



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.319 OF 2014

PETER WAMBUA MWINZI.....CLAIMANT

VERSUS

KIBUWA ENTERPRISES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 04.03.2014 through Ososro Chege Kibathi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the actions of the respondent amounted to unlawful dismissal.
- b) Unpaid salary for January, February, August, and September 2011 Kshs.64, 000.00.
- c) Notice of 1 month Kshs.16, 000.00.
- d) Leave days Kshs.15, 866.67.
- e) House allowance for period served Kshs.40, 800.00.
- f) Gratuity at 20% on the basic salary for 17 months Kshs. 54, 400.00.
- g) Compensation for unlawful loss of employment 12 months' salaries Kshs. 192, 000.00.
- h) Unreimbursed repairs to KBL 475 B Kshs. 5, 000.00.
- i) NSSF arrears Kshs. 6, 800.00.
- j) NHIF arrears Kshs. 4, 080.00.
- k) Unlawful deduction or withheld salary as per minimum wage order (leave of Court will be sought to utilise CPMU of the Labour Ministry).
- l) Interest on (b) to (i) above.
- m) The respondent to issue the claimant a certificate of service.
- n) Costs of the suit.
- o) Any other relief that the Honourable Court deems fit to grant.

The statement of response was filed on 09.04.2014 through Kibuchi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that the respondent employed the claimant as a truck driver. The parties dispute on the effective date of appointment. The claimant alleges that he was employed effective 19.04.2011 and the respondent says that it was effective 17.04.2010. The claimant testified that he was employed April 2010. The Court returns that the effective date of the employment was on 17.04.2010.

The **next issue** for determination is whether the termination of the claimant's employment was unfair. The claimant's testimony is that on 16.12.2010 he got injured in an accident while on duty. Further his troubles started when he demanded compensation from the respondent in that regard. On 23.08.2011 he arrived from a trip in Burundi. He reported on duty on 24.08.2011 and worked until 29.09.2011 when he was summoned by his boss. He was told that he had delivered a wrong cargo from Burundi on his just concluded trip. His case was that he was not given an explanation why the delivered cargo had been wrong. He was then terminated without a warning letter.

The respondent's account and evidence is that the claimant was given the letter of 25.08.2011 to explain why he ignored categorical instructions to load cargo for a regular client of the respondent on his return leg from Burundi driving the truck KBL475B. Further the letter stated that he had been given adequate fuel on that trip and it was surprising that he had requested for additional fuel. Further the relevant seal was on board but yet he had requested for cash to purchase another seal. The claimant was required to explain. The evidence was that the claimant replied by his letter dated 25.08.2011. He explained that a person known as Muarabu had refused to load the client's cargo and it was upon reaching Nakuru that it was discovered that the wrong cargo had been loaded. On fuel he explained that his fuel as provided had been stolen while he was asleep and it was raining. About the seal he stated that he did not see any on board and if it was on board, it was kept in a place he did not know.

The letter of summary dismissal is dated 29.09.2011. It states that after the claimant's reply, the claimant attended meetings at the respondent's office. The issues had been discussed on 19.09.2011, 21.09.2011 and 22.09.2011. The respondent's findings were that in the Burundi trip the claimant had parked at the same place with another respondent's motor-vehicle KBK 088D but whose driver did not report theft of the fuel. Further, upon discovery of the theft of fuel, the claimant had failed to report the alleged theft promptly as was necessary and no police report had been made in that regard. The letter further stated that the claimant had failed to give satisfactory explanation on delivery of the wrong cargo in his last trip from Burundi. Prior to departure on the Burundi trip the respondent had confirmed that the seal in issue had been on board. Thus the claimant was summarily dismissed from the respondent's service.

The Court returns that as at the time of termination the respondent had valid reasons to dismiss the claimant as per section 43 of the Employment Act, 2007. Further the reasons related to the claimant's conduct, capacity and compatibility as well as the respondent's operational requirements as per section 45 of the Act. The Court further finds that prior to the dismissal the respondent accorded the claimant a notice of the allegations and a disciplinary hearing at the several meetings that took place and as per section 41 of the Act. Accordingly the Court returns that the termination of the claimant's contract of service by way of the summary dismissal was not unfair.

The **final issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The termination was not unfair and the Court finds that the claimant is not entitled to a declaration that the actions of the respondent amounted to unlawful dismissal.
- b) The claimant failed to justify by way of evidence the prayer for unpaid salary for January, February, August, and September 2011 Kshs.64, 000.00. On the other hand as per computation at Page 25 of the respondent's bundle of documents it is clear that the salaries in issue were applied to recover expenses not accounted for and the claimant offered no evidence to rebut the computation. The computation shows that the claimant, after the surcharge, still owed the respondent a sum of Kshs. 8, 000.13. The claimant is therefore not entitled as claimed and prayed for.
- c) The court has found that the summary dismissal was not unfair and the claimant is not entitled to notice of 1 month Kshs.16, 000.00.
- d) The Court returns that the termination was on 29.09.2011 and the suit was filed on 04.03 2014 outside the 12 months of limitation of action for continuing injuries as per section 90 of the Act. Thus the prayers for leave days Kshs.15, 866.67; house allowance for period served Kshs.40, 800.00; and alleged underpayment throughout service period will fail because the cessation of the injuries was on 29.09.2011 and the claims were time barred.
- e) The claimant was a member of NSSF and gratuity at 20% on the basic salary for 17 months Kshs. 54, 400.00 was not justified at as it was not available under section 35 of the Act.
- f) The termination was not unfair and the Court returns that the claimant was not entitled to claim compensation for unlawful loss of employment 12 months' salaries Kshs. 192, 000.00.
- g) The claimant did not justify unreimbursed repairs to KBL 475 B Kshs. 5, 000.00 especially that he still owed the respondent Kshs. 8, 000.13 as not accounted for.
- h) The Court returns that NSSF arrears Kshs. 6, 800.00 and NHIF arrears Kshs. 4, 080.00 are enforceable under the relevant statutory provisions rather than by way of payment to the claimant as prayed. The Court returns that the claimant is entitled to enforce his claims in that regard per the relevant statutory provisions.
- i) The respondent to issue and deliver the claimant's certificate of service per section 51 of the Act.
- j) The Court has considered parties' margins of success and returns that there will be no orders on costs of the suit.

In conclusion judgment is hereby entered for the parties and the suit is determined with orders:

- 1) The respondent to issue and deliver the claimant's certificate of service per section 51 of the Act by 01.12.2018.
- 2) There will be no orders on costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 16th November, 2018.

BYRAM ONGAYA

JUDGE