



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2018 OF 2014

NICKSON MARITA.....CLAIMANT

VERSUS

THIKA COFFEE MILLS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a driver until 2.9.2013 when he was suspended for allegedly syphoning fuel from the respondent's motor vehicle KBL 107D which had been assigned to him from February to July 2013. The claimant denied the alleged offence but the suspension was not lifted for over one year. On 5.8.2014 he served a demand letter treating the extended suspension as constructive termination. The demand letter was ignored and he brought this suit seeking:

- a. One month salary in lieu of notice***
- b. Compensation for unfair termination***
- c. Unpaid salary from 1.9.2013 to 30.10.2014***
- d. Unpaid overtime***
- e. Certificate of service***
- f. Costs and interest***

2. The respondent denied the alleged unfair termination and averred that the claimant was only suspended to pave way to investigations on the fuel consumption by the motor vehicle KBL 107D. She further contended that it is the claimant who constructively terminated his own employment through the demand letter dated 5.8.2014 by which he purported to pursue the claim for termination. She therefore denied the claim for terminal dues and prayed for the suit to be dismissed with costs.

3. The suit was heard on 3.5.2018 and 22.6.2018 when the claimant testified as CW1 and the respondent called her Project Accountant who testified as RW1. Thereafter both parties filed written submissions which I have considered carefully alongside the evidence presented to the court.

Claimant's Case

4. Claimant testified that he joined the respondent from 2007 as a cleaner and in 2010 he became a driver earning Kshs 7,879. On 2.9.2013 he was served with suspension letter for alleged syphoning of fuel from the vehicle assigned to him by the respondent. He responded by his letter dated 3.9.2013 denying the offence. He continued to report to work after the Transport Manager told him that the suspension was only from driving company vehicle. However, on 5.9.2013 the respondent's Managing Director told him to leave the company premises.

5. The Claimant further testified that he stayed on the suspension for over a year and served a demand letter through his lawyer but the same was ignored. He therefore brought this suit believing that he had been constructively terminated. He contended that the termination was unfair both substantively and procedurally. He produced work tickets to prove that the respondent's vehicle in issue had been assigned to several drivers during the period he was accused of syphoning the fuel and denied responsibility for the alleged syphoned fuel.

6. On cross examination the Claimant stated that in April 2014 the respondent's Chairman called him with other suspended drivers and stated that he did not know the person who suspended them and directed them to meet him again on the following day to discuss the matter but when they went back to see the Chairman he never showed up and he never called the claimant back to work. He contended the prolonged suspension of one year made him believe that he had been constructively dismissed from his job. He maintained that all the correspondences from the employer was done to him in writing and since the suspension letter on 2.9.2013, he was never served with any other letter lifting the suspension and as such he instructed his lawyer to serve a demand letter followed by this suit.

Defence Case

7. RW1 testified that he joined the respondent in 2011 as an Accounts Assistant but he later became the Project Accountant. He confirmed that the claimant was a fellow employee at the respondent working as a driver.

8. RW1 further testified that in 2012 -2013 he was dealing with issuing of LPOs to suppliers based on requisition by drivers on weekly basis and while analyzing the documents, he noticed that motor vehicle KBL 107D had an anomaly and notified the Finance Manager who escalated the matter to the Managing Director (MD). The Managing Director directed him to make an analysis for the past one year and thereafter all the vehicles were taken to the garage for check up of the fuel system to ensure that their fuel consumption was okay.

9. After the check up the claimant and other drivers were suspended to pave the way for investigations. That after the investigations the claimant was not found culpable because the vehicle was not assigned to him alone but to many drivers. As a result, the respondent's Chairman called the claimant and other drivers who had been suspended or dismissed to a meeting in October, 2013 to discuss return to work. Thereafter one Samuel Mukiri returned to work but the rest did not.

10. On cross examination, RW1 admitted that he was not aware of what transpired in the meeting between the respondent's Chairman and the suspended drivers because he never attended the meeting. He further admitted that after the investigations no conclusive evidence of fuel syphoning was found against the claimant and that is the reason he was called back. He clarified that the management verified that there was no proof of theft of fuel and decided to recall the claimant and the other drivers back to work through the Chairman.

Analysis and Determination

11. There is no dispute that the claimant was employed by the respondent as a driver until 2.9.2013 when he was suspended indefinitely from work for alleged syphoning of fuel from the vehicle he was assigned to drive. There is further no dispute that the suspension continued for over one year without payment of salary. The issues for determinations are:

(a) Whether the indefinite suspension amounted to unfair termination of the contract of service.

(b) Whether the claimant is entitled to the reliefs sought.

12. The claimant contended that after waiting for one year without pay he considered his contract of service to have been terminated constructively. He then served a demand letter through his lawyer but it was ignored. RW1 testified that after investigations into the alleged syphoning of fuel by the claimant and other drivers, it was verified that such offence was not done. That because of the lack of evidence against the claimant and other drivers, the management sent the respondent's Chairman to meet the claimant and his colleagues and discuss their return to work. That the meeting was done in April, 2014 but only one driver Mr Mukiri reported back to work.

13. RW1 was not in the meeting and he admitted that he was ignorant about the matters discussed between the Chairman and the suspended drivers. However, the claimant contended that the meeting was postponed to the following day but the Chairman never showed up and never called him again even after he served the said demand letter and filed this suit.

14. Constructive termination of employment occurs when the employer commits a repudiatory breach of the contract or where he conducts himself in a manner that makes continuation of the employment by his employee impossible or intolerable. In this case, the respondent suspended the claimant indefinitely without pay. She therefore prevented the claimant from performing his part of the contract as a driver and further committed a repudiatory breach of the employment contract by denying the claimant his pay for over a year. Consequently I find and hold that the respondent had by his conduct terminated the claimant's employment contract and the claimant was right in considering that he had been constructively terminated.

15. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid and fair reason is one that relates to the employee's conduct, capacity and compatibility or the employers operational requirements. Fair procedure on the other hand refers to the process of explaining to the employee the reason for the intended termination and according him a chance to defend himself before the termination is decided.

16. In this case, the claimant contended that he was suspended for alleged syphoning of fuel from the vehicle he was assigned to drive. However, after investigations, the claimant was found innocent of the alleged offence but he was never recalled to work by the respondent. He was therefore dismissed for no valid and fair reasons. In addition he was never accorded any hearing prior to the termination. The said lack of valid and fair reason and failure to accord a hearing prior to the termination as required by section 41 of the Act rendered the constructive termination of the claimant contract of service by the respondent unfair.

Reliefs

17. Under section 49 of the Employment Act, I award the claimant one month salary in lieu of notice plus 12 months salary compensation for

unfair termination of his contract of service. The said award is based on his salary of Kshs 7,879/= per month. In awarding the said compensation I have considered the claimant's long service and the fact that he never contributed to the termination through misconduct.

18. I further award the claimant salary for the period of suspension in September, 2013 to 5.8.2014 when he repudiated the contract of service by the demand letter dated same date. However, the claim for over time is dismissed for want of particulars and evidence.

Conclusion and Disposition

19. I have found that the indefinite suspension of the claimant without pay lasting for over a year entitled the claimant to repudiate the contract of service and sue the respondent for constructive dismissal. I have further found that the constructive termination of the claimants contract of service herein was unfair. Consequently I enter judgement in the following terms:

<i>(a) One month notice</i>	<i>Kshs 7,879.00</i>
<i>(b) Compensation</i>	<i>95,548.00</i>
<i>(c) Unpaid salary</i>	<i><u>88,184.20</u></i>
<i>Total</i>	<i>Kshs <u>190,611.20</u></i>

20. The claimant will also have costs and interest. The award will be paid subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 9th day of November, 2018

ONESMUS N. MAKAU

JUDGE