



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 70 OF 2017

[FORMERLY MOMBASA ELRC CAUSE NO 260 OF 2017]

JAKA KASSIM NDARO.....CLAIMANT

VS

DANKA AFRICA (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim filed in court on 11th April 2017, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Response on 17th May 2017 to which the Claimant responded on 14th June 2017.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Operations Manager, Phyllis Wanjiku. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a heavy commercial driver from 5th June 2013 until 2nd March 2015. He was initially employed on casual basis but his employment status later changed to term contract. As at the time of termination, the Claimant earned a monthly salary of Kshs. 17,000. He avers that he worked for eleven hours per day over six days per week. He adds that he was not allowed to take his full leave entitlement.

4. On 22nd March 2015, the Claimant reported for duty as usual upon which the Respondent's Manager, Meshack Mbayu issued him with a termination letter of the same day. The Claimant states that the termination of his employment was unlawful and unfair. In this regard, he avers that there was no valid reason for the termination and that he was not given an opportunity to be heard.

5. The Claimant therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 20,070.95
- b) Accumulated leave days from 1.6 2014 to 3.3.2015.....9,032.50
- c) Underpayment from 1.5.2013 to 31.7.2013.....27,569.85
- d) Underpayment from 1.8.2013 to 28.2.2015.....58,348.05
- e) Unpaid wages for 1st and 2nd March 2015.....1,062.65
- f) 12 months' salary in compensation.....240,851.40
- g) Certificate of service
- h) Costs plus interest

The Respondent's Case

6. In its Response dated 16th May 2017 and filed in court on 17th May 2017, the Respondent states that the Claimant was employed as a driver of a medium size vehicle and was in charge of running errands within Mombasa County and its environs. The Respondent denies that the Claimant was a heavy commercial driver.

7. The Respondent further states that the Claimant was issued with a six (6) months' employment contract dated 9th April 2014. His working hours ran from 8.00 am until 5.00 pm during week days and from 9.00 am until 1.00 pm on Saturdays. The Respondent admits that the Claimant earned a monthly salary of Kshs. 17,000. The Respondent denies the Claimant's claim for underpayment.

8. Regarding the Claimant's exit, the Respondent states that he was summarily dismissed on 2nd March 2015 on account of rudeness to his seniors and the management in general. Prior to the dismissal, the Claimant had been issued with two warning letters dated 22nd August 2014 and 27th November 2014 which he ignored.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant's employment was terminated by letter dated 2nd March 2015 stating as follows:

"RE: TERMINATION OF SERVICES JAKA KASSIM NDARO I.D. NO. 11764381

We refer to the above matter.

We regret to communicate to you of the management's decision to terminate your services with us effective 3rd March 2015. On various occasions you have been called to the office and warned of your rude/disagreeable behavior with management and fellow staff and no change has been observed from you.

We thank you for services rendered to the company and wish you well in your future endeavors.

Yours Sincerely,

DANKA AFRICA (K) LIMITED

(Signed)

MANAGING DIRECTOR

MESHACK MBAYU

11. The allegations made against the Claimant as disclosed in the termination letter fall within the province of gross misconduct under Section 44(4) of the Employment Act, 2007. The Respondent's Operations Manager, Phyllis Wanjiku told the Court that the Claimant had been issued with prior warnings. In this regard, the Respondent produced two warning letters dated 22nd August 2014 and 27th November 2014. The Claimant however denied receiving any warning letter and there was no evidence of service upon him.

12. Even if the Court were to give the Respondent the benefit of doubt and hold that the Claimant had indeed been warned, the Respondent would still bear the burden of serving formal charges upon the Claimant at the shop floor. This is the whole essence of procedural fairness requirements set out under Section 41 of the Employment Act.

13. The Court was referred to the decision by the Court of Appeal in ***Krystalline Salt Limited v Kwekwe Mwakwele & 67 others [2017] eKLR*** where it was held that in claims of unfair termination, the employer bears the evidential burden to demonstrate a valid and fair reason for the termination. The learned Judges of Appeal went ahead to confirm that the employer is also required to show that fair procedure was employed in the termination.

14. I do not need to say more. The law is well settled in this matter. It is not enough to issue a termination letter with a litany of allegations. These allegations must be tested in a disciplinary process, prior to termination and the applicable procedure is well spelt out in Section 41 of the Employment Act.

15. From the evidence on record, it is clear that the Respondent made no attempt to mount a disciplinary process as required and the ensuing termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

16. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's failure to adhere to the procedural fairness requirements set out in law. I further award the Claimant one (1) month's salary in lieu of notice.

17. The claim for leave pay and days worked in March 2015 are admitted and are payable.

18. The claim for underpayment is premised on the Claimant's averment that he was a heavy commercial driver which averment was not supported by his employment contract. The claim was therefore not proved and is dismissed.

19. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 102,000
- b) 1 month's salary in lieu of notice.....17,000
- c) Leave pay for 14 days (17,000/30x14).....7,933
- d) Salary for 2 days in March 2015 (17,000/30x2).....1,133

Total.....128,066

20. This amount will attract interest at court rates from the date of judgment until payment in full.

21. The Claimant is also entitled to a certificate of service and costs of the case.

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF SEPTEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kariuki for the Claimant

Miss Obura for the Respondent