



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2220 OF 2014

JUSTUS KANGETHE WANYOIKE.....CLAIMANT

VERSUS

ROY HAULIERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was an inspection supervisor of the Respondent from 26th May 2006. He worked with diligence until he was dismissed on 17th September 2014 by one of the directors Shemir Yakub. He asserts that the director summoned him to the office and accused him of recommending fake repairs to a vehicle belonging to a client of the Respondent. He averred that the mistake was committed by his colleague Felix Mutuku who owned up to it and he was instructed to report to the HR manager Jessica Mumo who handed him a summary dismissal letter and ordered him to leave the premises. He asserts that no reasons were given for the drastic action as he had served without blemish for 8 years and that due process was not followed in the dismissal. He thus sought payment for the 17 days worked in September – Kshs. 20,424/-, one month salary in lieu of notice – Kshs. 36,042/-, overtime pay for 8 years – Kshs. 1,297,728/-, 12 month's salary as compensation – Kshs. 432,504/-. He also sought costs and interest.

2. In the defence filed, the Respondent averred that the Claimant was dismissed for the reasons advanced in the letter of summary dismissal issued on 17th September 2014. The Respondent averred that upon dismissal, the Claimant's terminal dues were calculated and part of the dues applied to pay the loan the Claimant had. The balance was paid to the Claimant through Equatorial Commercial Bank. The Respondent therefore sought the dismissal of the suit with costs.

3. The Claimant testified and reiterated that his dismissal was unfair as the error for which he was blamed was owned up by Mutuku. The Claimant's written submissions were to the effect that he was entitled to reasons for the action taken against him and that no notice to show cause was issued to him neither was he heard before the decision to dismiss him was made. He relied on the case of **Donald Odeke v Fidelity Security [2012] eKLR** where the learned judge stated that the dismissal is *ipso facto* unfair if the employee is not given an opportunity to defend himself when faced with a disciplinary action. He also cited the case of **Geoffrey Kariuki Mwaniki v Managing Director Nanak Trucking Co. Ltd [2013] eKLR** and submitted that the Respondent had failed to discharge its burden under Section 47(5) of the Employment Act. The Claimant thus sought grant of the prayers in his claim.

4. The Claimant was dismissed for his deteriorating performance and attitude to work and carelessly and unprofessionally performing his work by reporting fake jobs subjecting the company to losses. The dismissal was summary. Section 41 of the Employment Act provides as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

5. He asserts that he did not undertake any fake repair jobs. His appraisal form exhibited by the Respondent assesses the Claimant as having a good attendance record, obedient and strict adherence to time and having a positive attitude. The only warning exhibited is one warning him about not coming to work on a Sunday. The allegations about fake repairs were not proved against the Claimant as no records of the 'fake' repairs were availed. The Claimant proved that he was not heard prior to dismissal. The dismissal was therefore not for a valid reason

and in terms of the Employment Act the Respondent did not discharge its burden. In the final analysis he is entitled to compensation for the unlawful dismissal. He was paid for the days worked and the dismissal being summary no notice was given. He is therefore entitled to the following:-

- a. One month's salary in lieu of notice Kshs. 36,042/-
- b. Compensation for 6 months Kshs. 216,252/-
- c. Costs of the suit.
- d. Interest at court rates on the sums in a) and b) from the date of judgment till payment in full.

It is so ordered.

Dated at Nyeri this 3rd day of December 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 4th day of December 2018

Radido Stephen

JUDGE