



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 509 OF 2015

BETWEEN

1. JOSEPH KARAKACHA WERAKOKO

2. JOHN PAUL BARASA A.K.A. IBRAHIM BARASA ...CLAIMANTS

VERSUS

HUSSEIN DAIRY LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimants

Muthee Soni & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimants filed their joint Statement of Claim, on the 20th July 2015. The 1st Claimant states he was employed as a Security Guard by the Respondent, on 3rd November 2002. He earned a salary of Kshs. 8,000 as of the date of termination, 30th November 2014. The 2nd Claimant was employed as a Driver on 1st June 2011. He earned a salary of Kshs. 18,000 as of the date of termination, 23rd February 2015.

2. The 1st Claimant states his contract was terminated by Respondent's Director Mahmoud Kassam Mianyi, through Respondent's Foreman, Ramadhan. Mianyi and Ramadhan held a long conversation in their mother tongue, after which the Claimant was informed by Ramadhan his services were no longer required. The Claimant was threatened he would be arrested, when he sought to consult the Director Mianyi. He was paid a total of Kshs. 30,000 in unspecified terminal dues. He feels termination was unfair and unlawful, and prays for Judgment against the Respondent for:-

a. 1 month salary in lieu of notice at Kshs. 10,911.

b. Annual leave for 2013 and 2014 at Kshs. 10,911.

- c. Underpayment of salary for May 2012 to April 2013 at Kshs. 18,852.
- d. Underpayment of salary for May 2013 to December 2014 at Kshs. 58,220.
- e. Gratuity at 18 days' salary for every year completed in service at Kshs. 105,753.
- f. Service pay, when N.S.S.F contributions were not remitted [10 years] at Kshs. 63,000.
- g. The equivalent of 12 months' salary in compensation for unfair termination at Kshs. 130,932

Total...Kshs. 398,576

3. The 2nd Claimant received a text message from the Respondent on 23rd February 2015, informing him that his contract of employment had been terminated. He was advised he would be called on phone and given the reason for the decision. No call was made to him and reason given. He too feels termination was unfair and unlawful. He seeks Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 18,000.
- b. Annual leave pay for 3 years at Kshs. 43,596.
- c. Service pay at Kshs. 41, 520.
- d. Equivalent of 12 months' salary at Kshs. 216,000

Total Kshs. 319,116

4. The total amount pleaded by the Claimants is Kshs. 717,695.

5. The Respondent filed its Statement of Response on the 2nd September 2015. Its position is that the 1st Claimant was involved in several elaborate plans to instigate Locals to encroach on Respondent's land, and cause damage to Respondent's property. He was a threat to the Respondent. His contract was terminated fairly and validly, and terminal dues paid.

6. The Respondent states the 2nd Claimant was a negligent, reckless and careless Driver. He was involved in several accidents. Among the accidents was one involving Respondent's lorry, registration number KBA 066W whereby several People died, and others injured. This resulted in civil suit for damages filed by the victims against the Respondent, where the Respondent was ordered to pay Kshs. 1,857,938. The 2nd Claimant was also involved in another accident in another of Respondent's lorry, registration number KAP 991K. The 2 Claimants' contracts were fairly and lawfully terminated. The Respondent prays the Claim is dismissed with costs to the Respondent.

7. The 1st Claimant gave evidence on 14th March 2016. The 2nd Claimant gave evidence on 7th September 2016 when Claimants' case closed. Senior Clerk Margaret Adongo Oduol gave evidence for the Respondent on 3rd November 2016 when hearing closed. The matter was last mentioned on 13th December 2016 when Parties confirmed filing of their Closing Submissions, and Judgment scheduled for delivery.

8. The 1st Claimant confirmed the contents of his Pleadings, his employment history with the Respondent and the terms and conditions of service. He was summoned on 30th November 2014 by Respondent's Director and told his contract had been terminated. He was asked to move out Respondent's staff house. The 1st Claimant was not able to move out as he had not been paid his dues. The Director told the 1st Claimant there would be repercussions, if the 1st Claimant failed to move out. The 1st Claimant reported to the Police Station that he had been threatened by the Director. He was referred to the Labour Office

who wrote to the Respondent demanding the Respondent pays the 1st Claimant his terminal dues. The Respondent paid to the Claimant Kshs. 25,000 as shown in the petty cash voucher attached to the Statement of Claim. No other money was paid. The 1st Claimant moved out of Respondent's staff house after this.

9. Cross-examined, Karakacha Werakoko told the Court he was not given a written contract by the Respondent. He was paid Kshs. 8,000 monthly. There was no pay slip. He was off duty on 30th November 2014. He was called and told his contract had been terminated. The Director threatened to harm the Claimant if he did not move out. He was paid Kshs. 25,000 as shown in the voucher. He was paid an additional Kshs. 10,000 as stated in his Witness Statement. He lived in the staff house for 2 years. It was free accommodation. The N.S.S.F Statements did not show the name of the Employer to be the Respondent. Contributions to the N.S.S.F were partly remitted. Kshs. 35,000 is all the 1st Claimant was paid after 12 years of service. The 1st Claimant conceded there were intruders who invaded Respondent's property, causing damage, as captured in the photographs exhibited by the Respondent. He was not at work when the invasion occurred. He did not conspire with the invaders. He told the Court on redirection he was not at work when invasion took place.

10. Ibrahim Barasa confirmed the contents of his Pleadings, his employment history with the Respondent, and the terms and conditions of service. He was sent a text message on his phone by Khalfan, son to the Director Mahmoud. He was told his employment contract had been terminated. He was not given any reason. There was no hearing.

11. It is true there were 2 accidents involving the 2nd Claimant. The first accident occurred at Voi. The 2nd Claimant's lorry had broken down. He parked by the roadside. A wayward Coast Bus knocked the Claimant's lorry from behind. In the 2nd accident, the 2nd Claimant was knocked by another vehicle from the side. He was not negligent in either case. He had 14 years' driving experience. Cross-examined, Barasa stated he did not have the phone through which the dismissal text message was communicated. He did not know that the Respondent was found liable for the accident claims resulting from the incident at Voi. He stated he was a Witness in the accident claim. The Bus Driver was at fault.

12. Margaret Adongo Oduol confirmed the Claimants were Respondent's Employees. There were robberies at the Respondent's workplace. The 1st Claimant was colluding with the robbers. The invaders once broke into Respondent's office block, and prevented Respondent's livestock from being taken to graze. The damage caused is captured in the photographs filed by the Respondent. The 1st Claimant was paid terminal dues at Kshs. 25,000. There was a balance which the Respondent retained. He was not underpaid. He was a Member of the N.S.S.F. He utilized his annual leave.

13. The 2nd Claimant was involved in an accident which resulted in a Judgment against the Respondent in favour of the accident victims. The Respondent forgave the 2nd Claimant, and assigned him another lorry. He caused a second accident, damaging the lorry which had been assigned to him, after the initial accident. There was no option but to terminate 2nd Claimant's contract. The Respondent had not started paying his N.S.S.F contributions as he worked for a short period. The 2nd Claimant was not dismissed. He was asked to stop working momentarily. He rushed to Court. Termination was in any event fair.

14. Cross-examined, Oduol told the Court she did not bring any material before the Court to show the 1st Claimant was involved with the raiders. The raiders were arrested. The 1st Claimant was not arrested. She did not have a breakdown of the sum of Kshs. 25,000 paid to the 1st Claimant as terminal dues. N.S.S.F contributions were paid for the 1st Claimant. There are no leave records for the 1st Claimant. She was not aware that the 2nd Claimant was cleared in the first accident. There was no disciplinary hearing. N.S.S.F contributions were not paid for the 2nd Claimant. Oduol told the Court there were warnings issued to the Claimants before termination.

The Court Finds:-

15. The Claimants were employed by the Respondent as Security Guard and Driver respectively. Their terms and conditions of service are not disputed. It is similarly undisputed from the evidence of the Parties, that the Claimants' contracts were terminated by the Respondent's Director by word of mouth. The Witness for the Respondent stated the Respondent had no option but to terminate the 2nd Claimant's contract, after he caused accidents twice. She contradicted herself in her evidence, when she stated the 2nd Claimant was not dismissed, but was told to stop working, and rushed to Court. To stop working, was the same thing as termination, unless specified by the Respondent to amount to suspension. There is no doubt both Claimants had their contracts terminated by the Respondent.

16. It is clear termination was not preceded by any form of hearing. The 1st Claimant was told by word of mouth that he had been sacked. The 2nd Claimant was sacked through a text message sent to his phone by the Director's Son. The Respondent completely failed to pay heed to the requirements of Section 41 and 45 of the Employment Act on fair procedure.

17. There were valid reasons in terminating Claimants' contracts in either case. The 1st Claimant was a Security Guard. He acknowledges Respondent's farm was invaded and property damaged. There are photographs showing the extent of the damage. It was the 1st Claimant's obligation to protect his Employer's property. He did not tell the Court what steps he took, to avert the invasions. The Respondent states the 1st Claimant colluded with the invaders. There was nothing shown to the Court linking the Claimant to the invaders. He was not arrested. His default was in failure to avert the mayhem visited upon his Employer's property. He did not show the Court what he did in protecting his Employer's property. The Respondent therefore had valid reason under Section 43 and 45 of the Employment Act 2007, to terminate 1st Claimant's contract.

18. The 2nd Claimant caused accident after accident, damaging Respondent's Lorries and exposing the Respondent to civil suits filed by the 2nd Claimant's victims. He tried to shift blame to other motorists. The frequency of the accidents would lead the Respondent to feel that the 2nd Claimant was not performing his role with the care, required of that role. The Respondent would be entitled to summarily dismiss both Claimants under Section 44 [4] of the Employment Act, given the way the Claimants treated their Employer's properties.

19. The procedure as noted above was not fair. ***The Respondent shall pay each Claimant 5 months' salary in compensation for unfair termination.***

20. Termination was on valid ground. Notice pay is not merited. The item is rejected.

21. The prayer for underpayment of salary, made by the 1st Claimant, is adequately supported by the Wage Orders for the relevant period. His salary was Kshs. 8,000 monthly. He was entitled to Kshs. 10,911 under the Wage Orders. ***The prayer for underpayment of salary is allowed at Kshs. 77,072.***

22. Annual leave is claimed by the 1st Claimant at Kshs. 10,911 for the period 2013/2014. The Respondent offered no document showing that the 1st Claimant had utilized his annual leave entitlement for the period. ***The prayer is granted at the rate of 21 days x daily rate of Kshs. 419 = Kshs. 8,812.***

23. There is no material to support the prayer for gratuity. The item is declined.

24. Respondent's Witness admitted the Respondent did not pay 1st Claimant's N.S.S.F contributions for the full period worked. The period in question is 10 years. At the rate of 18 days' salary for every year completed in service under the Wage Order applicable to private security industry, ***the 1st Claimant merits and is granted service pay at Kshs. 75,420.***

25. The 2nd Claimant is granted annual leave pay for a period of 3 years as claimed, for the same reasons stated in the case of the 1st Claimant. ***This translates to 63 days x daily rate of Kshs. 692 = Kshs. 43,615.***

26. The 2nd Claimant was not subscribed to the N.S.S.F. Oduol explained that the Claimant had worked for a short time, and therefore no registered under the N.S.S.F. He merits service pay. ***The Court grants him 18 days' salary for every complete year of service, at Kshs. 37,368.***

27. No order on the costs.

28. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a. Termination in either case was based on valid grounds, but procedurally unfair.

b. The Respondent shall pay the-

1st Claimant

- ***The equivalent of 5 months' salary in compensation for unfair termination at Kshs. 54,555.***
- ***Underpayment of salary at Kshs. 77,072.***
- ***Annual leave pay at Kshs. 8,812.***
- ***Service pay at Kshs. 75,420.***

Total ... Kshs. 215,859.

2nd Claimant

- ***The equivalent of 5 months' salary in compensation for unfair termination at Kshs. 90,000.***
- ***Annual leave pay of Kshs. 43,615.***
- ***Service pay at Kshs. 37,368***

Total... Kshs. 170,983

c. No order on the costs.

d. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge