



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

ELDORET

CAUSE NO.13 OF 2017

TIMOTHY KIPKOSGEI KEMBOI.....CLAIMANT

VERSUS

SHRINATH HARDWARE LTD.....RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 30th March, 2017 and summonses were served upon the respondent on 4th April, 2017 an Affidavit of Service to this effect was filed by Nathan Cheruiyot Kirui on 2nd May, 2017. There was no appearance or defence filed. The claimant applied for judgement in default of appearance and defence.

On 29th June, 2017 the claimant was in court for directions. The claimant filed Amended Memorandum of Claim, this was served upon the respondent on 11th December, 2017 and returns filed to this effect. There is no response.

On 23rd April, 2018 the court noting there was no appearance and defence directed hearing of the claimant's case on 27th April, 2018.

The claimant, an adult male was employed by the respondent company from 1st October, 2016 as a Driver on contract and a wage of Kshs.10, 000.00 per month. The claimant was allocated motor vehicle registration Number KCD 610S as the respondent deals in all hardware material, cement, pipes, nails rods and iron sheet and which the claimant would transport to various customers and undertake other designated duties. The claimant travelled to Nairobi, Meru, Nakuru and other destinations as required and this went into late night and the whole day.

On 1st March, 2017 the respondent dismissed the claimant from his employment without any cause, reasons or notice and forced him to sign a document upon directions not to report on duty the next day. This was in breach of the claimant's rights in that the summary dismissal was without cause, notice or a hearing, terminal dues were not paid and the certificate of service due has not been issued. This amounted to unfair termination of employment and the claimant is seeking;

Notice pay of Kshs.10, 000.00;

Leave days due Kshs.10, 000.00;

Unpaid overtime Kshs.24, 000.00;

Compensation Kshs.120, 000.00; and

Costs.

The claimant also testified in support of his claims. Upon employment the claimant was allocated duties in the nature of delivering hardware goods to various customers of the respondent and which required him to travel for long hours to meet his set targets at various destinations. He was not paid for the overtime hours he was required to travel and work. Such long hours of work became the norm as the claimant was required to be on the road as part of his assigned duties. He worked diligently from 1st March 2016 until 1st July, 2017 when he reported back to work and was directed to hand over the vehicle keys to the respondent and which he obliged. The manager then directed the claimant to sign a document accepting a salary and upon which he was informed that his work had ended with the respondent. The next day the claimant saw a new employee driving the same vehicle he had been driving in the course of his work. Then he knew he had been terminated from work for no due cause. This was unfair as there was no notice, warning or any hearing for him to know what had led to the termination of employment.

The claimant called a witness Mr David Cheruiyot a driver and former employee of the respondent and who had worked with the claimant. Mr Cheruiyot testified that he knew the claimant was driving Motor vehicle No.KCD 610S belonging to the respondent and on 1st July, 2017 he witnessed him being directed to surrender the keys back to the respondent. He was not allowed back at work since that day.

Without any defence, the case was closed.

The claimant filed written submissions.

Without the attendance of the respondent or any defence to challenge the evidence on record, the court is only left with the claimant's case. Despite such non-attendance, the claim shall be assessed on its merits and the applicable law.

Where an employer fails to issue an employee with a written contract of service, keeps the employee under an oral contract, where a dispute arises such as this, the court must rely on the evidence of the employee and the applicable law in terms of terms and conditions of service.

The evidence on record is that on 1st July, 2017 the claimant was summarily dismissed by the respondent without notice, warning or a hearing. Is the summary dismissal of the claimant justified?

Section 43 of the Employment Act, 2007 provides that;

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

The duty is vested upon the employer to prove the reason(s) for the termination of employment. Where there is no reason(s) section 45 of the Act deems the same as unfair termination of employment. The basis is set out under section 45(2) of the Act 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.

The test as to whether termination of employment is thus that there is a valid reason which is fair and relating to an employee's conduct, capacity or capability or due to operational reasons and that in addressing such matters the employer followed fair procedure.

In this case, where there are no written reason(s) leading to the claimant's termination, the summary action taken by the respondent on 1st July, 2017 does not meet the threshold set out above under sections 43 and 45 of the Employment Act, 2007 and as held in the case of **Walter Ogal Anuro versus TSC [2013] eKLR** and also reiterated in the case of **Mwanajuma Juma Kunde versus Kaps Municipal Parking Services Ltd [2013] eKLR**.

WI thought the set facts in the claim being controverted; I find the claimant was unfairly dismissed from his employment. Such was unlawful as it failed to meet the requisite substantive or procedural justice.

On the finding that termination of employment was unfair, section 49 of the Employment Act, 2007 allow for compensation. In this case an award of 3 months wage is found appropriate and all assessed at Kshs.30, 000.00.

Notice pay is due in a case of summary dismissal from employment without and contrary to the law. Section 35 of the Employment Act, 2007 allow for notice pay at one month's wage all assessed herein at Kshs.10, 000.00.

Without any record to show that the claimant took his annual leave and pursuant to section 28 of the Employment Act, 2007 this is due and quantified to one (1) months' pay all at Kshs.10, 000.00.

On the evidence that the claimant worked over hours and was not compensated, without any challenge to this claim, the claimed sum of kshs.24, 000.00 is found reasonable and is hereby confirmed as due.

Accordingly, judgement is hereby entered for the claimant against the respondent with a declaration that termination of

employment was unfair; compensation awarded at Kshs.30,000.00; notice pay Kshs.10,000.00; leave pay due Kshs.10,000.00; overtime pay Kshs.24,000.00; and costs of the suit.

Delivered in open court at Eldoret this 29th day of June, 2018

M. MBARU JUDGE

In the presence of:

Court Assistants: Martin and Robert

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