



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 858 OF 2016

JULIUS MWANGOLO MWATUA.....CLAIMANT

VS

RAISONS DISTRIBUTORS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 7th November 2016 and filed in court on 8th November 2016 is for unfair termination of employment.
2. The Respondent filed a Response on 22nd December 2016 but did not avail a witness. The Claimant testified and was duly cross examined. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 1st August 2005 as a general worker. On 1st August 2014, the Claimant was involved in a road traffic accident in the course of duty.
4. Following the accident, the Respondent sent the Claimant on compulsory and unpaid leave, indicating that he would be recalled. The Claimant was never recalled, implying that his employment had been terminated.
5. The Claimant submits that his employment was terminated without reasonable cause and notice. He claims the following:
 - a) One month's wages in lieu of notice.....Kshs. 16,000
 - b) One month's accrued leave.....16,000
 - c) Service pay for 9 years.....72,000
 - d) 12 months' salary in compensation
 - e) Certificate of service
 - f) Costs plus interest

The Respondent's Case

6. In its Response dated 21st December 2016 and filed in court on 22nd December 2016, the Respondent states that the Claimant was initially employed as a loader on 1st August 2005. On 1st January 2014, he was engaged as a driver at a monthly gross salary of Kshs. 16,000.
7. The Respondent avers that the Claimant was not diligent in his work and was guilty of misconduct by ignoring instructions from his superiors that resulted in his suspension from duty on 17th August 2012. The Respondent adds that the Claimant absconded his daily duties and/or was absent from work without lawful justification thereby breaching the contractual relationship between the parties.

8. The Respondent states that on 4th April 2014, the Claimant was involved in an accident with one of the Respondent's vehicles and that he never reported back to work after the accident. The Respondent further states that the loaders reported back to work but the Claimant did not report back and could not be traced by the Respondent. The Claimant only re-appeared to collect his salary at the end of the month.

9. The Respondent maintains that by his conduct, the Claimant had absconded his duties. By way of counterclaim, the Respondent claims from the Claimant the sum of Kshs. 16,000 being one month's salary in lieu of notice.

Findings and Determination

10. 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?

11. In denying the Claimant's claim that he was unlawfully and unfairly terminated, the Respondent states that it is the Claimant himself who deserted duty following an accident with the Respondent's motor vehicle.

12. Desertion of duty falls within the realm of gross misconduct which renders an employee liable to summary dismissal. The caveat is that like all other forms of misconduct, it must be proved. Emerging jurisprudence is to the effect that an employer alleging desertion of duty must demonstrate efforts made to reach out to the deserting employee (see *Stanley Omwoyo v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*)

13. The Respondent did not adduce any evidence to prove that efforts were indeed made to trace the Claimant's whereabouts. Desertion was therefore not proved. Moreover, the Respondent did not call any evidence to challenge the Claimant's testimony that he was sent away following an accident in the course of duty. The Claimant's testimony was consistent not only with his pleadings but also with the Respondent's admission that the Claimant was involved in an accident. The Court therefore had no reason to disbelieve the Claimant.

14. Ultimately, the Court finds and holds that the Claimant's employment was unlawfully and unfairly terminated and he is entitled to compensation.

Remedies

15. In light of the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service tempered with his employment record. I have also considered the Respondent's conduct in the termination transaction.

16. I further award the Claimant one (1) month's salary in lieu of notice and prorata leave for 2014.

17. The Claimant admitted that he was a contributing member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay.

18. In the end, I enter judgment in favour of the Claimant in the following terms:

- a) 10 months' salary in compensation.....Kshs. 160,000
- b) 1 month's salary in lieu of notice.....16,000
- c) Prorata leave for 2014 (16,000/30x1.75x7).....4,013

Total.....180,013

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

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

21. Orders accordingly.

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

LINNET NDOLO

JUDGE

Appearance:

Miss Mbogoh for the Claimant

Miss Ochola h/b Mrs Kipsang for the Respondent