



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 803 OF 2016

HEZRON KUDIBA OCHILO.....CLAIMANT

VS

BORDERLESS TRACKING LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 4th October 2016 and filed in court on 7th October 2016, the Claimant has sued the Respondent for unfair termination of employment. The Respondent’s defence is contained in a Statement of Defence dated 24th November 2016 and filed in court on 29th November 2016.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Regional Manager, Amunyunzu Oscar. At the close of the *viva voce* hearing, the parties filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 5th March 2014 in the position of Tag Operators Supervisor. He earned a monthly salary of Kshs. 30,000.

4. The Claimant claims that his employment was terminated verbally on 10th February 2015. He terms the termination as unlawful and unfair in that he was not given notice and was not afforded an opportunity to be heard. The Claimant avers and maintains that the Respondent was in violation of labour laws forcing him to institute criminal case No 2305 of 2015 against the Respondent.

5. He claims the following:

- a) Notice pay.....Kshs. 30,000
- b) Unpaid 10 days worked in February 2015.....10,000
- c) Unpaid working holidays.....2,000
- d) Prorata leave for 11 months.....19,000
- e) 12 months’ salary in compensation.....360,000
- f) Certificate of service
- g) Costs

The Respondent’s Case

6. In its Statement of Defence dated 24th November 2016 and filed in court on 29th November 2016, the Respondent admits that the Claimant’s employment was terminated but denies the claim that the termination was unlawful.

7. The Respondent states that the criminal case pending against it has no bearing to these proceedings. The Respondent adds that it was not

properly served in the criminal proceedings.

8. The Respondent maintains that the termination of the Claimant's employment was for a sound and proper legal reason. Further, all procedural requirements were complied with.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant testified that on 10th February 2015, he was told by the Respondent's Manager, one Mr. Afzal that the Director had given instructions that the Claimant should cease serving for sometime. Upon inquiry to the Director, the Claimant was informed that he should not work pending alteration of duties. After one week, the Claimant was told to hand over all company belongings to allow payment of his dues. On 2nd March 2016, he handed over but was not paid his terminal benefits.

11. The Claimant told the Court that attempts to settle the employment dispute at the Labour Office were unsuccessful, hence this claim.

12. The Respondent's Regional Manager, Amunyunzu Oscar told the Court that the Claimant was dismissed for tagging unauthorized containers. He was also accused of misusing a company motor bike assigned to him.

13. These accusations would fall within the realm of misconduct as defined in the Employment Act, 2007. The handling procedure of such cases as set out in Section 41 of the Act was summarized by my brother, **Radido J** in **Alphonse Maghanga Mwachanya v Operation 680 [2013] eKLR** as follows:

“for an employer to meet the legal requirements of procedural fairness under section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following:

- (i) Explained to the employee in a language the employee understood the reasons why it was considering termination.***
- (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation.***
- (iii) Heard and considered any explanations by employee or his representative.***
- (iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has complied with its own internal disciplinary rules.”***

14. There was no evidence that any administrative charges were made against the Claimant at the shop floor as required under Section 41 of the Employment Act. It follows therefore that the allegations made against him were untested and unproved as required under Section 43 of the Act. This renders the termination both substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

15. In light of the foregoing findings, I award the Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

16. In the absence of leave records to counter the claim for prorata leave, this claim succeeds and is allowed. The claim for days worked in February 2015 is admitted and is payable.

17. The claim for unpaid working holidays was not proved and is dismissed.

18. In the ultimate I enter judgment in favour of the Claimant as follows:

- a) 4 months' salary in compensation.....Kshs. 120,000
- b) 1 month's salary in lieu of notice.....30,000
- c) Prorata leave for 11 months (30,000/30x1.75x11).....19,250
- d) Salary for 10 days in February 2015.....10,000

Total.....179,250

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

DATED SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Anaya for the Claimant

Mr. Okelo for the Respondent