



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 593 OF 2014

ISAAC NDIRANGU THIONGO.....CLAIMANT

VERSUS

ROY HAULIERS LIMITED.....RESPONDENT

MR. NYABENA FOR CLAIMANT

M/S ONYANCHA FOR RESPONDENT

JUDGMENT

1. The claimant seeks maximum compensation and terminal benefits set out under paragraph 11 of the statement of claim filed on 8th April 2014 for alleged unlawful and unfair termination of employment.
2. The particulars of claim are set out in the memorandum of claim and in the testimony of the claimant to the effect that he was appointed a driver by respondent vide a letter dated 23rd March 2012 at a monthly gross salary of Kshs.22,940/=.
3. The claimant served continuously, diligently and faithfully, until the respondent terminated the employment on 23rd January 2014.
4. That the termination was without notice or payment of salary in lieu of notice. The respondent did not invite the claimant to show cause why he should not be terminated from employment in contravention of Section 41 of the Employment Act, 2007 or the principle of natural justice.
5. That the claimant was simply recalled from Mombasa to Nairobi and his employment was terminated upon arrival and no disciplinary hearing was held.
6. The claimant states that he was never given annual leave for the entire period he worked nor was he paid in lieu of leave. That he worked 3 hours overtime daily and was never paid. That he worked during public holidays for a total of 18 public holidays and was not paid the extra salary.
7. That the respondent made unlawful deduction from his salary for loan/fuel excess consumption without the claimant's consent.
8. That the respondent was served a demand notice but did not pay the claims hence the suit which the claimant prays it be allowed with costs.

9. The claimant also seeks payment of service gratuity at the rate of 15 days salary for each completed year of service.

Response

10. The respondent filed a statement of defence in which the particulars of employment of the claimant are admitted.

11. The respondent adds that the service by the claimant was littered with instances of misconduct involving unexplained excessive diesel demand contrary to respondent's company policies.

12. The claimant received verbal warnings on the matter which were not heeded. The respondent lost patience and terminated the service of the claimant. That the claimant was given opportunity to explain each incident of misconduct that arose and was surcharged for his excess usage of fuel.

13. The respondent states that the letter of termination dated 24th January 2014, contains the reason for the termination. That by a warning letter dated 2nd September 2013, the claimant was informed that any repeat of the frequent unjustified excess fuel demands would be treated seriously and his employment would be terminated without further warning. The claimant acknowledged receipt of that letter by countersigning on respondent's copy.

14. With respect to leave days, the respondent states that the claimant took all his annual leave and/or was paid in lieu.

15. The respondent denies that the claimant worked any overtime as alleged at all. That the company policy only allowed drivers to drive for not more than 9 hours in a day. That in the event a driver had to drive for more than 12 hours maximum that had to be specifically approved by the Managing Director and overtime would be paid accordingly. The respondent states that it never allowed the claimant to drive overtime.

16. That the claimant was surcharged for excessive fuel request, which conduct was adjudged gross misconduct. That the respondent provided 40 litres extra fuel for any emergencies and/or re-routing and any fuel consumed above this was to be surcharged.

17. That the full and final dues for the claimant were computed but he refused to collect the same. The computation was in exhibit '7' which includes;

a. notice pay Kshs.22,940/=

b. 21 days leave Kshs.22,940/=

c. Salary for 24 days worked in January 2014, Kshs.17,760/=

Total payable was Kshs.49,784/=

Less PAYE Kshs.40,976/=

Less advance paid Kshs.9,000/=

Emergency costs Kshs.250/=

Loan balance Kshs.29,456/=

Balance Kshs.2,270/=.

18. The claimant refused to collect the dues above.

Determination

19. The issues for determination are; -

- (i) Whether the termination of the employment of the claimant was for a valid reason.
- (ii) Whether the termination was done in terms of a fair procedure.
- (iii) Whether the claimant is entitled to the remedies claimed.

Issue I and II

20. The claimant was summoned to report to Nairobi from Mombasa: Upon arrival in Nairobi, he was given a letter of termination and provided with computed final payment of Kshs.2,270/= net.

21. The claimant had no knowledge why he had been summoned to Nairobi, he did not receive any letter to show cause nor was he charged with any dismissible offence. He was simply given a letter of termination without any charge and was not told the reasons for the action taken by the respondent and without opportunity to explain why his employment ought not to be abruptly terminated. The termination occurred on 24th January 2014.

22. It is not in dispute that the claimant had received a warning letter dated 2nd September 2012 in which he was accused of incurring loss of fuel load of 280 kgs which exceeded the allowable amount of 100 kgs. The excess cost was debited on his salary. The claimant was not given any opportunity to explain the excess fuel load before the surcharge and grant of a warning.

23. The claimant claims against these arbitrary deductions on his salary without opportunity to explain the discrepancy.

24. The letter of termination accuses the claimant of poor work performance and attitude to work leading to great losses due to excessive diesel consumption. It is clear from the letter that no notice to show cause or disciplinary hearing preceded the termination.

25. The provisions of Employment Act, Section 41, 43 and 45 are clear and are couched in mandatory terms. Section 41 makes it mandatory for an employer who intends to terminate employment of an employee to provide the employee with an opportunity to explain why his employment should not be terminated. This is either done by way of a notice to show cause to be responded to in writing and/or by subsequently requesting the employee to appear before a disciplinary panel with a colleague or shop floor representative to understand the reason for the intended termination and provide oral explanation why the employment should not be terminated.

26. In this case, neither opportunity was presented to the claimant and no reason for the termination was provided to him in terms of Section 43 of the Act, prior to the termination itself.

27. It is futile for an employer to provide the reason for termination in the letter of termination itself if the reason had not been given to the employee in a show cause letter or at a disciplinary hearing.

28. The conduct by the respondent ipso facto violated Section 41, 43 and therefore 45 of the Act, which provides that a termination or dismissal without providing a valid reason and without following a fair procedure is unfair and unlawful.

29. The court has therefore answered Issue I and II in the affirmative and the claimant is entitled to compensation.

Issue III

30. As stated earlier, the remedies sought by the claimant are set out in paragraph 11 of the statement of claimant and the court will deal with each one of them as follows;

Compensation

31. Having found that the termination of the employment of the claimant was not for a valid reason and was not done in terms of a fair procedure, the court finds that the claimant is entitled to compensation in terms of Section 49 (1) (c) of the Act.

32. The claimant had served the respondent for slightly more than one year. The claimant did not have a clean record, because there were constant queries on his job performance with regard to fuel consumption by the truck he drove, which the respondent insisted exceeded permissible limits. The claimant therefore in one way or the other contributed to the loss of his employment.

33. The claimant lost his job abruptly and without notice. He was not paid any terminal benefits and this aggravated the loss and damage to him. The lack of due process and not providing a reason for the termination also aggravated the harm to the claimant.

34. In the circumstances the court awards the claimant four (4) months' salary as compensation for the unlawful termination of employment.

35. The respondent already offered to pay the claimant the following benefits;

- (i) Notice pay in the sum of Kshs.22,940/=
- (ii) Salary for January 2014 in the sum of Kshs.17,760/=
- (iii) Payment in lieu of 15.75 days' leave Kshs.12,044/=

Total Kshs.52,744/= which the court awards accordingly.

36. The respondent did not file any counter claim and therefore the deductions made in the computation dated 27th January 2014 are disallowed.

37. The claimant did not prove the claims in respect of overtime, public holidays and service gratuity and the same are dismissed.

Illegal Deductions

38. The claim of Kshs.58,161/= in respect of surcharges by the respondent on the basis of excessive fuel claims is well founded given the admissions made by the respondent in this respect. The respondent had no basis to unilaterally deduct the salary of the claimant without due process. The claim is allowed.

39. In the final analysis, the court awards the claimant as follows;

- (i) Kshs.91,760/= compensation.
- (ii) Kshs.52,744/= admitted terminal benefits.
- (iii) Kshs.58,161/= refund of illegal deductions.

Total Kshs.202,665/=

- (iv) Interest at court rates from date of judgment till payment in full.
- (v) Costs to follow the outcome.

Dated and delivered at Nairobi this 28th Day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE