



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 617 OF 2014

JAMLECK KARIUKI KIBUGI.....CLAIMANT

VERSUS

DHL EXEL SUPPLY CHAIN (K) LIMITED.....ESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment contract by the respondent on 15.11.2013. In total, he prays for Kshs.169,400 made up of one month's salary in lieu of notice plus 12 months salary compensation for unfair termination.

2. The respondent has denied liability for the alleged unfair termination and averred that the termination of the claimant's contract of service was substantively and procedurally fair and lawful and prayed for the suit to be dismissed with costs. The suit was heard on 30.5.2018 when the claimant testified as Cw1 but the respondent called no witnesses.

Claimant's Case

3. Cw1 testified that he was employed by the respondent in 2012 as a Truck Driver earning Kshs.24,200 per month. On 9.11.2012 he was assigned Truck registration KAU 354L pulling trailer No. ZB 2145 to ferry cargo during the night shift. He was not assigned any Turn boy to assist him and the truck he had was defective and could not be driven in the highway but only within the Kenya Breweries Limited Compound.

4. Cw1 further testified that on that fateful night, he started the engine of the truck after it was fully loaded and stepped out to remove the wheel choke so as to drive away. Because of defect in the handbrake, the truck rolled down and hit a line of stacks of crates and destroyed them before stopping. In the process, the lorry caught his hand and injured him and he was rushed to the hospital for treatment.

5. Cw1 further stated that on the day, he reported to work and recorded a statement about the accident but the Security Officer Mr. Ole Sayaya tore the same because it had the potential of causing the respondent's contract to be terminated. He was therefore guided by Mr. Ole Sayaya to record another statement after being assured that he would not lose his employment. However, on 12.11.2013, he was served with show cause letter followed by a dismissal letter. He contended that the dismissal was unfair because he was not accorded any hearing in which to defend himself. He therefore prayed for terminal dues as prayed in the claim.

6. On cross examination Cw1 admitted that he was serving under one year contracts and the last one was running for January to December 2013. He blamed the employer for the accident because she assigned him a defective truck without any Turn boy to assist him. He admitted that he was served with a show cause letter but contended that the response he made was forced on him by the Security Officer to save the respondent's contract for services. He concluded by stating that he completed his clearance form but the employer declined to pay his terminal dues because of an outstanding SACCO loan which he has since paid.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent under one year contract ending on 31.12.2013 but he was dismissed prematurely on 15.11.2013. The issues for determination are:

- a. Whether the dismissal was unfair;

b. Whether claimant is entitled to the reliefs sought.

Unfair termination

8. Under section 45(2) of the Employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on valid and fair reason that it was done after following a fair procedure. In this case, the ground cited for the dismissal was causing an accident through negligence performance of his duty. The claimant admitted the said offence in his response to the show cause letter served on him before the dismissal. He however retracted the said confession and contended that he made the said confession involuntarily after being forced by the Security Officer Mr. Ole Sayaya. The said officer has not tendered any evidence herein to rebut the claimant's evidence.

9. Under section 43 of the Act, an employee has the right to challenge the reason for his termination in which case employer has the burden of proving the reason for the termination and in default, the termination is rendered unfair within the meaning of section 45 of the Act. In this case, the respondent has not discharged the said burden of proof and as such, I find and hold that the dismissal of the claimant was unfair and unjustified within the meaning of section 45 of the Act. In arriving at the foregoing opinion, I have considered the circumstances under which the accident occurred and found merits in the claimant's explanation that he was forced to admit liability for negligence in order to save his employer contract. Had he stood by his correct position that employer was to blame for the accident for assigning him a defective truck without any Turn boy to assist, the employer would be in danger of losing the transport business at the Kenya Breweries Limited.

10. As regards the procedure followed, I believe that after signing a response to the show cause letter admitting the misconduct of negligence performance of duty, there was no further need for an oral hearing in the presence of a fellow employee or union representative under section 41 of the Act. However that does not in any way negate the finding herein above that the termination was rendered unfair by the failure by the respondent to prove the reason for the dismissal of the claimant from his employment.

Reliefs

11. In view of the finding that the dismissal was unfair and unjustified, I award the claimant Kshs.24,200 being one month salary in lieu of notice plus Kshs.48,400 being 2 months' compensation for the unfair dismissal. In awarding the foregoing, I have considered the fact that the claimant was serving under a fixed term contract whose unexpired period was 2 months and therefore the claimant's reasonable expectation to continue serving was limited to the 2 remaining months. He will also get certificate of service because it is his right under section 51 of the Act.

Conclusion and Disposition

12. For the reason that the dismissal of the claimant was unfair, I enter judgment for him in the sum of Kshs.72,600 plus costs and interest at Court rate from the date hereof. The said award will be paid less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE