



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 262 OF 2015

(Before D. K. N. Marete)

JOHN DAVID OMANYALA.....CLAIMANT

VERSUS

SANTRAM HARDWARE LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 26th October, 2015. The issue in dispute is therein cited as;

“Unlawful dismissal of the claimant from employment and withholding of the claimant's dues.”

The respondent in a Respondent's Defence dated 13th January, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent as a truck driver and earned Kshs.12,000.00 per month. This was for eight months. He worked diligently and in December, 2013 he was promoted to a driver of a higher axle truck.

The claimant's further case is that he would report at 700 hours and leave at 1900 hours thus doing twelve (12) hours daily. He was not awarded leave for the entire period.

The claimant's other case is that on 11th August, 2015, he was summarily dismissed without notice or salary in lieu of notice. This was unlawful and contrary to the principles of law and the Employment Act, 2007. And despite demand, he has not been paid a farthing.

The claimant further avers that he is entitled to overtime, public holidays, leave, compensation allowance and or dues besides salary arrears as at the time of resignation including other dues withheld by the respondent. He continues to suffer mental anguish and loss and the respondent is wholly to blame.

He prays as follows;

- a) *Salary in lieu of notice.*
- b) *Compensation and remedy for summary dismissal.*

c) Ten months salary arrears.

d) Normal overtime.

e) Three months leave allowance.

f) Public holidays and offs annually

g) Leave for three years.

h) House allowance for three years.

i) Compensation under section 49 (10 c) of the Employment Act No.11 of 2007.

j) Cost of the suit to be borne by the respondent.

The respondent denies the claim with a rider that she employed the claimant in December, 2013 as a driver of motor vehicle 478N, a middle size vehicle which he drove until he abandoned his employment.

It is the respondent's further case that the claimant was not diligent or that he was summarily dismissed. She avers that the claimant dumped and/or abandoned and/or left unattended motor vehicle registration number KBF 478N at its offices on 1st August, 2015 and has not returned to date. He never issued any notice of terminating his services.

The respondent's other case is that the claimant was paid his full salary and acknowledged receipt thereof by signing the master roll. He was also paid Kshs. 1,000.00 over and above his entitlement every day he reported on duty. Again, his salary was Kshs17,000.00 which covered house allowance and therefore she disclaims his entitlement to this extent.

The respondent makes a counter-claim for Kshs.80,140.00 being a soft loan made to her claimant and particulars of which are within the knowledge of the claimant.

This matter came to court variously until the 13th July, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent.
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Is the respondent entitled to the Counter – Claim?
5. Who bears the costs of this cause?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. The parties take opposed stances on this. The claimant does not file written submissions or any other pleadings and therefore relies on the claim in support of his case.

The respondent in his written submission dated 22nd July, 2016 reiterate his case. It is her position that the respondent abandoned his work and was not on duty on 1st August 2015. She seeks to rely on the authority of section 47 (5) of the Employment Act 2007 which shifts the burden of proof of unfair termination onto the employee with a reciprocal burden of justifying termination on the employer. This is as follows;

Section 45(5),

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

She further seeks to rely on the authority of **Ann Njoroge vs Topez Petroleum Ltd**, (2013)eKLR

“When an employee claim is based on unfair termination that is countered with a defence of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice.”

This is buttressed by section 44 (4) of the Employment Act 2007 as follows:

a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.

b) ...

c) An employee willfully neglects to perform any work which was his duty to perform, or if carelessly or improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.

d) ...

The claimant has *in toto* failed to establish a case of termination of employment. He does not tender any evidence, or at all in support of his case. His case lies bare. The respondent on the other hand presents a case of abscondment from duty which stands uncontroverted. I therefore find a case of no termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

With a finding of no termination of employment, issue numbers 2 and 3 dissipate into nothingness. They fall by the way side.

The next issue for determination is whether the respondent is entitled to the Counter-Claim. The respondent pleads that this counter claim for Kshs.80,140.00 is within the knowledge of the claimant. This was a soft loan made to the claimant during his stint of employment. The respondent does not in any other way support the counter claim in evidence. The counter-claim is therefore not established and fails.

I am therefore inclined to dismiss the claim and counter claim with costs to the respondent.

Delivered, dated and signed this 21st day of February 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa holding brief for Mr. Omusundi instructed by Morgan Omusundi Law Firm Advocates for the claimant.

2. Miss Hayo instructed by M/s Nyairo & Company Advocates for the respondent.