



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 568 OF 2015

SWALEH TSIMBA MBANDI.....CLAIMANT

VS

MSB EDUCATIONAL INSTITUTE.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation for unfair termination of the claimant's contract of employment by the respondent on 20.7.2013. It is the claimant's case that the termination was done for valid and fair reason and without according him a fair hearing or serving him with a prior notice.
2. The respondent never filed any defence despite being served with summons and the claimant's pleadings. Consequently the suit was heard exparte on 22.6.2016 when the claimant testified as Cw1 and thereafter filed written submissions.

Analysis and Determination

3. After careful consideration of the evidence and the submissions presented before the court there is no dispute that the claimant was employed by the respondent as a Driver from May 2009 to 20.7.2013 when his service was terminated by the respondent. The issues for determination are:-

- (a) **Whether the termination of the claimants contract was unfair**
- (b) **Whether the claimant is entitled to the reliefs sought.**

Unfair termination

4. Under section 45 (2) of the Employment Act, termination of employment contract by the employer is unfair if he 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 which is true and which relates to the employee's conduct and the operational requirement by the employer. On the other hand, a fair procedure involves according the employee a fair hearing before the termination, paying him any accrued dues and giving him a Certificate of Service.

5. In this case the respondent never defended the suit to dispute the claimants claim. However considering the fact that she paid the claimant severance pay, I have no doubt that the termination was through

redundancy without following the mandatory statutory procedure under section 40 of the Act. Consequently, I find that the claimant has discharged his burden under Section 47(5) of the Employment Act by proving that he was unfairly dismissed.

6. The reason for the foregoing view is that although the employer paid him one month salary in lieu of notice, she never cited any provision of the contract of employment that entitled her to terminate the contract as such. Under section 40 of the Employment Act, in addition to payment of salary in lieu of notice, she was required in mandatory to serve the claimant and the Labour officer with at least one month notice and do a fair selection of the employees to be laid off before terminating the claimant on ground of redundancy. In addition, the failure to issue the claimant with a Certificate of Service was unfair and in breach of Section 45(5) (c) and Section 51 of the Employment Act. The answer to the first issue for determination is in the affirmative.

Reliefs

7. Under Section 49(1) (4) of the Employment Act the claimant is awarded 120,000 being eight (8) months salary as compensation for unfair termination. In making the said award I have considered the fact that the claimant did not contribute to the termination through misconduct and also the fact that the employer paid him severance pay.

8. In addition to the said compensation above, I order the respondent to forthwith issue the claimant with a Certificate of Service as required under Section 51 of the Employment Act.

Disposition

9. For the reasons stated above I enter judgment for the claimant for the sum of **kshs.120,000** plus costs and interest. The claimant will also have a Certificate of Service.

Signed, dated and delivered at Mombasa this 20th day of January, 2017.

O.N. MAKAU

JUDGE