



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NO. 23 OF 2016

ISSAC KIPKOECH MELLY.....CLAIMANT

VERSUS

KASSAM HAULIERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for Kshs.340,786 as terminal dues plus compensation for unfair termination of the claimant's services by the respondent in February 2015. It is the claimant's case that he was dismissed for no justified reason and without following due process as provided by the law.
2. The respondent has denied the alleged unfair termination and averred that the claimant never resumed duty as required and he has since 12.3.2015 absconded duty. She therefore prays for the suit to be dismissed with costs because she never terminated the claimant's service.
3. The suit was heard on 17.11.2016 and 26.4.2017 when the claimant testified as Cw1 and the Respondent called Mr. Abraham Hussein Mangale and Aziza Musa on Rw1 and Rw2 respectively.

Claimant's Case

4. Cw1 testified how he was employed by the respondent on 1.9.2012 as a Tractor Driver earning Kshs.22,000 per month and worked until February 2015 when he fell sick following an outbreak of eye disease. He further testified that due to poor sight, he was given one week sick off by the Transport Manager Mr. Asisa. However upon reporting back to work, Mr. Osman terminated his employment and he was paid Ksh.10,500 on 15.3.2015. Cw1 stated that, the said Mr. Osman used to complain about his work.
5. Cw1 further testified that the termination was unfair because it was not grounded on any genuine reason and he was not accorded any prior hearing. He denied the allegation that he deserted work and maintained that he was dismissed by Mr. Osman and directed to see a Mr. Fayz to calculate his dues but the latter referred him to the HR Manager for the same.
6. Cw1 prayed for the reliefs sought in the suit inclusive of accrued leave. He contended that he never went for any annual leave.
7. On cross examination, Cw1 stated that he was given sick off to return after getting treated. He admitted that he never sought eye treatment but he was treated for stomach sickness. He contended that he was stopped from driving on 15.3.2015 but the actual termination date was 7.4.2015. He maintained that the termination was done orally. He concluded by stating that his gross pay was Kshs.22,700 but he used to receive a net of Kshs.20,000 in cash without any payslip.

Defence Case

8. Rw1 is the HR Manager for the respondent. He confirmed that, Cw1 was employed by the respondent for 2 years effective from 31.8.2013. Rw1 explained that Cw1 worked well until March 2015 when he started differing with his Supervisor Mr. Osman for alleged irregular attendance to work. He produced Attendance Card for March 2015 to prove that the claimant attended work for only 6 ½ days. Rw1 explained that he summoned the claimant over the issue but he came drunk and violent demanding his terminal dues saying that he has secured another job. He therefore paid him his dues and let him go away. He denied that the claimant was on leave or sick off except on 7.3.2015 when he had one day sick off, to report back on 8.3.2015.

9. Rw1 explained that the respondent's policy on terminations is that a letter is issued to the employee stating the reason for the termination and a certificate of service follows it. He further explained that after the claimant reported to the labour office a conciliation was done before Mrs. Ronga where the claimant was represented by his union. He however explained that the conciliation was abandoned after the claimant brought this suit.

10. On cross examination Rw1 explained that when an employee fell sick he was given a sick sheet. He further explained that the claimant was never given a sick sheet because he never reported that he was sick and never availed any medical documents. He stated that Mr. Osman was not qualified to hire or fire any employee. He maintained that he was the only officer with the power to fire an employee in the company.

11. Rw2 is the respondent's Head of Container Department. He stated that Cw1 was one of the respondent's truck drivers until 12.3.2015 when he last reported to work. He further explained that the claimant reported back after one week and when his supervisor asked him about his absence, he answered that he had no right to ask him that and a quarrel ensued before the claimant went away. Rw2 explained that the claimant returned after 3 day, he was very drunk and carrying receipts for medication showing that he had a sick off one and half days Rw2 contended that the claimant had not reported any sickness and no one in the office gave him sick off. When he referred the claimant to see the Boss at 3pm, he disappeared and the next time he heard from him was through a demand letter from his lawyer. He denied that the claimant was terminated.

12. On cross examination, Rw2 contended that Cw1 never returned to the office from 15.3.2015. He admitted that he was not present when the claimant quarreled with his supervisor Mr. Osman. He contended that the claimant had several warning letters in November 2014, January 2015 and 9.3.2015 for attending work while drunk, abandoning a tractor on the road and absenteeism respectively. He admitted that he was not present when, the claimant was allegedly dismissed by Mr. Osman. He further admitted that he was not aware whether the claimant was accorded any hearing before the alleged termination. He however denied the alleged termination and maintained that Mr. Osman had no power to dismiss anyone.

Analysis and Determination

13. There is no dispute that the claimant was employed by the respondent from August 2013 and worked until 15.3.2015. The issues for determination are:

- a. Whether the claimant deserted employment or he was unfairly terminated.
- b. Whether the claimant is entitled to the reliefs sought.

Desertion or Unfair termination

14. The claimant alleged in his written statement that he suffered eye sickness in February 2015 and he secured sick off from the Transport Manager Mr. Asisa (Cw2) until the time we got healed. However when he reported back on 15.3.2015 he was dismissed by Mr. Osman, his supervisor who allegedly used to complain about his work.

15. Rw1 admitted in evidence that claimant had one day sick off on 7.3.2015 and he was to report back on 8.3.2015. Rw2 on the other hand contended that the claimant reported back on 12.3.2015 after one week and when he asked by his supervisor Mr. Osman about his absence, he told him that he had no authority to ask him about that and a quarrel ensued leading the claimant to go away but returned after 3 days very drunk and carrying receipts for medication that showed that had been given sick off for one and half days. He however denied that he claimant had reported the alleged sickness to the respondent or availed the medical documents to the respondent before.

16. After careful consideration of the evidence presented to the Court, I find on a balance of probability that the claimant fell sick and failed to attend work from 8.3.2015 to 12.3.2015 when he reported. However after some arguments with his supervisor, he went away immediately and reported back after 3 days with medical documents showing that he had a sick off which had not been communicated to the employer. According to him, he was stopped from driving by Mr. Osman on 15.3.2015 and when he was referred to the HR for calculation of his terminal dues. The said Mr. Osman has not been called by the respondent to deny the alleged termination and the referral of the claimant for calculation of his terminal dues. Rw1 and Rw2 were not present when Mr. Osman dismissed the claimant and as such, they cannot rebut that contention. Consequently, I find on a balance of probability that the claimant never deserted work but he was dismissed by his supervisor Mr. Osman.

Unfair termination

17. Under section 45 of the Employment Act, termination for employees services is unfair if the employer fails to prove that it was done on ground a valid reason and after following a fair procedure. In this case, the reason used for dismissing the claimant was justified. Under section 44(4) (a), absenteeism from work without leave is a just cause that entitles an employer to dismiss the employee summarily. In this case, the claimant was given a sick off for one day on 7.3.2015 and failed to notify the employer. He further continued being absent until 12.3.2015 when he reported back to work and on being asked where he was, he quarreled with his supervisor and went away. When he reported back on 15.3.2015 with the medical receipts and the sick off for one day, he was dismissed and referred to the HR Manager for calculation and payment of his terminal dues. Such conduct was gross and brought the claimant to the discretion of the employer to summarily terminate his services.

18. However, the procedure followed before dismissing the claimant was not fair within the provisions of section 41 of the Act. Under the provision, before terminating the services of his employee on ground of misconduct, poor performance or physical incapacity, the employer is required in mandatory terms to first explain to the employee, in a language he understands and in the presence of a fellow employee or

shop floor union representative of his choice, the reason for which termination is contemplated and thereafter accord he employee and his chosen companion a chance to air their defence for consideration before the terminations decided. Rw1 and Rw2 were not present when Mr. Osman dismissed the claimant and as such, they could not rebut the claimant's evidence that he was never accorded a fair hearing before the dismissal. Consequently I find and hold that the respondent has failed to prove on a balance of probability that she followed a fair procedure before dismissal the claimant and that rendered the dismissal unfair.

Reliefs

19. Under section 49 of the Act I award the claimant Kshs.22,700 being one month salary in lieu of notice plus Kshs.68,100 being 3 months salary compensation for the unfair termination. In making the said award, I have considered the fact that the claimant contributed to his own dismissal through gross misconduct.

20. I also award the claimant Kshs.18,333 being salary for one year at the rate of 21 days pay. The claim for public holidays for one year is however dismissed for want of particulars and evidence.

Disposition

21. For the reasons stated herein above, I declare the termination of the claimant's contract of service as unfair and enter judgment for him in the sum of Kshs.109,133 less Kshs.10,500 paid after termination leaving a net of Kshs.98,633 plus costs and interest. The said award will be subject to any relevant statutory deductions.

Signed and dated and at Nairobi this 21st day of May, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of July, 2018.

JAMES RIKA

JUDGE