



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO.514 OF 2015

HANSEN BALANGA ATSANGA.....CLAIMANT

VS

SHIVA CARRIERS LTD.....RESPONDENT

JUDGEMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimants employment by the respondent on 14.4.2015. In total the claimant seeks an award of kshs.554,386. It is the claimants case that the he was not given any hearing before the termination as expected by section 41 and 45 of the Employment Act.
2. The respondent has denied liability for unfair termination and averred that it is the claimant who terminated the employment contract through desertion from 28.3.2015. According to the respondents the claimants suit lacks merits and it should be dismissed with costs.
3. The suit was heard on 13.7.2016 and 7.9.2016 when the claimant testified as Cw1 and the respondent called Mr. Godfres Ojiambo as Rw1. Thereafter both parties filed written submissions.

Claimants case

4. Cw1 was employed on a one year contract as a Heavy Commercial driver starting 1.9.2014. His salary was kshs. 25,382 per month. On 16.1.2015, he was invited for disciplinary hearing to defend himself on a charge of causing accident at the Port of Mombasa and after the hearing he wrote an apology and he was reinstated to work.
5. Cw1 contended that he worked until 14.4.2015 when he was dismissed from work by the Transport Manager Mr. James Matoke for drunkenness and rudeness. That he was not given a hearing on the alleged misconduct before the dismissal.
6. Cw1 further contended that he attended work without failure and signed attendance Register daily but the respondent persisted in deducting his salary illegally for alleged absent days. He prayed for the said terminal dues, salary in lieu of notice plus compensation for unfair termination.

Defence case

7. Rw1 is the respondents Claims Manager. He confirmed that the claimant was employed by the respondent as local fleet driver for one year starting 1.9.2014 and ending on 1.9.2015. He however accused the claimant of poor performance and causing several road traffic accidents including one on the 1.1.2015 while driving motor vehicle KAD 932Q.

8. He contended further that due to the said misconduct and poor performance Cw1 was given a disciplinary hearing on 16.1.2015 and was found guilty by the disciplinary panel. However, upon giving a written apology, Cw1 was reinstated to work and continued until 27.3.2015 and thereafter he deserted work without any prior notice to the respondent. That the respondent tried in vain to trace the claimants whereabouts until Rw1 started seeing him near the respondents work station working for another person.

9. Rw1 produced copy of Master roll for March 2015 to prove that Cw1 worked until 27.3.2015 and thereafter deserted work. He thereafter denied the allegation by Cw1 that he continued work until 14.4.2015 when he was allegedly dismissed. On the issue of deductions of salary, Rw1 contended that the deductions was in respect to the days not worked by the claimant in January 2015.

Analysis and Determination

10. After careful consideration of the pleadings, evidence and the submissions presented to the court, it is clear that the claimant was employed by the respondent as a driver for a fixed term contract of one year starting 1.9.2014; that on 16.1.2015 he was invited to a disciplinary hearing and found guilty of misconduct and negligent performance of duty; that he apologized for the offence and he was reinstated to work. The issues for determination herein are:-

a) Whether the claimant deserted work from 28.3.2015 or he was unfairly dismissed on 14.4.2015.

b) Whether the reliefs sought ought to issue.

Desertion vs Unfair termination

11. Under section 47(5) of the Employment Act, the burden of proving unfair termination of employment lies on the employee who alleges that he was so terminated. Under section 45(2) of the Act, termination is unfair if it was not founded on a valid and fair reason and if it was done without following a fair procedure.

12. In this case the claimant pleaded that his dismissal was without any justifiable cause and without first giving him a hearing. In his written statement he stated that he was dismissed for the reason that he mishandled a Company truck leading it to stall on the road and thereafter being impounded by the Kenya Ports Authority for obstruction. In his testimony, Cw1 changed his story to say that the reason for his dismissal was cited as drunkenness and rudeness.

13. I find it difficult to belief the evidence by the claimant that he was unfairly dismissed by the respondent. If in deed he was, he should be consistent on the reason cited by the transport manager. He should also have produced some evidence either documentary or from another witness to prove that he continued working until 14.4.2015 and that he was indeed dismissed by the transport manager.

14. On the contrary I believe the evidence by the Rw1 that Cw1 worked until 27.3.2015 and absconded duty from 28.3.2015. That he was never dismissed by the respondent and as such he terminated his own employment through desertion to look for greener pastures in the neighbourhood. Consequently, I find that the claimant has not proved on a balance of probability that he was unfairly dismissed from employment by the respondent.

Reliefs

15. In view of foregoing finding, the claims for salary in lieu of notice, salary for the unexpired period of

the contract term and compensation for unfair termination once dismissed for lack of merit. The court cannot be asked to compensate the claimant for his own wrong doing.

16. The claim for leave is granted only for the period worked on pro rata basis. He worked for six months which amounts to 13 leave days equaling to kshs.12,691.

17. The claim for unlawfully deducted salary for January 2015 is also allowed because the days when the claimant failed to work was during suspension and did not amount to termination. In any event, the claimant was unconditionally reinstated to work after the disciplinary hearing on 16.1.2015. He is therefore entitled to the salary for the days he was on suspension being kshs.25,382 less paid kshs.7800 equalling to kshs.17,582. As regards the claim for salary deduction for March 2015, I decline to grant the same because the claimant deliberately absented himself from duty in March 2015.

18. The claimant is however granted the prayer for Certificate of Service because that is his right under section 51 of the Employment Act.

19. For the reason stated above judgment is entered for the claimant for kshs.30,273 plus half cost and interest. He will also get Certificate of Service.

Signed, dated and delivered at Mombasa this 13th day of January, 2017.

O.N. MAKAU

JUDGE