



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1404 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PATRICK MUSYOKA KAKULI.....CLAIMANT

VERSUS

KARIUKI NGARI.....RESPONDENT

JUDGMENT

By statement of claim dated 29th August and filed on 2nd September 2013, the claimant avers that his employment was unfairly terminated by the respondent. He prays for the following orders –

1. A declaration that the claimant's termination from his employment was unlawful and unfair.
2. The claimant be paid his terminal benefits and compensation as set out in paragraph 9 herein above amounting to Kshs.1,984,042/= (One million, nine hundred and eighty four thousand, and forty two only).
4. The respondent be ordered to pay damages to the claimant for unfair termination at the equivalent of twelve (12) months gross salary.
4. That the respondent be ordered to issue the certificate of service to the claimant.
5. The respondent to pay the costs of this claim.
6. Interests on the above at court rates.
7. The court do issue such orders and give such directions as if may deem fit to meet the ends of justice.

The respondent filed response to claimant's statement of claim and counterclaim on 16th September 2013 in which he denies owing the claimant the sum claimed in the statement of claim. The respondent counterclaims for Kshs.541,000 owed to the respondent by the claimant and prays for orders as follows –

- a. Special damages amounting to Kshs.541,000/=.
- b. Costs of the suit.
- c. Interest on (a) and (b) at court rates.
- d. Any other relief the court may deem just and fit to grant.

At the hearing, the claimant testified on his behalf while the respondent called three witnesses. The parties thereafter filed and exchanged written submissions.

Although the claim was filed by an advocate the claimant conducted the hearing in person.

Facts

The claimant was employed by the respondent as a Driver in April 2004 and worked until April 2013 when he was dismissed. His starting salary was Kshs.10,000. At the time he left employment he was earning Kshs.23,000 with an additional of Kshs.2,000 paid by the respondent's wife. The claimant was employed for the sole purpose of taking the respondent's children to and from school.

Claimant's Case

It is the claimant's case that the termination was unfair as he was not given notice or a hearing.

The claimant testified that he worked from 6 am in the morning until 7 pm in the evening for 6 days every week, that for the 10 years he worked for the respondent he never took annual leave. He further testified that he took care of the respondent's children while the respondent and his wife were away.

The claimant denied getting a loan of Kshs.500,000 to build a house. He denied using the respondent's fuel K-card after leaving service. The claimant denied damaging respondent's motor vehicle VW Jetta KAW 624W but admitted being reported for careless driving of the respondent's Toyota Premio Registration No. KBL 356L.

Respondent's Case

The respondent (RW1) relied on his witness statement and on the evidence of PAUL MUNYU KAMAU (RW2) and GEDEON NDAMBUKI (RW3).

The respondent's case is that he sent the claimant to rest after the claimant drove his VW Jetta KAW 624X badly and spoilt the gear box, failed to take Premio KBL 356L for service and caused the engine to knock and also quarrelled with his wife. Thereafter the claimant sent him and his wife threatening sms messages, which caused him to dismiss the claimant. He testified that the claimant did not do any overtime work as he reported for work at 7 am and dropped the children to school then rested until 3 pm. when he picked the children from school. He further testified that the claimant was off during school holidays in April, August and December and weekends. He testified that the claimant was not underpaid and that the claimant's salary was inclusive of housing allowance. He testified that the claimant did not work on public holidays. He testified that he did not pay NSSF and NHIF for the claimant as the salary was all-inclusive.

On the counterclaim, RW1 testified that he built for the claimant a house on the claimant's plot at Njiru. He commissioned Paul Kamau RW2 to build the house at a cost of Kshs.500,000. He further testified that the claimant used the K-card for fuel after leaving work on 4th April 2013 to draw fuel worth Kshs.7,000 and on 7th April 2013 for fuel worth Kshs.10,000. He further testified that he advanced the claimant Kshs.30,000 in January 2013 out of which the claimant had only paid Kshs.6,000 at the time of leaving employment and therefore owed the respondent the balance of Kshs.24,000. He prayed for judgment in the total sum of Kshs.541,000 as prayed in the counterclaim.

RW2 testified that he is a Mason and Carpenter, that he was engaged by the respondent and his wife to build a house for the claimant at his plot in Ruiru. He produced some photographs and other documents as exhibits 1 to 7.

RW3 testified that he was engaged as a housekeeper cum cook by the respondent in 1998. He testified that the claimant did not do any work other than taking the children to and from school. The claimant picked the children at 7 am and dropped them home by 5 pm except occasionally when the children had events in school on Saturdays when the claimant worked up to 12 pm. He further testified that he claimant took 2 weeks off every April, August and December when schools were closed.

Determination

I have considered the evidence on record and the submissions by parties. It is evident as admitted by the respondent that the claimant's employment was terminated following the damage to the respondent's two motor vehicles, which the claimant does not deny. The termination was however without a hearing as envisaged under Section 41 of the Employment Act. I therefore find that the termination was unprocedural and therefore unfair.

Remedies

The claimant is entitled to salary in lieu of notice. He is further entitled to salary for March 2013 which the respondent did not deny he did not pay. The claimant was not underpaid based on the consolidated wages according to the Regulation of Wages and Conditions of Employment (General) Order as amended during the tenure of his employment.

I find that the claimant has not denied that he took time off during school holidays. He is therefore not entitled to annual leave. He is also not entitled to house allowance as the salary he was paid was above the consolidated minimum wage (inclusive of house allowance). I further find that the claimant has not proved that he worked on public holidays or that he did any overtime work.

The prayers for NSSF and NHIF are rejected as the same are not payable to the claimant but to the statutory bodies established for the purposes of management of the same. The claimant has further not proved that any money was recovered from his salary for payment of NSSF and NHIF and not remitted to warrant refund of the same to him.

The respondent having admitted not paying NSSF, the claimant is entitled to service pay. The claimant is also entitled to compensation for unfair termination of employment, which I award him at 6 months' salary taking into account the circumstances under which his employment

