



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 500 OF 2015

BETWEEN

TSUMA NYAMAI MWAJOTO.....CLAIMANT

VERSUS

HARDWARE & ACCESSORIES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Stephen Oddiaga & Company Advocates for the Claimant Sherman Nyongesa & Mutubia Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 17th July 2015. He states that he was employed by the Respondent in the year 1995. He does not say he was employed in what capacity. His contract was terminated by the Respondent on 5th January 2015, after he was involved in a road accident, on 25th December 2014. His last salary rate was Kshs. 11,500 per month. He states that termination was unfair and unlawful. He was not paid his rightful terminal benefits. He prays the Court to grant him Judgment against the Respondent, as follows:-

- a) Accrued annual leave over a period of 16 years at Kshs. 184,000.
- b) 1 month salary in lieu of notice at Kshs. 11,500.
- c) Service pay/gratuity at 15 days' salary for each of the 16 complete years of service at Kshs. 92,000.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 138,000.
- e) Arrears of house allowance at Kshs. 1,725 per month for 16 years at Kshs. 331,200.

Total...Kshs. 756,700.

- f) Certificate of Service.
- g) Costs and interest.

2. The Respondent filed its Statement of Response on 11th August 2015. Its position is that the Claimant had not worked for 16 years. He utilized all his annual leave days. He was paid all his dues in accordance with the law. He had received several warnings to desist from going to work while intoxicated. He was warned against insubordination. He did not heed the warnings and his contract was therefore terminated by the Respondent on 5th January 2015. The Claim has no merit. The Respondent prays the Court to dismiss the Claim, with costs to the Respondent.

3. Parties agreed to have the Claim disposed of on the strength of the record, on 13th December 2017. They confirmed the filing of their Closing Submissions, on 21st February 2018.

4. The Claimant submits he was instructed by his Employer on 25th December 2014 to go and pick a fellow Employee from an undisclosed location. He states in his Submissions that he worked as a Driver. He was involved, while in the course of executing his Employer's instruction, in a road traffic accident. A bicyclist and motorcyclist were involved. Nobody was injured. He recalled while at the scene of the accident, that he had been instructed to pick his Colleague by his Employer. He left the scene of the accident, boarded a Tuk Tuk, and went for his Colleague. Upon return to the scene of the accident, he was surprised to find the vehicle he was driving, which was involved in the accident had been towed away. Police arrested him and detained him at the local Police Station. He was later released on bond. The Respondent had closed for the yuletide season, by the time of Claimant's release. The Claimant reported back on 5th January 2015. He was slammed with termination letter. He submits he was not given a chance by the Respondent, to explain his conduct with respect to the accident. No warning letter was exhibited by the Respondent before the Court. No evidence, that the Claimant was intoxicated in the course of work, was brought before the Court. Termination was contrary to Section 41 and 45 of the Employment Act 2007.

5. He submits he is entitled to service pay under Section 35[5] of the Employment Act 2007. He has shown his contract was unfairly terminated, and merits compensation. He was paid a basic salary of Kshs. 11,500. He was not paid house allowance as required under the law. No annual leave records were exhibited by the Respondent to contradict the prayer for annual leave pay. The Employment Act allows the Claimant to have his Certificate of Service.

6. The Respondent did not file any Witness Statement. It submits that the Claimant admits he was involved in an accident on 25th December 2014. This is shown also, in the letter of termination of employment, issued on 5th January 2015 by the Respondent to the Claimant. He however did not bother, to explain the circumstance of his accident. He drove while intoxicated. It is settled law that unless a Motor Vehicle has mechanical defects, accidents of this nature do not occur on their own. The Driver must be negligent for the accident to occur. The Claimant drove while under the influence of intoxicants, and was wholly to blame for the accident and loss occasioned to the Respondent. He did not rebut the contents of the letter of termination. The Respondent submits it is not mandatory to hear an Employee before termination, under Section 41 of the Employment Act. The word 'shall' does not always mean an act is obligatory.

The Court Finds:-

7. The Claimant was employed by the Respondent as a Driver, in the year 1995. His contract was terminated by the Respondent on 5th January 2015. He states he worked for 16 years. The Respondent denies that the Claimant worked for 16 years. The Respondent however, does not give an alternative date, when it employed the Claimant, or supply the Court with a written contract, contradicting the Claimant on this term of employment, as required under Section 10 [2] [d] of the Employment Act 2007. The Court upholds the position of the Claimant, under Section 10 [7] of the Employment Act 2007, that he was employed in the year 1995.

8. The Claimant's contract was terminated following a road traffic accident involving Respondent's Motor Vehicle which was driven by the Claimant, a Motorcyclist and a Bicyclist. The accident took place on Christmas Day, 25th December 2014. The Claimant, quite insensibly, fled from the scene of the accident, leaving behind Respondent's Motor Vehicle, and the 2 Cyclists. Police were called in his absence and towed the Motor Vehicle. The Claimant was later arrested and released on bond. He went back to the workplace on 5th January 2015. He was immediately dismissed for his activities of 25th December 2014.

9. The Court has no hesitation in finding that the Claimant's contract was terminated for valid reason as required under Sections 43 and 45 of the Employment Act 2007. While the Respondent did not supply evidence to show that the Claimant drove while intoxicated, and show that this was the cause of the accident, it is clear that the Claimant ran away from the scene, leaving the Police and other involved Parties to unravel the cause of the accident. He left his Employer's Motor Vehicle unattended. He acted contrary to traffic law and commonsense by fleeing. He explained his flight, to have been necessitated by a sudden recollection, that he had been instructed by his Employer to pick a Colleague. He therefore deemed what had just happened on the road, not urgent, and boarded a Tuk Tuk, to pick his Colleague. He did not disclose to the Court if he contacted his Employer and informed his Employer that he had just been involved in an accident. He was not advised by his Employer as far as the Court can see from the record, to abandon the scene of the accident, and go on to pick his Colleague in a Tuk Tuk. A law-abiding and reasonable Driver would have stayed at the scene of the accident, until the Police finalized with their investigations and assessment of the scene of the accident, and leave only after every piece of information on the cause of the accident had been recorded by the Police. He should certainly not have fled, leaving his Employer's Motor Vehicle unattended. Although there is no evidence that the Claimant caused the accident through drunk driving, there is evidence that he fled the scene of the accident and abandoned his Employer's Motor Vehicle. He concedes he left the scene of the accident. There was no reason for him to flee. He was in the view of the Court, guilty of an employment offence under Section 44[4] [c] of the Employment Act 2007: he discharged his role on 25th December 2014, carelessly and recklessly. Termination was based on valid reason.

10. The Submission by the Respondent, that Section 41 on the right of hearing can be qualified, is without foundation. There is not a slightest hint of discretion granted to Employers on whether to hear, or not to hear Employees before termination, for reasons given under Section 41. The right and form of hearing must, as much as is practicable, be in accordance with Section 41. The obligatory nature of the right of hearing is not only to be read in the use of the word 'shall' but also by implication under Sections 43 and 45 of the Act. The Employer is required to prove the reason or reasons for termination, and to act in accordance with justice and equity. It is doubtful that the Employer can conclusively prove reason or reasons of termination, and act in accordance with justice and equity, without affording the Employee a form of hearing. The rules pertaining to justice and equity have the right of hearing before condemnation, as their centerpiece. To hold that there is discretion on the part of the Employer, to hear or not to hear an Employee before termination, would result in reverting employment law in Kenya, to the era of termination-at-the will of the Employer.

11. The Respondent failed to give the Claimant a hearing of any form. He reported to work on 5th January 2015. Rather than ask him to show cause, why he should not be disciplined, the Respondent slammed the Claimant with a termination letter. Termination took effect immediately. The Respondent alludes in the letter of termination, to previous warnings issued to the Claimant, concerning insolence and disobedience. The Statement of Response refers to warning on intoxication. These warnings were not shown by the Respondent to have issued upon the Claimant. There were no written warnings exhibited before the Court. There was no oral evidence or even a Statement of any Witness from the Respondent, suggesting the Claimant had these disciplinary problems. He had worked for 16 years. The Court was not told when the Claimant, in those 16 years, became intoxicated, insubordinate, disobedient or insolent. These are general accusations contained in

Submissions and Pleadings of the Respondent, totally unsupported by any shade of evidence. The warnings in any case, were not shown to be related, to the events of 25th December 2014. Procedure was not fair as demanded by Section 41 and 45 of the Employment Act 2007.

12. The Respondent shall pay to the Claimant equivalent of 5 ¾ months' salary in compensation for unfair termination at Kshs. 66,125.

13. The Claimant is allowed the prayer for 1 month salary in lieu of notice at Kshs. 11,500.

14. Parties did not give evidence on house allowance. There is no pay slip on record, and the Court is not in position to conclude that Kshs. 11,500 paid to the Claimant, was or was not, all inclusive. The Claimant did not include a claim for arrears of house allowance in his demand letter dated 18th May 2015. The prayer seems to have been drafted into the Claim, in afterthought. There is no evidence to support arrears of house allowance. The prayer is rejected.

15. In response to the prayer for annual leave, the Respondent states at paragraph 5 of the Statement of Response, that the Claimant had taken all his annual leave and had been paid all his dues, in accordance with the existing legal framework. There are no records of annual leave supplied to the Court, showing when the Claimant took his annual leave. It is not clear if the Respondent meant to say the Claimant was paid annual leave pay by the latter statement about payment of all his dues. If he was paid in lieu of leave, there is no document or other form of evidence capturing details of payment. It was not disclosed to the Court what existing legal framework the Respondent is referring to above, and how it was applied with respect to the prayer for annual leave. This particular demand was included in Claimant's letter of demand before filing of the Claim. The Respondent had ample opportunity to show annual leave was given and taken, or paid for in cash, and specify the existing legal framework under which leave was given and taken or paid for in cash. ***The Claimant is allowed the prayer for annual leave, based on a statutory minimum annual leave of 21 days, over a period of 16 years at Kshs. 148,615 [21 days' salary = Kshs. 9,288 x 16 years= 148,615].***

16. The Respondent similarly did not supply the Court with any evidence on Claimant's social security status. The Claimant submits he was not subscribed to any Social Security Plan. The Respondent did not have any Plan at the workplace, and did not enlist the Claimant to the National Social Security Fund. The Court is inclined to find that the Claimant merits service pay under Section 35[5] and 35[6] of the Employment Act 2007. ***He is granted 15 days' salary for each of the 16 years completed in service, at Kshs. 106,153 [Kshs. 11,500 divide by 26 working days = Kshs. 442.30 x 15 days = Kshs. 6,634.61 x 16 = Kshs. 106,153].***

17. He is granted the prayer for Certificate of Service, under Section 51 of the Employment Act 2007.

18. No order on the costs.

19. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair for want of fair procedure.

b) The Respondent shall pay to the Claimant: equivalent of 5¾ months' salary in compensation for unfair termination at Kshs.66,125; notice pay at Kshs. 11,500; annual leave pay at Kshs. 148,615; and service pay at Kshs. 106,153 – total Kshs. 332,393.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 5th day of July 2018.

James Rika

Judge