



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 335 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GILBERT ONYANGO.....CLAIMANT

VERSUS

NDUGU TRANSPORT COMPANY LIMITED.....RESPONDENT

JUDGMENT

Gilbert Onyango was employed by the respondent Ndugu Transporters in its quarry in Kisumu on 1st January 1997 as loading supervisor/quarryman. His services were terminated on 10th June 2013.

It is the claimant's case that he reported for work on that day at 7.00 a.m. but was told by Balraj Sehmbi a Director of the respondent not to do anything, Balraj called him a thief. He walked away and after two days he wrote a joint letter with his two colleagues Cleophas Koech and Frederick Sewe who had been sent home with him, seeking clarification of their employment status but there was no response. The letter was addressed to the Managing Director with copy to Balraj and Human Resource Manager.

After failing to receive any response the claimant approached his lawyer who sent a demand letter to the respondent on 21st July 2014 but there was no response. A reminder of 6th August 2014 similarly elicited no response, prompting the claimant to file the present suit.

The claimant prays for compensation for unfair termination, annual leave for 15 years at 21 days per year, gratuity, rest days and public holidays, notice house allowance.

The claimant denied colluding with other employees to overload trucks as alleged in the response to the memorandum of claim by the respondent. He stated that he was never arrested or caught stealing.

The claimant stated his starting salary was Kshs.10,000 which he earned for 9 years. The salary was increased to 13,000 for two years then to 15,000 which he earned until his employment was terminated.

Under cross-examination, the claimant denied being housed by the respondent but admitted that the respondent paid his NSSF and NHIF although some months were no paid.

Respondent's Case

Mr. Aketch for the respondent testified that on 10th June 2013 the respondent confirmed that trucks from its quarry were being overloaded. The respondent suspected the quarry foreman, the loader and the day guard. The respondent verbally asked the three to explain under what circumstances the overloading occurred but they did not give any explanation either on the same day or later. The company therefore summarily dismissed them. He testified that the claimant did not collect his terminal dues.

Under cross-examination, he testified that he did not deal with the cases personally, that it is a Director who discovered the matter and dismissed the claimant and the other two employees. He stated that there was no letter of dismissal issued. He stated that the Director Balraj who dealt with the matter was available. He testified that there is no weighbridge at the quarry. He stated he was not aware the claimant's phones were snatched, that he is not the immediate supervisor of the claimant who worked. He stated that the respondent worked on Sundays and public holidays.

Determination

I have considered the pleadings, evidence and submissions filed by the parties. The issues for determination is whether the dismissal of the claimant was fair and whether he is entitled to the prayers sought.

The law relating to termination of employment is contained in the Employment Act. Section 41 of the Act sets out the procedure, section 43 provides for proof of grounds for termination and Section 44 the grounds that constitute gross misconduct. Section 45(2) provides that where either Section 41 or 43 is not complied with the termination is deemed to be unfair.

In the present case it is not in dispute that the claimant was verbally dismissed without compliance with either section 41 or 43 of the Act. This is averred by the claimant and admitted by the respondent's witness.

The dismissal of the claimant is therefore unfair both procedurally and substantively.

Remedies

The claimant prayed for leave at 21 days per year for 15 years served, gratuity at 15 days per year worked, one month's pay in lieu of notice, house allowance, rest days and compensation. The respondent's witness confirmed that the quarry operated on public holidays and Sundays, so the claimant is entitled to rest days. The claimant has however not proved that he is entitled to gratuity. He was a member of NSSF and is not entitled to the same by virtue of Section 35 of the Employment Act.

I therefore award the claimant the following –

1. Annual leave

I award the claimant annual leave for the 15 years worked at the rate of 21 days per year worked being Kshs.181,730.80 based on the last salary of Kshs.15,000 divided by 26 days to arrive at the daily rate of pay.

2. Notice

I award the claimant Kshs.15,000 in lieu of notice.

3. Compensation

The claimant is entitled to compensation which I award him at maximum rate of 12 months' salary taking into account his long service and the circumstances under which he lost his employment. The compensation awarded is therefore (12 x 15,000) Kshs.180,000.

4. Rest days

I award the claimant rest days capped at three years being 52 days per year (based on 52 weeks in a calendar year). Since rest days are payable at double rate, I award in (52 x 576.90 x 2) Kshs.59,997.60

5. Costs

The respondent shall pay the claimant's costs for the claim.

6. Interest

The decretal sum shall attract interest from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE