



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 512 OF 2015

JARED NYABERI OGEA.....CLAIMANT

VS

SHIVA CARRIERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Heavy Commercial Driver in December 2012 under one year contract. The contract was renewed for the equal terms in 13.12.2013 and 13.12.2014. His salary was kshs.25,382 per month. On 9.3.2015, the claimant was summarily dismissed from service on account of unsatisfactory performance of duty. It is the claimant's case that the premature termination of his contract was unfair and unjustified because the reason for the termination was not genuine and factual and that it was done without giving him a fair hearing as provided under section 41 and 45 of the Employment Act. He therefore brings this suit claiming kshs.629,146 including terminal dues plus compensation for unfair termination.

2. The respondent has admitted that she had employed the claimant but she has denied liability to pay the damages sought by the claimant and avers that the dismissal of the claimant was done legally, fairly and procedurally under the Law; and on account of a fair and justifiable reason. She therefore prays for the suit to be dismissed with costs.

3. The issues for determination arising from the dispute are:

(a) Whether the reason for dismissing the claimant from service was valid and fair.

(b) Whether the procedure followed in terminating the claimant's service was fair.

(c) Whether the claimant is entitled to the reliefs sought or any part thereof.

4. To answer the said questions, the claimant testified as Cw1 and the respondent adopted the written statements of her two witnesses Mr. Adi Yusuf and Rolyn Mukunza, with the claimant's consent. After the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

Reason for termination

5. Under section 45(2) of the Employment Act, termination of employment is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason cited in the dismissal letter was unsatisfactory performance of duty by the claimant. The claimant denied that allegation and maintains that he was never given any targets and thereafter appraised. In addition, he has contended that he was being allocated defective Lorries which kept on breaking down.

6. The respondent has however contended that the Lorries assigned to the claimant were not defective and when he reported such defects, they were repaired. The respondent further averred that for a whole month the claimant used mechanical problems on every truck assigned to him as a reason not to perform his duty. According to Mr. Mukunza, (defence witness), the claimant was initially performing well when he was assigned truck KBN 113N but when he was assigned other trucks he started to perform poorly in the pretence that all the other trucks assigned to him were mechanically defective. Mr. Mukunza, maintained that their company policy did not allow a driver to dictate to the management, which truck he should be assigned.

7. There is no dispute that all the trucks assigned to the claimant had mechanical problems which he reported and the management acted on them. His dear truck number KBN 113N was involved in an accident. Likewise, KBH 834J and KBK 936W were also reported to have problem when being driven by the claimant. During the disciplinary hearing held on 9.3.2015, Mr. Wanjohi, who was the chosen companion of the claimant asked the management to review the job cards for the two trucks to see the frequency of the repairs because that could indicate whether the mechanical problems in the trucks had been properly diagnosed.

8. In the same proceedings, the Workshop Foreman Mr. Omondi admitted that the KBH 834J was repaired and it was given to another driver and there was no complaint from the said driven ever since. He further confirmed that KBK 936W was still being repaired on the date of the said proceedings, that is 9.3.2015 the same day the claimant was dismissed. So on what basis was the claimant dismissed for unsatisfactory performance? All Lorries allocated to him had mechanical problems which had been confirmed by the Workshop Manager during the disciplinary hearing, and herein by the two defence witnesses.

9. The claimant is being accused of complaining of defects on the truck allocated to him because he wants to chose the truck he should be assigned against the company policy. I however see no legal basis for that hypothetical allegation by the defence and I dismiss it. The claimant had a right and a legal duty to drive only those trucks which were roadworthy. It would have been negligent on his part if he drove defective motor vehicle without alerting the respondent.

10. In addition to the foregoing finding that the claimant was right to complain about the defects on the trucks being allocated to him, I further make finding that no appraisal was done on his performance based on some agreed targets to form the basis for dismissing him on account of poor performance. Although clause 25 (a) of his contract entitled the respondent to terminate his contract on account of failure to meet set performance targets, the respondent did not prove that there were indeed set performance targets, which the claimant failed to meet. Consequently, I hold that the respondent has failed to prove and justify the reason for terminating the claimant service as required by Section 43(1), 45(2) (a) (b) and 47(5) of the Employment Act.

Procedure followed

11. The claimant has alleged that he was dismissed without being accorded any hearing as required under section 41 of the Act. He has further contended that the proceedings produced as exhibits by the respondent were in relation to another employee. The respondent has however maintained that the proceedings were for the claimant's disciplinary hearing done on the 9.3.2015. That the minutes named him as the accused person.

12. I have carefully considered the said proceeding and confirmed that indeed they refer to a disciplinary

hearing for the claimant held on 9.3.2015. In addition, I find that the said proceedings constituted a fair hearing because the claimant was invited to a disciplinary hearing in the presence of another employee of his choice one, Mr. Simon Wanjohi. That both the claimant and Mr. Wanjohi were accorded a chance to air their representations before the dismissal was decided.

13. Under section 41 of the Act, an employer who wishes to dismiss his employee on account of misconduct, poor performance or physical incapacity must explain the reason for the intended termination, to the employee in a language he understands and in the presence of another employee or shop floor union representative of his choice, and thereafter invite the employee and his chosen companion to air their defence before the dismissal is decided. Considering the evidence and the said provision of the law, I hold that the respondent has proved on a balance of probability that she followed a fair procedure before dismissing the claimant's contract.

RELIEFS

Declaration

14. Under section 43, 45(2) (a) (b) and 47(5) of the Act the burden of proving and justifying the reason for terminating employee's contract of service is on the employer. If the employer fails to prove and justify the reason for terminating the contract in legal proceedings like herein, the termination is deemed unfair within the meaning of section 45(2) of the Act. Section 43(1) of the Act provides as follows:

“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

15. In this case, the respondent has failed to prove that the claimant was unsatisfactorily performing his duties on a balance of probability as required under section 43(1) of the Employment Act, and therefore I declare that the dismissal of the claimant from employment by the respondent was unfair, unlawful and unjustified within the meaning of section 45 of the Act.

Notice and Compensation

16. Under section 49(1) (4) of the Act, the claimant is entitled salary in lieu of notice plus upto twelve months salary for unfair termination. I therefore award to the claimant one month salary in lieu of notice as prayed being kshs.25,382. I also award to the claimant kshs.203,056 being 8 months salary as compensation for the unfair and unjustified termination. In awarding the said compensation I have considered the fact that the claimant did not contribute to his termination through misconduct. I have also considered the fact that the claimant had expected to work and earn his salary for nine months before his fixed term contract expired in December 2015.

Salary for un expired contract term

17. The foregoing award of compensation for 8 months salary plus one month salary in lieu of notice puts the claimant to the position he would have been had worked to the end of his contract. The claim for his salary for the unexpired contract term is therefore declined because it would amount to double compensation to the claimant.

Leave

18. The claimant prayed for 50 leave days for the whole period served being 2 years and 3 months. The contract of employment provided for 21 leave days per year. He applied for leave but he was denied on ground of much work. The defence witnesses never denied the claim for leave and no leave records were produced to contest the claim for leave. Consequently, I award the claimant 47.25 leave days on pro rata basis equaling to kshs. 46,126.90

Certificate of Service

19. I award the claimant the Certificate of Service as prayed because he is entitled to the same under section 51 of the Act.

Disposition

20. For the reason that the respondent has failed to prove the reason for dismissing the claimant, I enter judgment in favour of the claimant declaring that the premature termination of his contract of employment was unfair, unlawful and unjust, and awarding him **kshs.274,564.90** plus costs and interest. He will also have a Certificate of Service.

Signed, dated and delivered at Mombasa this 3rd day of February, 2017.

O.N. MAKAU

JUDGE