



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1521 OF 2011
JOHN MAINA KAMAU.....CLAIMANT
VERSUS
BLUELINE PROPERTY LIMITED.....RESPONDENT

Mr. Okemwa for claimant

M/s Bembela for respondent

JUDGMENT

1. The suit was commenced by a memorandum of claim filed on 9th September 2011. The claimant seeks compensation for unlawful termination of employment and payment of terminal benefits set out under paragraph 8 of the memorandum of claim as follows;

- a.) Salary for February 2010 – Kshs.13,833/=
- b.) Payment in lieu of 84 days leave – Kshs.41,499/=
- c.) Payment in lieu of one month's notice – Kshs.13,833/=
- d.) Payment for 23 public holidays worked and unpaid for Kshs.12,237/=
- e.) Underpayment of wages – Kshs.118,772/=
- f.) 110 yearly resting days not paid – Kshs.58,524/=
- g.) Severance pay for two ears – Kshs.13,833/=
- h.) Salary for the period 28th february 2010 to 31st decembe 2011

2. The claim is based on the following facts set out on the memorandum of claim;

3. The claimant was employed by the respondent on 18th April 2005 as a heavy commercial vehicle driver at a daily rate of Kshs.300/=.

4. The claimant worked continuously, with honesty and diligence until 28th February 2010 when the

employment was terminated without notice or justification.

5. The claimant was declared redundant without payment of the terminal dues or following the laid down procedure under Section 40 of the Employment Act, 2008.

6. That the termination was effected maliciously and without regard to the claimant's welfare and rights.

7. The claimant sets out particulars of malice including;

- a.) Failure to give him notice.
- b.) Failure to give claimant a hearing.
- c.) Failure to pay salary for days worked.
- d.) Failure to pay terminal dues.

8. The claimant alleges that he was underpaid contrary to employment law. The claimant was earning a monthly salary of Kshs.10,000/= at the time of termination instead of Kshs.13,833/= which was the minimum wage as per the General Order in place at the time.

9. The claimant seeks the reliefs aforesaid with interest and costs. That demand was made but was not honoured, hence the suit.

10. The claimant testified in support of the above particulars of claim. He elaborated all the claims he had made in his testimony.

11. The claimant explained that he worked six days a week from Monday to Saturday and was not paid for Sundays because he did not work. He was housed by the respondent and worked from 5 a.m. in the morning until 7 to 8 p.m. in the evening.

12. The termination followed the sale of the truck he drove. The lorry was driven by him to its new owner. He asked to be paid his terminal dues in vain.

Leave

13. The claimant states that he only got leave twice and claims leave for the period 2005 to 2009 at 21 days per year hence the total of 84 days. He seeks payment of Kshs.41,499/=.

Public Holidays

14. Claimant stated that he did not work during public holidays and was not paid including on Sundays when he did not work. He claims salary deducted for the days he did not work since he was a permanent employee. He claims salary for 23 public holidays in the sum of Kshs.12,237/=.

Rest Days

15. Claimant seeks payment of 110 rest days. Sunday was the weekly rest day but was not paid for. He seeks Kshs.58,524/- in that respect.

Severance Pay

16. Claimant seeks severance pay because he was retrenched and was also not registered with NSSF until August 2008. He claims gratuity payment for the years 2005 to 2007.

Compensation

17. The claimant states that the termination was unlawful and unfair and seeks compensation. He also seeks costs and interest.

18. Under cross examination the claimant conceded that he operated in Machakos area mainly and the minimum wage for the area at the time was Kshs.9,564/= and he was paid Kshs.10,405/= per month. He however said in 2005 he was paid daily rate of Kshs.300/= instead of Kshs.348/= and in 2006 he was paid Kshs.300/= instead of Kshs.390/=. He claims the difference.

Leave Days

19. The claimant insisted that he was owed 84 days leave.

Termination

20. Claimant testified that he lost his job upon sale of the truck. He was told by the Manager, Mr. Kabugi that there was no more work for him. He denied that he absconded from work and insisted that the lorry was sold when contrary opinion was put to him by counsel for the respondent.

21. The claimant accepted that sometimes on 28th June 2009 he had an accident with the lorry. He drove the same lorry until he delivered it to a new owner in Muranga.

Defence

22. Respondent filed a memorandum of response on 5th October 2011 in which respondent avers that the claimant was employed as a pick-up driver but not as a heavy commercial vehicle driver. That he worked under Machakos and not Nairobi and was therefore paid the minimum wage rate applicable in Machakos and was not underpaid.

23. The respondent denies that it dismissed or declared the claimant redundant and avers that the claimant abandoned employment while at a client's site at Muranga. He left the vehicle he was driving in Muranga and never reported back to work.

24. RW1 James Kabugi, testified under oath for the respondent. He told the court that he worked for the respondent from 1980. That the claimant worked for the respondent from April 2005 until 11th February 2010 when he absconded duty. That claimant worked as a pick-up driver and was paid a daily rate of Kshs.300/= for six days a week. He was paid a monthly salary of Kshs.10,000/=.

25. The company is located at Mombasa Road, Machakos County. That that is where they were located when the claimant absconded. Presently the company is located at Westlands.

26. W1 denied that the claimant was declared redundant. The company had no reason to terminate the employment of the claimant.

27. The claimant drove KAD 845Q, a pick-up and he produced a picture of the vehicle.

28. That on 11th February 2010, the claimant did not report to work. On 24th February 2010, the company wrote him a letter asking him to explain why he was not coming to work. The letter was sent by registered post using his last known address. The letter was produced in court. The letter was resent to another address after a mistake was noted.

29. The company returns show that at the time the company was located in Mavoko Municipality – L.R 7149/59. The company was involved in construction.

Salary for February 2010

30. RW1 stated that the claimant was not paid salary for February 2010 because he worked for 11 days and absconded. The company owes him Kshs.3,666/= as per Machakos scale.

Leave Days

31. RW1 states that the claimant had only 9 days outstanding leave. He offered Kshs.5,238/= in lieu of outstanding leave. He produced documents for leave dated 9th June 2009 for 30 days and another dated 7th January 2010. RW1 said the claimant took 73 days leave in total.

Notice Pay

32. RW1 stated that claimant was not entitled to notice or payment in lieu since he absconded.

Public Holidays

33. RW1 said the claimant did not work during public holidays.

Under Payment of Wage

34. RW1 stated the claimant was never underpaid since 2005 when he was employed. He was paid correct daily rate for Machakos of Kshs.300/= per day.

Rest Days

35. RW1 admitted that the claimant was not paid for Sundays because he did not work.

Severance Pay for 6 Years

36. RW1 stated that the employment of the claimant was never terminated and so he is not entitled to severance pay.

Salary for the Period 28th December 2010 to 31st December 2011

37. RW1 states that the claimant worked for 11 days in February 2010 and then absconded. He is not entitled to salary for this period since he did not work.

Under payments

38. RW1 admitted underpayments in respect of 2005, 2006, 2007 and 2009 and judgment was entered for a sum of Kshs.22,940/= based on admission.

39. RW1 prayed the rest of the claims be dismissed.

40. RW1 under cross examination admitted that the company owned several vehicles including a Mitsubishi lorry registration No. KZV 481. The company also owned a prime mover KYU 165, a lorry with a trailer and KAU 079U a prime mover.

41. He admitted that the company had only one driver, the claimant. He admitted that the claimant drove the lorry registration no. KZN 481, Mitsubishi.

42. Another driver employed by a sister companied drove the prime mover KAV 835 belonging to Gichohi properties.

43. RW1 said the claimant was employed to drive a pick-up, but he drove the trucks since there was no other driver. He admitted that claimant drove the truck regularly.

44. RW1 also admitted that respondent was based at Westlands by the time the claimant left but insisted that claimant worked from Mavoko. He also insisted that the claimant deserted work and was not dismissed.

45. RW1 confirmed that claimant drove the lorry to Muranga but it was not sold but hired to work there. The claimant left the lorry there.

Determination

46. The issues for determination are as follows;

(i.) Did the claimant abscond work or was he dismissed?

(ii.) Is the claimant entitled to the reliefs sought?

Issue I

47. The court has carefully considered the pleadings by the parties and the oral testimony by the claimant and RW1.

48. The claimant insisted that he was declared redundant by the respondent upon sale of the lorry he was driving and was told to go home since there was no more work for him. The respondent on the other hand through RW1 stated that the lorry was hired for some works in Muranga, where the claimant delivered the same and absconded work.

49. To evaluate the credibility of the two versions, the court has considered the averments in the memorandum of claim where the respondent denied in total that the claimant was employed to drive any lorry in paragraph 4 of the memorandum of response. This was surprisingly contradicted by RW1 who testified that indeed the claimant regularly drove a Mitsubishi truck which he eventually delivered to Muranga and absconded.

50. To this extend, the defence preferred by the respondent is inconsistent with its statement of defence and lacks credibility.

51. The version told by the claimant is sensible and consistent with his pleading that the lorry he was employed to drive was sold in Muranga where he was asked to deliver it and when he returned to the respondent's office in Nairobi, he was declared redundant as there was no work for him.

52. This version is consistent with the later admission by RW1 that indeed the respondent underpaid the claimant and offered to pay him the salary difference.

53. There is no tangible explanation why the claimant would abscond duty since there was no dispute between him and the respondent at the time.

54. The court finds that the claimant's employment was terminated without notice, and without following the procedure provided under Section 40 of the Employment Act.

55. Accordingly, the termination was unlawful and unfair and the claimant is entitled to compensation in terms of Section 49 of the Employment Act.

56. In this regard, the claimant had served the respondent diligently from the year 2005 up to February 2010 when the employment was terminated for reasons of redundancy without giving him or the labour office notice and without paying him severance pay for each completed year of service.

57. The respondent admits it had other trucks and a pick-up and has given no explanation why it was necessary to retrench its only driver yet it was still engaged in construction work. For this reason even

the reason for the declaration of redundancy was not valid.

58. The claimant suffered loss and damage and is entitled to compensation equivalent to eight (8) months' salary as compensation in the sum of Kshs.110,664/=.

Terminal Benefits

Salary for February 2010

59. The court found that the claimant did not abscond from duty but was declared redundant and therefore finds he worked up to 28th February 2010 and awards him arrears salary for in the sum of Kshs.13,833/=

Payment in Lieu of 84 Days Leave

60. The claimant demonstrated that due to the nature of his work, he did not take 84 days leave and was not paid in lieu thereof. The court awards him Kshs.41,499/= in lieu of leave days.

Notice Pay

61. The claimant was declared redundant without notice and is entitled to Kshs.13,833/= in lieu of notice.

Under Payment

62. This claim was conceded by the respondent in the sum of Kshs.22,960/= and the court awards the claimant accordingly.

110 Yearly Rest Days

63. The respondent conceded that the claimant did not work on Sundays and was therefore not paid salary for the Sundays. The non-payment of rest days is contrary to the provisions of Section 37 of the Employment Act since the claimant was a monthly paid employee and his employment was permanent in nature.

64. Accordingly, the court awards the claimant Kshs.58,524/= for all the Sundays that were not paid for.

23 Public Holidays

65. Similarly, being a permanent employee, the claimant was entitled to payment of 23 days public holidays not worked in the sum of Kshs.12,237/= and the court awards him accordingly.

Severance Pay

66. The court found that the claimant was declared redundant and was therefore entitled to payment of severance pay calculated at 15 days salary for every completed year of service. The claimant served for six years and is awarded Kshs.41,833/=.

Salary for 28th February 2010 to 31st December 2011

67. This claim has no basis and is dismissed.

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

a.) Compensation eight (8) months Kshs.110,664/=

b.) Arrears salary for February 2010 Kshs.13,833/=

c.) Payment in lieu of leave Kshs.41,499/=

d.) Notice pay Kshs.13,833/=

e.) Service pay Kshs.41,833/=

f.) Underpayments Kshs.22,960/=

Total Kshs.244,622/=

g.) Interest at court rates from date of judgment till payment in full.

h.) Costs to follow the outcome.

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

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE