



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 743 OF 2017

JAVAN KISOI MULWA.....CLAIMANT

VS

S.A.A INTERSTATE TRADERS (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 13th September 2017 and filed in court on even date, the Claimant has sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Reply on 30th October 2017.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called its Director, Abdallah Alwi.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a turn boy in the year 1998. He was elevated to the position of supervisor at a monthly salary of Kshs. 14,000 from 2008.

4. The Claimant further states that in February 2017, he was sent to Malaba where the Respondent’s truck had overturned, to deliver a landing jerk. After the truck was recovered, the driver of the truck fastened the landing jerk on the rear end of the truck. The crew proceeded to Kampala to deliver goods and upon arrival the driver discovered that the landing jerk was missing.

5. Upon returning to Mombasa, the Claimant reported the missing landing jerk to Abdallah who was in charge of the Respondent’s yard. The Claimant was terminated and told not to return to the Respondent’s premises.

6. The Claimant avers that the decision to terminate his employment was unlawful and unfair. He adds that he was not paid salary for the months of December 2016 and January 2017 as well as 23 days worked in the month of February 2017.

7. The Claimant further states that he worked during public holidays without compensation. He also claims that he was not paid house allowance.

8. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 14,000.00
- b) Salary for December 2016 and January 2017.....28,000.00
- c) Salary for 23 days worked in February 2017.....13,461.50
- d) Public holidays (January 2008 to 23.2.2017).....86,160.00
- e) House allowance (January 2008 to 23.2.2017).....231,000.00
- f) Compensation for unfair termination.....168,000.00
- g) Certificate of service

h) Costs plus interest

The Respondent's Case

9. In its Reply dated 30th October 2017 and filed in court on even date, the Respondent admits having employed the Claimant as a truck driver in the year 2006. The Respondent states that the Claimant's employment was peaceful and uninterrupted from the year 2006 up to February 2017 when the Claimant absconded duty, having failed to account for a car jerk that went missing while in his custody, care and control.

10. The Respondent denies terminating the Claimant's employment and states that the Claimant was paid all his terminal dues up to the date he absconded duty.

11. By way of counterclaim the Respondent claims from the Claimant the sum of Kshs. 14,000 being one month's salary in lieu of notice as well as the monetary value of the missing car jerk.

Findings and Determination

12. There are three (3) issues for determination in this case:

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

Desertion of Duty or Unlawful Termination?

13. In response to the Claimant's claim for unlawful termination, the Respondent states that it is the Claimant who deserted duty after failing to return a landing jerk given to him in the course of duty. By definition, desertion implies an intention on the part of an employee not to resume work. In this regard, my brother **Radido J** in *Philomena Kiprotich Kirui v Lessos Veterinary Suppliers Ltd [2016] eKLR* stated the following:

“an employer who terminates the services of an employee on grounds of abscondment or desertion has to demonstrate and/or prove that the employee had no intention of resuming work.”

14. In order to discharge this burden, the employer must demonstrate efforts made to reach out to the deserting employee (see *James Ashiemi Namayi v Menengai Oil Refineries Limited [2016] eKLR*).

15. The Respondent's Director, Abdallah Alwi told the Court that he told the Claimant to go and bring the missing jerk. He added that the Claimant asked that the cost of the jerk be recovered from his monthly salary, a proposal that Alwi himself rejected. An employee who offers to pay for the cost of a missing item cannot be said to have demonstrated an unequivocal intention not to resume work.

16. The Court therefore rejects the theory advanced by the Respondent that the Claimant absconded duty. I thereby find that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure.

Remedies

17. Pursuant to the foregoing findings, I award the Claimant twelve (12) months' salary in compensation for unfair termination of employment. In arriving at this award, I have taken into account the Claimant's long service, going by the employment period admitted by the Respondent. I have also considered the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

18. The Claimant further claims house allowance. Section 31(1)and(2) of the Employment Act provides as follows:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage

or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective

agreement which provides consolidation of wages as provided in

paragraph (a).

19. There was no evidence that the monthly salary paid to the Claimant was inclusive of house allowance. I therefore award the Claimant house allowance at 15% of his basic salary and adopt the resultant figure of Kshs.16,100 as the Claimant's monthly salary for purposes of this claim.

20. The claims for salary arrears and public holidays were not proved and are dismissed.

The Respondent's Counterclaim

21. In light of the finding that the Claimant did not abscond duty but was unfairly terminated, the counterclaim for one month's salary in lieu of notice fails and is dismissed. The counterclaim for cost of the landing jerk was not supported by any evidence and therefore also fails and is dismissed.

Final Orders

22. Finally, I enter judgment in favour of the Claimant as follows:

- a) 12 months' salary in compensation.....Kshs. 193,200
- b) 1 month's salary in lieu of notice.....16,100
- c) House allowance for 122 months.....256,200

Total.....465,500

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

24. The Claimant is also entitled to a certificate of service plus costs of the case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Anangwe h/b Mr.Ngonze for the Respondent