



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 857 OF 2015

WAMBUA NYAMAI .....CLAIMANT

VERSUS

UFANISI FREIGHTERS [K] LTD .....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant was employed by the respondent as a truck driver under fixed term contract starting 23/8/2014. The last contract started on 1/12/2014 and was to end on 30/11/2015. His salary was ksh.25381 which was later increased to ksh.26650 per month. On 7/7/2015, the claimant was allegedly sent on a compulsory leave for 14 days but when he reported back on 22/7/2015, the respondent HR Manager Mr. Kingora informed him that his services had been terminated.

2. As a result of the said termination the claimant instructed kituo cha sharia to demand damages from the respondent for the unfair termination. The demand letter was not responded to but the respondent wrote a letter to the claimant on 29/7/2015 inviting him to show cause why disciplinary action should not be taken against him for absconding duty and further invited him for a hearing on 4/8/2015. The said letter was copied to Kituo Cha sharia. Kituo Cha Sheria responded to the letter on 24/8/2015 stating that the claimant was not served with any MEMO on duty allocation after the compulsory leave and had indeed ceased being employee of the respondent from 22/7/2017 when he was dismissed by the HR manager. Thereafter the respondent served the claimant with a dismissal letter dated 21/8/2015.

3. The claimant has now brought this suit seeking terminal dues plus compensation for the unfair termination of his contract of employment by the respondent on 22/7/2015. The respondent has admitted that she employed the claimant as pleaded in his suit. She has however denied the alleged unfair termination of the contract of service. It is the defence case that the claimant reported back from leave on 22/7/2015 but thereafter absconded duty. It is further defence case that the claimant was invited to a disciplinary hearing but defaulted to attend forcing her to dismiss him summarily on 21/8/2015. She thereafter prayed for the suit to be dismissed with costs.

4. The suit was disposed of by written submissions on the basis of the pleadings, documentary evidence and the witness statements filed.

ANALYSIS AND DETERMINATION

5. There is no dispute that the claimant was employed by the respondent as a truck driver. There is also

no dispute that the claimant never applied for any leave but he was send on leave by the respondent from 7/7/2015 till 22/7/2015 when he reported back to work. Finally there is no dispute that from 22/7/2015, the claimant never resumed his duties as a truck driver and that he severed a demand letter on the respondent demanding damages for unfair termination of the employment contract.

6. The issues for determination are:

- (a) Whether the claimant was dismissed from employment on 22/7/2015 or 21/8/2015.
- (b) Whether the said dismissal was unfair.
- (c) Whether the reliefs sought out to issue.

#### DATE OF DISMISSAL

7. The claimant has alleged that his dismissal was done verbally by the HR Manager Mr. Kingora on 22/7/2015 when the claimant reported back from the leave he was forced to take. He contends that the show cause letter dated 29/7/2015 was an afterthought meant to defeat the demand letter dated 27/7/2015. He therefore urged that the disciplinary process invoked after the dismissal on 22/7/2015 was of no consequence because he had already ceased to be her employee.

8. The respondent has not explained why she never responded to the demand letter from the claimant's lawyers to say that the claimant had absconded. She just ignored the lawyers completely and proceeded to dismiss the claimant for absconding duty. She has produced a MEMO dated 22/7/2015 purporting to reassign duties to the claimant but no evidence of service of the said MEMO has been produced in court. Having considered all the material presented to the court, I find on a balance of probability that the claimant was verbally dismissed from work on 22/7/2015 by Mr. Kingora. I have carefully perused the witness statement by Mr. Kingora and I did not see anywhere where he denied that he met the claimant on 22/7/2015 and conveyed the information that he had been dismissed. Consequently I agree with the claimant that the disciplinary process commenced by the respondent after service of the demand letter by the claimant's lawyers, was an afterthought, which was meant to sanitize the mess which had already been done.

#### UNFAIR TERMINATION

9. Under section 45(2) of the Employment Act, termination of an employee's contract of service is unfair unless the employer proves that it was founded on a valid and fair reasons and that it was done after following a fair procedure. In this case the termination was done while the claimant was on leave and when he reported back on 22/7/2015, the decision was conveyed by the HR Manager Mr. Kingora. The burden of proving the reason for termination and the procedure has therefore not been discharged by the respondent. The respondent has not proved misconduct, poor performance or physical incapacity to warrant the dismissal of the claimant on 22/7/2015. The alleged absence from work was in respect of the period after the dismissal. In addition the invitation to defend himself for the alleged misconduct came after the dismissal on 22/7/2015. Consequently, I find that the dismissal of the claimant from employment on 22/7/2015 was unfair within the meaning of section 45 of the Act.

#### RELIEFS

10. Under section 49 of the Act, an unfairly terminated employee is entitled to salary in lieu of notice, plus compensation for the unfair termination. In this case the claimant was serving under a fixed term contract which had six months remaining before expiry. I will therefore award him ksh.26650 being one month salary in lieu of notice plus ksh.133,350 being 5 months salary as compensation for the unfair termination.

11. As regards the claim for unexplained deductions, there is no doubt that the claimant's salary was deducted. The payslips produced do not explain the purposes for the said deductions. The defence

witness explained that the deductions were in respect of recovery of diesel for which the claimant failed to account plus court fines paid for him after his arrest. The alleged lost diesel has not been proved in evidence, in addition the fine in issue was occasioned by the respondent when she instructed the claimant to drive the truck without a valid inspection sticker, according to the claimant's letter dated 17/4/2015 produced by the defence. Consequently, I award the claimant the sum deducted being ksh.27840 less ksh.4100 and Ksh.3550 which was reimbursed to the claimant on 4/10/2014 and 2/4/2015 respectively.

### DISPOSAL

12. For the reason that the claimant was unfairly terminated, I enter judgment for him in the sum of ksh.180,090 plus costs and interest. In addition the claimant will also have certificate of service.

Dated, signed and delivered this 28th April 2017

O.N. Makau

Judge