



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1336 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOSEPHAT OLUWAHO OTUNDO CLAIMANT

VERSUS

WORLDWIDE MOVERS KENYA LIMITED RESPONDENT

JUDGMENT

Vide memorandum of claim dated 3rd August 2015 and filed by the claimant in person on 4th August 2015 the claimant avers that the respondent wrongfully and unfairly terminated his employment and also failed to pay his terminal benefits. He seeks the following remedies

(i) The sum of Kshs.163,000. as particularized below

a. Salary in lieu of Notice Kshs.10,000

b. NSSF money deducted and not remitted 30 x 400 Kshs.12,000

c. Leave for 5 years (10,000/30 x 21 x 5) Kshs.21,000

d. Compensation for unfair termination

(10,000 x 12 months) Kshs.120,000

TOTAL AMOUNT KSH.163,000

(ii) Costs of this suit

(iii) Interest in (i) and (ii) above.

(iv) Any other relief as the Court may deem just.

The respondent filed a memorandum of reply admitting employing the

claimant as a packer but denies terminating his employment. The respondent avers that the claimant absconded duty.

At the hearing of the case the claimant testified on his behalf while the respondent called NEENA PRIOR, a Director of the respondent and KITUNGULU PETER LUNYAMA a supervisor. Parties thereafter filed and exchanged written submissions.

Facts

The claimant was employed by the respondent on 5th September 2010 as a Packer. His last salary was Kshs.10,000. On 2nd March 2015, the claimant lost a brother and applied for four days permission to attend the burial. He gave the letter to his Supervisor **Kitungulu Peter (RW2)** but left before the Director **Neena Prior (RW2)** could authorise as the body was being transported on the same day. Kitungulu

forgot to hand over the letter to Neena.

When he reported back on 9th March 2015 he was issued with a warning letter but refused to sign. According to the claimant he refused to sign because Neena refused to give him a copy.

According to the claimant he was told to go home until he is called back. Neena however testified that the claimant walked out of his job. Kitungulu testified that the claimant had given him a letter seeking four days off duty to attend his brother's funeral, that on the day the claimant reported back he spoke with the boss (Neena) and later called to inform Kitungulu that he had been dismissed.

Determination

The issues arising for determination are whether the claimant was unfairly dismissed or absconded duty and whether he is entitled to the remedies sought.

Whether the claimant was dismissed or absconded duty

The evidence from the claimant and Kitungulu confirm that the claimant reported back for duty after the funeral and after a discussion with Neena, left employment. It is evident that the termination of the claimant's employment resulted from his going for the funeral without waiting for permission to be granted.

Although this was valid ground for disciplinary action to be taken against the claimant, it was not a valid ground for termination of employment without a hearing and without a letter of termination.

According to Section 41 of the Employment Act, an employee is entitled to a hearing before termination and according to Section 45(2) termination without subjecting an employee to a disciplinary hearing or giving an opportunity to an employee to defend himself renders any resultant termination of employment unfair. I therefore find the termination of the claimant's employment unfair.

Remedies

On remedies the claimant prayed for one month's salary in lieu of notice which he is entitled to and I award him the sum of Kshs.10,000.

The claimant prayed for NSSF remittance for 30 months at the rate of Kshs.400 per month. He is not entitled to the same. What he should do is report the matter to NSSF, which has the power and capacity both legal and administrative, to collect the same from the respondent.

The claimant prayed for leave for 5 years. The respondent did not deny that the claimant had not taken leave for the period he was in employment. No records were produced to prove that the claimant took leave. I award him the same at 21 days per year for the four and a half years he worked at Kshs.36,153. I note that the claimant's calculation had an error and he prayed for a much lessor sum.

The claimant further prayed for compensation in the sum of Kshs.120,000 being maximum compensation of 12 months' salary. Having worked for four and a half years and taking into account all circumstances of the case, I award him five months compensation at Kshs.50,000.

The claimant prayed for costs. Having represented himself, I award him Kshs.30,000 to cover his reasonable expenses including filing and service fees.

In summary therefore I award the claimant the following –

- (i) Pay in lieu of notice Kshs.10,000
- (ii) Leave Kshs.36,153
- (iii) Compensation Kshs.50,000
- (iv) Costs Kshs.30,000

The total amount awarded is **Kshs.126,153/=**.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE