



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1133 OF 2013

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 27TH JUNE, 2018)

SAMWEL CHEGE NJOGU.....CLAIMANT

VERSUS

EASY COACH.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 17th July 2013 through the firm of Mwakio, Kirwa & Company Advocates seeking damages for unlawful and unfair termination/dismissal and non-payment of terminal dues and benefits.
2. The Claimant avers that on or about April 2011, he was employed by the Respondent as a bus inspector at a gross salary of Kshs. 14,071.53 per month. He served the Respondent with loyalty and diligence until 22nd March 2013 when the Respondent wrongfully and unfairly dismissed him and refused to pay him his terminal benefits.
3. He avers that the Respondent suspended him on 14th March 2013 pending investigation and hearing on 18th March 2013. He states that he was not given a chance to defend himself on 18th March 2013 when he attended the meeting. While at the meeting, he states that the Respondent was forcing him to admit committing the alleged misconduct instead of hearing his case. The Respondent did not call the officer who made the allegations or the alleged passenger to attend the meeting to prove its case against him.
4. He further avers that the Respondent terminated his services summarily without following the right procedure laid down in the law and violated Section 41(1) of the Employment Act 2007.
5. He states that the termination was therefore unlawful unfair and/or illegal on the basis that the Respondent did not follow the procedure laid down in the Employment Act and that the Respondent terminated the Claimant without proving that the reason for termination was valid. A demand of his lawful dues was issued to the Respondents dated 15th April 2013.
6. The Respondents filed their Memorandum of Defence where they confirm that the Claimant was their employee where he was employed as a bus inspector in April 2011 whose responsibilities included ensuring that the bus complied with all the traffic regulations and that no excess passenger was being ferried on board.
7. They aver that on the night of 11/3/2013 the Claimant was travelling with Bus registration number KBS 956T from Homabay to Nairobi via Kisii. While enroute to Nairobi, the vehicle had left Homabay at around 1.30 am. It had 21 passengers on board. 8 passengers boarded the bus at Rongo booking office and on arrival at Kisii, 9 more passengers boarded the bus making a total of 38 passengers on board which is the maximum acceptable number of passengers on board at any one given journey.
8. They further aver that it is a traffic rule that every passenger should occupy his or her own seat. The Respondent's policy is to the effect that every passenger must be issued with a travel ticket. While at Kisii, the Claimant being the inspector of the said bus added another extra passenger to travel in the same bus to Nairobi by the name Simon Mbajah who in return paid him Kshs. 800 and was not issued with a receipt.
9. They further aver that on being stopped at Narok for inspection by senior inspector Mr. Abbas the bus was found to have excess passengers seated on the staircase. Upon enquiry, the passenger informed him that he was instructed to board the bus by the man wearing black clothes and had paid him Kshs.800.

10. They also aver that the Claimant was suspended from duty pending investigation and was supposed to report back on 18/3/2013 so as to appear before the disciplinary committee which he did and after been given an opportunity to be heard, he was suspended for another 5 days pending the management's decision.

11. They state that the Claimant was summarily dismissed from employment for gross misconduct. The reason for his dismissal was clearly stated in the letter. On 26/6/2012, the Respondent's management through the office of the Managing Director had issued an internal memo to all the inspectors warning them that any inspector found carrying staff without a ticket would be summarily dismissed.

12. They also state that this was not the first disciplinary action against the Claimant. He had previous disciplinary records dated 21/2/2012 and 22/11/2012 where he was issued with warning letters.

Submissions

13. The Claimant filed his submissions where he submits that he denied the allegations against him and was dismissed on 22/3/2013 without being paid salary for the month of March 2013, accrued leave days for the period of 2012-2013 and overtime worked.

14. He avers that the Respondent terminated his services without following a fair procedure contemplated in Section 45(2)(c) of the Employment Act. The Respondent also violated Section 45(1)(2)(a) of the Employment Act by terminating his employment unfairly, without a valid reason and by not following a fair procedure. The Respondent did not give the Claimant termination notice as provided for by Section 35 of the Employment Act.

15. He further avers that the Respondent was paying his NSSF and NHIF contributions but the Respondent did not produce any document in Court to that effect thus is liable to pay him gratuity in accordance with Section 35(5) of the Employment Act.

16. He also requests this Court to award him 15 days for each year worked as his service pay is not fixed. He relied on the case of **Peter Okumu Oloo Vs Simba Pharmaceuticals Ltd [2013] EKLR**. In Conclusion he submits that he has proved his case on balance of probabilities and prays for Judgment against the Respondent as claimed in the Memorandum of Claim.

17. The Respondent filed their submissions where they submit that the Claimant was not following the rules and regulations issued by the management in discharge of his duties, where he allowed an extra passenger to board the bus and travel without a ticket making the bus to carry excess passengers. This was discovered by the chief inspector at Narok who recorded a statement from the said passenger, which led to a disciplinary meeting with the Claimant being summarily dismissed after the committee scrutinized the evidence including statements from the passengers on board.

18. They aver that the Claimant was accorded a fair hearing as per the rules of natural justice and that he was found guilty as charged. They state that they are in a delicate business which involves compliance with many regulators including the Transport licensing Board, the Insurance regulations and any small non-compliance will lead to them being denied licences to carry on business.

19. They also aver that carrying excess passengers also exposes the company to risks of litigations in case an accident occurred and in that case the insurance company may end up repudiating the claims for non-compliance with the policy terms.

20. They submit that, that was not only against the rules and regulations at work place but also illegal for non-compliance with traffic rules. They state that the Claimant was paid all his terminal benefits and they do not owe the Claimant any salary arrears as alleged, he is not entitled to gratuity as he was summarily dismissed and that the issue of compensation is not applicable as the Claimant was terminated on valid grounds and following a fair process. Leave days were also paid for hence they pray that the claim be dismissed with costs.

21. I have examined all the averments and submissions of both parties. The Claimant averred that he was dismissed for no apparent reasons since the person who alleged he gave him 800/= to board the vehicle was not called as a witness. The person also never identified the Claimant as the one who allowed him to board the vehicle in Kisii.

22. The Respondents called the Claimant and subjected him to a disciplinary process where they considered statements of the witnesses but the witness one Simon Mbajah was not present. In the statement, the witness had indicated he paid 800/= to a man in black uniform in Kisii office. The man never identified the Claimant as the man in black to whom he paid the 800/=.

23. Though the Respondents found the Claimant culpable, there was no substantial evidence to warrant them make that finding. They relied on hearsay evidence and found the Claimant culpable.

24. It is my finding that the Respondent did not have a valid reason to dismiss the Claimant in the circumstances and the dismissal/termination was unfair and unjustified.

25. Under Section 45(2) of Employment Act states 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".

26. Having found that the Respondents did not have valid reasons to terminate the Claimant, I award him as follows:-

1. 1 month salary in lieu of notice = 14,071.53/=

2. Unpaid leave of 21 days = 9,850/=

3. Unpaid salary for March 2013 = 6,071.53/=

4. 4 rest days for month of March 2013 = 1,876/=

5. 12 months salary as damages for unfair termination = 12 x 14,011.53 = 168,858.36/=

Total = 200,727.42/=

6. The Claimant to be issued with a Certificate of Service.

7. The Respondents to pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this on 27th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties