



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 506 OF 2013

THOMAS ADENYA ASAVA.....CLAIMANT

VERSUS

WOTE GROUP SAFARIS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 12th April, 2013 contending that he was unfairly dismissed by the Respondent in November, 2012. He therefore prayed for the following:-

- a) Kshs.336,462.00
- b) Costs of this suit
- c) Interest on (a) and (b) above
- d) Any other relief this honourable court deems just e) Issuance of a certificate of service

2. The Respondent filed his defence on 17th July, 2017 denying the alleged unfair termination of his contract of employment. She stated that she engaged the Claimant for at least three months for which she paid him fully. She further stated that she was cautioned by her client Serena Hotels that the Claimant was rude to customers, was careless driver who used phone while driving, refused to maintain personnel hygiene and that of the car and failed to produce a PSV licence. She denied liability to pay the damages sought and contended that they were not well founded.

3. The suit was heard on 2nd October, 2018 when the Claimant testified as CW1 but the Respondent never attended the hearings to offer her defence.

Claimant's Case

4. CW1 testified that he was employed by the Respondent as a driver in October, 2011 at a monthly salary of Kshs.18,000/=. He was however not given a written contract but he produced payslips to prove the said employment relationship. His duty was to transport passengers from Serena Hotel to their destination of choice, keeping the vehicle clean and ensuring that it was running properly and had sufficient fuel.

5. On 23rd October, 2012 he was sent to pick Mr. Daniel Akelo at Buru Buru at 7.30am and while on his way back he was called by Mr. Lameck telling him to pick him at Serena and drive him to his home at Kahawa West. He complied but he noticed that the car had no sufficient fuel and when he went fuel it, the petrol station refused to fuel the car because of a debt owed by the Respondent. That Mr. Lameck ended up paying Kshs.500/= for the fuel.

6. CW1 further testified that on 26th October, 2012, he was suspended by a letter which raised unsubstantiated complaints and he responded by letter. That he remained away until 23rd November, 2012 when he was called back to work by Mr. Wambua but after working for two weeks he was terminated by the same Wambua without any prior notice or justifiable cause, but by simply being told that his services were no longer required.

7. He therefore described his termination as unfair and prayed for the reliefs sought in the suit.

Analysis and determination.

8. There is no dispute that the claimant was employed by the respondent as a second driver from October, 2011 to November 2012. The issues for determination are:

- a) Whether the termination of the claimant's employment without contract was unfair.
- b) Whether he is entitled to the reliefs sought.

Unfair Termination

9. Under Section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reasons and that it was done after following a fair procedure. In this case the respondent pleaded in her defence that she employed the claimant for three months on casual basis but the claimant contended that he worked for over a year. He also produced payslips to prove that he was not employed on casual basis. The Respondent never tendered any evidence to support her defence and as such I find that the claimant has proved on a balance of probability that he was not a casual employee but an employee for indefinite term earning a monthly and protected by the law from unfair termination.

Reasons for termination

10. Under paragraph 4 of the defence, the Respondent pleaded that she had received complaint from her client, Serena Hotel, that the claimant was rude to customers, he was a careless driver who used his phone while on the wheel, did not maintain hygiene for himself and she assigned car and that he had failed to produce PSV licence. The claimant has however denied in his evidence the alleged misconduct and contended that his problem had everything to do with failure to get fuel from the petrol station due to owed to the station by the company. That such issue arose twice when he was transporting managers to and from their homes.

11. After careful consideration of the un rebutted evidence by the Claimant, especially the suspension letters dated 23rd October, 2012 and his response dated 26th October, 2012, I have no doubt that there were complaints raised against the claimant. The complaints were not just about fueling of the car while transporting the managers but also about the standard of services rendered to customer's. Consequently, I return that the Respondent had a valid reason for terminating the claimant's services namely, negligent performance of duty under Section 44 of the Employment Act.

Procedure followed

12. The claimant contended that after being called back to work from the suspension he worked for two weeks and then he was dismissed verbally by Mr. Wambua. That he was only told to go away because his services were no longer required. The foregoing evidence was not rebutted in evidence. Consequently, I find that the mandatory procedure provided under Section 41 of the Employment Act was not followed before dismissing the claimant.

13. The said Section provides that before terminating the contract of his employee, the employer shall explain the reasons for which termination is being considered. That the said explanation shall be in language of the employee's understanding and in the presence of another employee or shop floor union representative by his choice. Finally the employee and his chosen companion are entitled to a chance to air their representations for consideration before the termination is decided. The failure to comply with the foregoing procedure, the rendered termination of the claimant's services unfair within the measuring of **Section 45 of the Act**.

Reliefs

14. Under **Section 49(1)** I award the Claimant one month salary in lieu of notice plus one month salary as compensation for unfair termination considering that he caused his termination through misconduct and that he had served for a fairly short period of one year.

15. I further award him salary for November, 2012. Finally I award 21 days leave for the one year worked. I however dismiss the claim for public holiday's worked and overtime for lack of particulars and evidence.

1. I have found that the claimant's services ere unfairly terminated.

Consequently I enter judgment for the Claimant as follows;

a) Notice	18,000/=
b) Compensation	18,000/=
c) Salary for November	18,000/=
d) Leave	14,538.45

68,538.45

The said sum will attract interest at court rate but I decline to award costs.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU JUDGE