



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2014 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 2nd October, 2018)

JAMES MUTHOKA MWANIKI.....CLAIMANT

VERSUS

KENYA BUILDERS &

CONCRETE COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 17.12.2013 through the firm of Namada and Company Advocates claiming unfair termination and non-payment of his terminal dues and compensatory damages by the Respondent.
2. The Claimant's case is that he was employed by the Respondent on 12/4/2009 as a Driver at a salary of 16,167. He avers that he served the Respondent diligently and satisfactorily and in November 2010, his oral contract was reduced into writing.
3. He avers that in April 2013, the Respondent's Human Resource Manager sacked him without any show cause letter alleging that he had submitted false mileage for motor vehicle registration no. KAG 322W to the Respondent's Pump Attendant.
4. Following the above incident, the Claimant avers that he was issued with a show cause letter asking him to explain why he may have given false mileage. He responded indicating it was not deliberate as the windscreen was dusty and he could not clearly read it because it was dismantled. After this, he was not called for any disciplinary hearing but was dismissed.
5. In cross-examination by Counsel for the Respondent, he avers that the dash board was very dusty and it was the pump attendant to read it. He avers that the Turn Boy of the vehicle assaulted the Personnel Manager. The Claimant was then arrested by the police and he recorded a statement to police in May 2013. He avers that the Turn Boy was the one charged with assault.
6. The Respondents on their part filed their Memorandum of Defence on 23.9.2013 through the Federation of Kenya Employers (FKE). They denied the Claimant's claim. They deny that the Claimant had discharged his duties diligently. They aver that the Claimant had been making false representations regarding fuel consumption by giving false mileage readings. That this led to loss of 2087.33 liters of diesel totaling 198,296.70. That when this was realized, the Respondent asked the Claimant to show cause why action should not be levelled against him. The Respondent deny that the Claimant responded to the show cause letter.
7. The Respondent aver that they only saw an alleged respond in Court filed with the Memorandum of Claim. The Respondents further aver that the alleged dusty dashboard is a fabrication as it was the Claimant's duty to keep the vehicle clean at all time.
8. The Respondents further aver that due to the show cause letter issued to the Claimant, he and the turn boy became violent and attacked the Personnel Manager whom they accused of setting them up. Their behavior was so volatile that the Respondent demanded they exit the premises until they cooled down and made response to the show cause letter.
9. The Claimant refused to heed and even threatened the Personnel Manager. The security intervened and expelled the Claimant from the Company premises.
10. On 7.5.2013, the Claimant and the turn boy made good their threats to the Personnel Manager who they attacked and physically assaulted. They were then arrested and that the matter is still active at Makadara Law Courts as Criminal Case No. 2049 of 2013.

11. The Respondent denied that the Claimant is entitled to prayers sought and prays that the claim be dismissed accordingly.
12. The Respondent further called one witness who gave evidence reiterating the averments in the Memorandum of Defence. When cross-examined, the RW1 indicated that the Claimant was not given an opportunity to defend himself as to the excel document Appendix 4.
13. He avers that after he was assaulted, he called the police. He never took any action against the Claimant. He also admitted that the Claimant was never charged in Court.
14. The Parties also filed their respective submissions in this case. I have examined the evidence and submissions of the Parties. The issues for determination are as follows:-

1. Whether the Claimant was dismissed by the Respondent.

2. If so, whether there were valid reasons and due process.

3. Whether the Claimant is entitled to remedies sought.

15. On the 1st issue, the Respondent avers that the Claimant was issued with a show cause letter when he was found falsifying mileage documents for the truck he was driving. He was then issued with a show cause letter. The Respondent witness told the Court that this infuriated the Claimant and his turn boy very much that they became very offended and attacked the Personnel Manager and physically assaulted him.

16. According to RW1, they were then expelled from the company premises. No further action was taken against them. The act of expelling the Claimants from the premises without further recourse to due process as admitted by the Respondent in my view amounts to a dismissal.

17. The events occurred on 27.4.2014 and there was no further action until 7th May 2014 when the Claimant and his turn boy were arrested ostensibly for assaulting the Personnel Manager.

18. In this Court's view, the Respondent having admitted that their security expelled the Claimants out of the Respondent's premises is an admission to an oral dismissal.

19. On the second issue, the issue of valid reasons for the dismissal and due process are under consideration.

20. The Respondents contend that the reason for the dismissal was falsification of mileage claims. The Respondents sought to rely on their Appendix 4, which is a record of diesel issue records for motor vehicle KAG 322 W. The document is computer generated for records dated January and February. There is no indication that it is from the Respondent's data nor does it bear any signatures. The author is also not known.

21. The Claimant denied ever seeing this document. The Claimant was issued with a show cause letter which he avers that he responded to.

22. The Respondent on their part deny that the Claimant Respondent to the show cause letter. The reason for the dismissal if at all however revolves around the mileage falsification. This is a reason which the Respondent relied on it to issue a show cause letter but the expulsion of the Claimant related to the 'violence' purportedly meted out against the Personnel Manager. The two reasons needed proof through some form of disciplinary process.

23. From the Respondent's own admission after the Claimant was expelled out of the premises, no further action was taken against him. This means that though the Respondent had some reasons or grounds against the Claimant, these reasons had not been tested through a disciplinary hearing. What therefore follows is that the Claimant was dismissed without a disciplinary process.

24. The dismissal of the Claimant was therefore unfair and unjustified as envisaged under Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..".

25. It is therefore my finding that the Claimant is entitled to compensation as follows:-

1. 1 month salary in lieu of notice = 16,167/=.

2. Unpaid salary for April 2013 = 16,167/=.

3. Unpaid salary from 1st to 16th May 2013 = 8,622/=.

4. 8 months' salary as damages for unfair dismissal = $8 \times 16,167 = 129,336$ /=.

Total = 170,292/=

5. *The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 2nd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri for Respondent – Present

Mukeli holding brief for Namada for Claimant – Present