.2015 he carried unauthorized passenger and their cargo in the security surveillance car without permission from the Respondent. He has not given any reason why RW1, his junior and crew member would falsely accuse him before the Manager and the Court of the offence of carrying unauthorized passengers and cargo in the company's car.

14. Carrying unauthorized passengers and their load in a security surveillance car constitutes misconduct. The Respondent was therefore entitled to treat the said conduct as a valid and fair reason for terminating the services of the Claimant under section 44(4) (c) of the Employment Act. The said provision entitles an employer to summarily dismiss his employee if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed properly.

Procedure followed

15. RW1 was not involved in the process of terminating the Claimant's Services. All what he did was to report his misconduct to the Manager. Thereafter the matter was left in the hands of the Manager Mr. Kigen who chose not to give any evidence. I therefore find that the Respondent has failed to prove that she followed a fair procedure before terminating the services of the Claimant. Although the termination letter purported to terminate the Claimant under section 35 and 36 of the Act, the defence and the testimony by the RW1 gave her away. The fact that the termination was on account of misconduct, the Respondent was barred by section 41 of the Act to accord the Claimant a fair hearing.

16. The said section provides that before terminating the employer for an employee on ground of misconduct, the employer shall first explain to the employee, in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reasons for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided. The failure to comply with the said mandatory procedure rendered the termination of the Claimant's employment unfair within the meaning of section 45 of the Act.

Reliefs

17. Under section 49 of the Act, I award the Claimant Kshs.15,600 being one month salary in lieu of notice plus Kshs.62,400 being 4 months' salary as compensation for the unfair termination. In awarding the said compensation I have considered the fact that he contributed to the termination through misconduct and also the fact that he had worked for the respondent for only 2 years.

18. He will also get leave for 2 years being $2 \times 21/26 \times 15600 = \text{Kshs.}25,200$. The claim for NSSF deductions not remitted is granted. The Respondent admitted in paragraph 3 of the defence that the Claimant worked for her from November 2013 to 6.10.2015. The NSSF statement produced by the Claimant indicated that NSSF was not remitted from November 2013 till December 2014. That is more than the 13 months payed. Each month he was deducted Kshs.200 which equals to Kshs.2,600 for 13 months.

19. The Claim for public holidays for 2 years is however dismissed for want of particulars and evidence.

Disposition

20. For the reasons stated herein above, I enter Judgment for the Claimant declaring termination of his employment unfair and awarding him Kshs.105,800 less Kshs.31,300 paid after termination. The Net award is Kshs.74,500 plus costs and interest from the date hereof. The award shall be subject to statutory deductions.

Dated and signed at Nairobi this 12th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

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JUDGE