



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 1732 OF 2013

SHEM ORINA OKONGO CLAIMANT

VERSUS

JIHAN FREIGHTERS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 28.10.2013 seeking terminal dues plus compensation for unfair and premature termination of his contract of service by the respondent on 31.8.2013. The respondent filed defence on 10.1.2014 denying the alleged unfair termination and averred that the termination was fairly done within the stipulations of his contract of employment which provided for premature termination upon service of a notice of 15 days. She further averred that she paid the claimant all his terminal dues after the termination including his outstanding leave days plus salary for 15 days in lieu of notice. She therefore prayed for the suit to be dismissed with costs.

2. The suit was heard on 13.2.2017 and 7.5.2018 when the claimant testified as Cw1 and the respondent called her Branch Manager Mr. Kombe Randu as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

3. Cw1 testified that he was employed by the respondent as a driver from March 2010 and later on one year contract basis from 2.1.2011 which was renewed in January 2012. In August 2013 he was robbed Kshs.15,875 while in a Nakuru restaurant and reported to the Branch Manager on 15.8.2013 but he was told to repay the lost money. He stated that the lost money was collection from clients which he collected with instructions from the employer although that was not part of his job description.

4. Cw1 contended that after the said incidence, he was no longer treated well by the employer and on 31.8.2013 he was served with a termination letter citing restructuring as the reason for the termination. He however did not believe the cited reason stating that he was the only one terminated and therefore maintained that the reason for his termination was the loss of money through the said robbery.

5. He however admitted that after the termination the employer computed his dues at Kshs.54,000 but he declined because in his view the sum was little and also because the deductions made were not justified. He further admitted that he had authorized the deductions. He contended that he used to work through out including Sundays and public holidays.

Defence Case

6. Rw1 testified that Cw1 was employed by the respondent for about 3 years but under separate fixed term contracts. He further testified that his last contract was dated 10.1.2013 and it ran from 1.1.2013 to 31.12.2013. He contended that the last contract was prematurely terminated on 31.8.2013 on ground of restructuring and not due to the loss of money as alleged by the claimant.

7. Rw1 further contended that after the termination, terminal dues were computed and a cheque drawn but the claimant declined to pick it and instructed a lawyer to serve a demand letter on 12.9.2013. Rw1 responded to the demand letter inviting the claimant to collect his cheque but he declined. He contended that the claimant collected Kshs.15,875 from clients upon delivery of cargo to them but failed to remit it to the respondent and that is why it was deducted from his terminal dues.

8. Rw1 denied the claim for rest days and public holiday allegedly worked and contended that the company does not operate on Sundays and public holidays. He further contended the office has an alarm system which alerts him and the security firm if any one accesses the company premises on a non-working day. He further contended that it is not possible for a person to work daily without resting on Sundays and public

holidays. Rw1 stated that all the claimant's leave days were computed and paid for and denied that there were more leave days outstanding. In addition, he further contended that the claimant was a member of the NSSF and all his contributions were duly remitted.

9. On cross examination, Rw1 explained that the contract was terminable by a notice of 15 days. He further contended that other employees were terminated together with the claimant on the basis of frequent losses and competence. He however admitted that the respondent never served redundancy notice on the claimant and the area Labour Officer. He further admitted that the company had daily attendance register for employees but he did not produce it as exhibit. He also admitted that the claimant cleared with the company but he was never issued with a certificate of service. He however invited the claimant to go for it together with his cheque for terminal dues.

Analysis and Determination

10. There is no dispute that the claimant was employed to serve the respondent from 1.1.2013 to 31.12.2013 but the contract was prematurely terminated by the respondent on 31.8.2013. The issues for determination are:

- (a) Whether the termination was unfair and unlawful;
- (b) Whether the reliefs sought should be granted;
- (c) Whether any reliefs granted should be subject to any deductions.

Unfair and unlawful termination

11. There is no dispute that the termination letter dated 31.8.2013 cited restructuring the reason for the termination and consequently it fell within the provisions of section 40 of the Employment Act.

12. The said provision set out the mandatory procedure for terminating contract of service on account of redundancy. First, the employer must serve at least one month notice to the employee and the Labour Officer. Second, he must conduct a fair selection process to identify the staff to be laid off. Finally, the employer must pay the employee one month salary in lieu of notice, accrued leave days and severance pay.

13. In this case the claimant never complied with the mandatory requirement to pay one month salary in lieu of notice and severance pay.

As a result of such breach of statutory procedure, the termination was rendered unfair within the meaning of section 45(2)(c) of the Act.

Reliefs

14. Under section 49 of the Act, I award the claimant one month salary in lieu of notice plus 4 months salary as compensation for the unfair termination totaling to Kshs.266,500. In awarding the foregoing, I have considered statutory provisions in section 35 and 40 of the Act which provides for minimum notice period in the circumstance of this case to one month notice. In addition, I have also considered the claimant's reasonable expectation to continue working and earning his salary for the remainder of his fixed term contract being 4 months. Finally, I have considered the fact that the claimant never contributed to his termination through misconduct.

15. I further award him leave for 2 years 8 months at the rate of 30 days per year equalling to 80 days. Hence, $80/26 \times 20,500 =$ Kshs.63,076.95 but he will get Kshs.61,500 which is what he has prayed for.

16. The claim for rest days and public holidays worked is dismissed for lack of evidence to support. The claimant never called any other witness to support his allegation or in any other way prove that he worked for all the 2.8 years without a single day off. The claim for certificate of service is however granted as prayed because it is a right under section 51 of the Act.

Deduction

17. The claimant admitted the loss of Kshs.15,875 through robbery. He never explained why he kept it in the pocket. He must pay the same. The alleged off day and outstanding debt are not recoverable for lack of evidence.

Conclusion and Disposition

18. For reason that the claimant's contract of service was unfairly terminated, I enter Judgment for him in the sum of Kshs.328,000 plus costs and interest. The said sum shall be paid less Kshs.15,875 plus the relevant statutory deductions.

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

ONESMUS N. MAKAU

JUDGE