



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1177 OF 2011

MUTHAI MULLI.....CLAIMANT

VS

TRAILINK FABRICATORS.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 30th June 2011 and amended on 15th November 2012 is for unlawful and unfair termination of employment. The Respondent filed a Response on 4th April 2012.

2. The matter came up for hearing before me on 16th November 2018, during the Nairobi Station Service Week. The Claimant testified on his own behalf and the Respondent called its Manager, Peter Njenga.

The Claimant's Case

3. The Claimant was employed by the Respondent as a driver on 3rd February 2003. He earned a monthly salary of Kshs. 15,000 which was later increased to Kshs. 18,000.

4. The Claimant states that he was summarily dismissed on 13th February 2011, on unfounded allegations that he had tampered with a GPRS system fitted in the motor vehicle assigned to him.

5. The Claimant claims that throughout his employment, he was made to work for 7 days per week including Sundays and public holidays, for which he was not remunerated. He adds that illegal deductions were made to his salary and further that upon dismissal from employment, he was not paid his terminal dues.

6. The Claimant avers that there was no justifiable cause for his dismissal and that he was not given an opportunity to be heard. He therefore terms his employment as unlawful and unfair.

7. The Claimant's claim is as follows:

- a) Damages for wrongful termination of employment;
- b) Unpaid leave days for 8 years in the sum of Kshs. 144,000;
- c) Three months' salary in lieu of notice in the sum of Kshs. 54,000;
- d) Computed unpaid holidays for the period amounting to Kshs. 124,000;
- e) Severance pay for every year worked in the sum of Kshs. 144,000;
- f) Unpaid overtime and illegal salary deductions;
- g) Costs plus interest.

The Respondent's Case

8. In its Response dated 4th April 2012 and filed in court on even date, the Respondent states that the Claimant was employed as a driver in September 2006 and not 3rd February 2003. The Respondent adds that at the time of leaving employment, the Claimant earned a basic salary of Kshs.15,650 plus a house allowance of Kshs.2,348.

9. The Respondent states that it had installed a General Packet Radio Service (GPRS) tracking system in all its motor vehicles including Motor Vehicle Registration Number KAV 500X which had been assigned to the Claimant.

10. The Respondent avers that the GPRS system ensures continuous connection to the internet and computer, thus allowing the Company's staff to monitor the movement of the motor vehicles.

11. The Respondent further states that on the material day, Motor Vehicle Registration Number KAV 500X was in proper working condition and securely fitted with a GPRS system. The unit had been sealed with spray foam.

12. The Respondent adds that the Company's staff could monitor the motor vehicle at the time the Claimant took it from the Respondent's compound but later they were unable to do so.

13. The Claimant was contacted and on coming back, he was unable to give an account of the GPRS system. The Respondent's staff was able to ascertain that the Claimant had intentionally interfered or caused the interference with the GPRS system as the spray foam colour had been changed from that used to seal the unit.

14. The Respondent states that when the Claimant was confronted to explain why the GPRS system was not working and why the spray foam had a different colour, he denied any involvement and went and dumped the motor vehicle in its yard and left without a word. The Respondent adds that thereafter, the Claimant failed to report on duty and did not notify the Respondent of the reasons for absconding duty.

15. The Respondent denies dismissing the Claimant and states that the Claimant himself absconded duty after the GPRS system incident and never went back to the Company.

16. It is the Respondent's case that the Claimant was given an opportunity to give reasons for the failed GPRS system. However, all he did was deny being involved and walked away from the Company premises never to return.

17. On the claims for leave pay and holidays, the Respondent states that the Claimant was paid all dues for leave days and holidays as and when they fell due.

18. The Respondent states that having abandoned his work, the Claimant is not entitled to 3 months' notice pay. If anything it is the Claimant who was to give the Company 3 months' notice or forego his 3 months' salary in lieu. The Respondent adds that the Claimant's prayer for severance pay is misplaced as he was not laid off due to redundancy.

Findings and Determination

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

- a) Whether the Claimant deserted duty or was unlawfully dismissed;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Dismissal?

20. The Claimant states that he was summarily dismissed on 13th February 2011, on unfounded allegations of tampering with a GPRS system fitted in the motor vehicle assigned to him. In response, the Respondent states that the Claimant himself deserted duty after being asked to explain the circumstances under which the system had been tampered with.

21. Desertion of duty in itself is a serious offence which renders an employee liable to dismissal. It must however be proved, by demonstrating that the employer has made efforts to reach out to the deserting employee and put them on notice that termination of their employment on account of desertion is being considered (see *Dickson Matingi v Db Schenker Limited*[2016] eKLR).

22. There was no evidence of any effort by the Respondent to reach out to the Claimant. The averment that he deserted duty was therefore not proved. Moreover, even assuming that the Claimant was properly accused of tampering with the GPRS system, there was no evidence that he was subjected to the mandatory disciplinary procedure set out under Section 41 of the Employment Act, 2007. This charge was therefore also not proved.

23. Having dispelled the Respondent's defence that the Claimant deserted duty and having found that the charge of tampering with the GPRS system was not proved at the shop floor, the only conclusion is that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure.

Remedies

24. In light of the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In making the award, I have taken into

account the Claimant's length of service and the Respondent's conduct in the termination transaction. In its Response dated 4th April 2012, the Respondent admits the notice period as 3 months. I therefore award the Claimant 3 months' salary in lieu of notice.

25. From the evidence on record, the Claimant was paid his leave pay until 31st December 2010. The claim thereon is therefore without basis and is dismissed.

26. The claims for unpaid public holidays, overtime and illegal salary deductions were not proved and are dismissed. No basis was laid for the claim for severance pay which also fails and is dismissed.

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

a) 10 months' salary in compensation.....Kshs. 180,000

b) 3 months' salary in lieu of notice.....18,000

Total.....198,000

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

29. The Claimant will have the costs of the case.

30. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Munyao for the Claimant

Mr. Chigiti for the Respondent