



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 70 OF 2017

ERICK GITAU KAMAU.....CLAIMANT

VS

JIWANI IMPEX LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Erick Kamau Gitau against his former employer, Jiwani Impex Limited. The claim, which is documented by a Memorandum of Claim filed in court on 26th January 2017 is for compensation for unfair termination and payment of terminal dues. The Respondent's defence is contained in Response dated 14th February 2017 and filed in court on 16th February 2017.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called Osman Abdi Mohamed. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant pleads that he was employed by the Respondent on 1st May 2012 in the position of heavy commercial truck driver. He worked as such until 20th November 2016 when his employment was terminated without reasonable cause.

4. The Claimant's claim is as follows:

- a) Two months' salary in lieu of notice.....Kshs. 64,400.00
- b) Leave pay for the year 2016.....32,200.00
- c) Gratuity for 4 years.....74,307.70
- d) 12 months' salary in compensation.....386,400.00

The Respondent's Case

5. In its Response dated 14th February 2017 and filed in court on 16th February 2017, the Respondent admits having employed the Claimant as a driver at a monthly salary of 32,200 effective 11th May 2010.

6. The Respondent states that at the time of employment, the Claimant who was 68 years old had retired from active transit/cross border driving. The Respondent denies that the Claimant was employed as a heavy commercial truck driver and adds that he was employed on humanitarian grounds. He was deployed to drive a pick up running short errands within Mombasa.

7. The Respondent avers that the Claimant habitually absented himself from work without permission thus inconveniencing the Respondent's operations. The last such incidents of absenteeism were noted in the months of September, October and November 2016 during which period, the Claimant reported for duty for only four days being 9th, 10th, 11th and 14th November 2016. Upon his return, the Claimant failed to fully account for his absence, only stating that he had been indisposed but failing to produce any medical records.

8. The Respondent further states that prior to these incidents, the Claimant failed to report to work as follows:

- a) 2 days in February 2016;
- b) 2 days in April 2016;
- c) 6 days in May 2016;
- d) 13 days in August 2016.

9. The Respondent avers that on 9th November 2016 a proposal was made to the Claimant to consider leaving employment on medical grounds. The Claimant was 71 years old at the time. The Respondent states that the Claimant agreed to the proposal to retire on medical grounds and was therefore issued with letter dated 8th November 2016.

10. The Respondent pleads that the Claimant was paid his full salary for the entire period of service, including the month of November 2016 despite the fact that he did not work for the whole month. In this regard, the Respondent states that the Claimant worked only on 9th, 10th, 11th and 14th November 2016. The Claimant did not serve his full notice period.

11. In response to the claim for leave pay, the Respondent states that the Claimant absented himself from duty without permission for a total of 118 days. The Claimant had therefore exhausted any leave days to his credit. The Respondent adds that the Claimant is not entitled to gratuity.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

13. The termination of the Claimant's employment was communicated by an unsigned letter dated 8th November 2016 stating as follows:

"RE: ERICK GITAU KAMAU ID NO: 2340913

The company is hereby issuing a termination notice to you starting from this month due to the explained reason below;

- *Incompetence due to age which is accompanied by interruptive labour due to recurring sickness.*

It has been our pleasure to work with you all those years you rendered service to the company and we believe that it has been a mutual feeling.

We all wish you the best.

REGARDS

MANAGEMENT"

14. This letter cites incompetence due to age and recurring sickness as the combined reason for termination of the Claimant's employment. The Claimant told the Court that in September 2016, he was admitted at the Coast General Hospital for two weeks. He was discharged but readmitted in the month of October 2016. Upon recovery he reported on duty on 12th November 2016 but on 14th November 2016, he was issued with a termination notice dated 8th November 2016.

15. On its part, the Respondent states that it had no notice of the Claimant's hospitalization or illness. The Respondent therefore takes the view that the Claimant had absconded duty. The Court was unconvinced by this line of argument for the main reason that the Respondent continued paying the Claimant's salary during the period of absence. It seems to me therefore that the Respondent was aware of and in fact acquiesced to the Claimant's absence. The Respondent cannot therefore turn around and brand the Claimant a deserter.

16. At any rate, it is common cause that the Claimant showed up at the Respondent's premises sometime in the month of November 2016. It is now well settled in law that desertion by an employee is presumed only in cases where the employee has demonstrated that they have no intention to come back (see *Sarafina Wanyonyi v Lessos Veterinary Suppliers Ltd [2016] eKLR*). The Claimant, having come back to work, cannot be categorized as a deserter.

17. The ground of desertion raised by the Respondent therefore sinks. That leaves illness and old age as the only grounds. The Claimant testified that as at November 2016, he was well enough to resume work. In the same breath however, the Claimant stated that his plan was to retire in December 2016. The termination therefore came only a month too early, by which time the Claimant was past the age of 70 years.

18. Going by the nature of the Claimant's job, it appears that this was a reasonable time for the Claimant to call it a day and it seems to me that the only inconvenience occasioned to him was loss of salary for the month of December 2016. This is what I will award him by way of compensation.

Remedies

19. I therefore award the Claimant one (1) month's salary in compensation plus a further 1 month's salary in lieu of notice.

20. The Respondent admits that the Claimant did not take his leave for 2016 but states that this was set off against the number of days he had absented himself from work. In light of my finding on this score, the trade-off pursued by the Respondent is rejected. I therefore award the Claimant leave pay for 24 days for the year 2016.

21. No basis was laid for the claim for gratuity which therefore fails and is dismissed.

22. Ultimately, I enter judgment in favour of the Claimant as follows:

- a) 1 month's salary in compensation.....Kshs. 32,200
 - b) 1 month's salary in lieu of notice.....32,200
 - c) Leave pay for 24 days (32,200/30x24).....25,760
- Total.....90,160**

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. I award the costs of this case to the Claimant.

25. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 2018

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JUDGE

Appearance:

Mr. Tolo for the Claimant

Miss Muyaa for the Respondent