



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1138 of 2013

PAUL NJOROGE KAMAUCLAIMANT

VERSUS

MULTIPLE HAULIERS E.A. LIMITEDRESPONDENT

JUDGEMENT

1. The claim was filed on 19th July, 2013; defence and counter-Claimant filed on 5th August, 2013; and defence to counter-claim filed on 20th September, 2013. On 14th May, 2015 the Claimant was heard on his case as the Respondent was served but was absent at the hearing.
2. The Respondent filed application dated 22nd May, 2015 seeking to call defence, parties agreed to address the same by written submissions. Ruling was delivered on 19th July, 2016.
3. The parties were directed to file written submissions with regard to the due judgement. The Claimant filed on 17th November, 2016 and the Respondent filed on 1st August, 2016.

Claim

4. The Claimant was on 15th April, 2003 employed by the Respondent as a Co-Driver/Turn man although he was an experienced driver. The Claimant was then promoted as a Driver at a salary of Kshs.20, 437.00 per month. The Claimant was a permanent and pensionable employee and was unionised under the Kenya Long Distance Truck Drivers and Allied Workers Union and paid his monthly fee thereto.
5. On 8th February, 2013 was at the Respondent premises following up on his bonus payment for a trip to Mombasa that he had made as he was speaking to his supervisor when the Respondent employee Mr Ravinder hit the Claimant on his right ear with his radio transmitted gadget. The Claimant was accused of causing disturbance and arrested and placed in custody at Embakasi Police Station. He was put on cash bail and no charges were preferred against him as he was released unconditionally.
6. In breach of the claimant's contract of employment, the Respondent terminated the Claimant from his employment without due cause, without notice or a hearing. At the time the Claimant had been falsely imprisoned, harassed and intimidated.
7. The claim is for reinstatement; compensation for wrongful dismissal; payment of lost salaries and annual increments; lost leave allowances and social security; severance pay; damages for inhuman and degrading treatment; salaries for lost years and costs.
8. The Claimant testified in support of his case. Upon employment by the Respondent, the Claimant

worked diligently for 10 years when in February, 2013 he was falsely arrested and put into custody without charge and at the instance of the Respondent. At the time of termination, he was not paid any terminal dues and is seeking reinstatement without loss of benefits and lawful dues.

9. The Claimant also testified that in defence the Respondent has alleged that he was absent from work on 11th March, 2013 but the truth is that the Respondent locked him out of work place, he was arrested and has since not been allowed back at work. On 15th February, 2013 the Claimant was given a contract with reviewed terms but he did not sign the same as he was a permanent and pensionable employee and had no reason to sign a new contract.

10. Termination of employment was on 8th February, 2013 while he waited for his vehicle to be repaired and was at the Respondent premises when he was arrested after being hit by the Respondent manager. The Claimant did not desert work and was only away for two weeks when he was sick and the Respondent was aware.

Defence and counter-claim

11. In defence the respondent's defence is that the Claimant deserted duty on his own accord as set out in his letter of 11th March, 2013 when he claimed he had been unfairly terminated from his employment. The Claimant had been on a contract of employment from 15th April, 2003 and was not promoted to position of a driver as alleged. He was never on a permanent and pensionable contract.

12. The Respondent continued to pay the due NSSF and NHIF dues for the Claimant despite his absconding duty. The Claimant was unionised and his dues were remitted as required in law. The Claimant was not at the Respondent premises on 8th February, 2013 as alleged and no assault on him took place as no report to the police was made but common cause that the Claimant was in court on 12th February, 2013. No evidence of assault has been submitted and thus the claims for damages made are not due.

13. While the Claimant was on duty, he was served with warnings for absenting himself from work on 21st October, 2003. The Claimant also applied and went on leave. The claims made on leave due or any allowances should not arise.

14. On the defence that the Claimant deserted work, the Claim of reinstatement should not arise.

Counter-claim

15. The claim by the Respondent is that the Claimant acted in breach of his contract of employment when he absconded duty without notice and failed to pay the Respondent in lieu of notice thereof. This is contrary to section 36 of the Employment Act and notice pay is due.

16. In reply to the defence and counter-claim, the claimant's defence is that he was promoted as a driver and he was summarily dismissed after he was assaulted and arrested on 8th February, 2013. The claim for leave is due. Upon summary dismissal, the Respondent cannot claim for notice pay as counter-claimed.

17. No evidence was called in support of the defence and counter-claim.

Submissions

18. The Claimant submits that his employment with the Respondent is not contested save that he was promoted to the position of Driver and not as alleged that he remained a turn boy. He was summarily dismissed on 8th February, 2013 after he was falsely arrested and after he had been hit by the Respondent manager. The dismissal was without notice, hearing or with a justified reason. The remedies sought are due. The Claimant has relied on the case of **Patrick Njuguna Kariuki versus Del Monte (K) Ltd [2012]**

eKLR.

19. The Respondent submits that the Claimant had an employment contract with the Respondent as a Truck Driver Mate dated 15th April, 2003 but termination of the same is in dispute. At the time of exit the Claimant was earning Kshs.22, 265.00 inclusive of house allowance. Despite the Claimant not reporting to work after February, 2013 the Respondent continued to remit his NSSF and NHIF dues monthly together with union dues. The Claimant never filed a claim with the union which is recognised by the Respondent for negotiating unionised employees complaints at work.

20. The Respondent also submits that the claims made by the Claimant that he was mistreated while at work have no foundation as no report was made with the police or evidence of any assault submitted. The Claimant had previously absconded duty and issued with warning letter on 21st October, 2003. He went on leave and cannot claim to be owed any leave days or an allowance thereof.

21. The remedies sought cannot issue as the Claimant absconded duty and has never reported back or been terminated.

Determination

22. The claim is that on 8th February, 2013 the Claimant was dismissed from his employment with the Respondent following what he describes as an assault on his person but he was instead arrested as the insane of the Respondent who accused him of creating disturbance. The defence is that the Claimant deserted work and was never dismissed as claimed.

23. On the defence, the Respondent had an employment contract with the claimant. He had duties to undertake under his contract of service. Where the Claimant absconded duty as alleged, the Respondent had the right under section 44(4) of the Employment Act to dismiss the Claimant from his employment. For the Respondent to state that the Claimant absconded duty and has not been terminated from his employment is not supported by any action to show that effort was made to call the Claimant to work and where he defied, action was taken. The continued payment of NSSF and NHIF or union dues is not a sufficient reason. In any case, where the Claimant is alleged to have absconded duty in October, 2003 there is a record of a warning letter.

24. I take I the events described by the Claimant with regard to the termination of his employment are correct whereby there was an incident on the shop floor on or the 8th of February, 2013 which resulted in his arrest and incarceration at Embakasi Police Station. Following this arrest he was not able to resume duty.

25. Where the Claimant was assaulted while at work, there is no evidence to confirm the same. Where the police at Embakasi Police Station did not take his report, nothing stopped the Claimant from reporting the same at any other station.

26. What is clear is that since 8th February, 2013 the Claimant was not able to return to work to undertake his duties. The Respondent has not issued the Claimant with any warning, recall back to work or a letter of termination with regard to the Claimant not attending to his duties under his employment contract.

27. When the Claimant filed suit, the Respondent also filed a counter-claim. That based on section 36 of the Employment Act, the Claimant terminated his employment without notice and he ought to pay the Respondent notice pay.

28. Where an employee fails to attend work, the duty is upon the employer to deal. Issue a show cause notice; issue a warning; or issue a termination letter. This has not been done by the Respondent. Where the Respondent reported the incident that arose at its premises on 8th February, 2013 and where the Claimant was involved and thus arrested, I take it the Respondent knew the whereabouts of the claimant. Whether the Claimant was charged or released by the police, the Respondent had the duty to ensure

Claimant was at work as and when he was required to. Failure to issue any sanction on his absence and for the Respondent to stand aside and claim the Claimant absconded duty without doing anything, such cannot find justification as a reasonable defence. Such I find to be in essence an unfair termination of employment. The Respondent by its own actions of omission and or commission by failing to take action on the claimant, I find the claim for unfair termination is justified.

29. The claim for reinstatement is premised on the provisions of section 12 of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act. The court must take into account the date of termination in addressing the remedy of reinstatement. Section 12 of the Employment and Labour Relations Court Act requires the court to put into account a time period of 3 years since the cause of action arose before directing an employer to reinstate the employee

30. The Claimant confirmed in evidence that he has not been back at the Respondent work place since 8th February, 2013. This is a period of over 3 years since. I take it the Respondent has made many changes since and in any event, the Claimant did not address the factors that ought to be put into account in seeking reinstatement as tabulated under section 49 of the Employment Act. See **Mary Chemweno Kiptui versus Kenya Pipeline Company (2013) eKLR**. As there is the remedy of compensation, reinstatement is found not an appropriate order in this case.

31. On the remedies due, the admission by the Claimant that by 7th February, 2013 that all his salaries had been paid. Save for the pay for the 8th days worked in February, 2013 the Respondent had complied and paid all due salaries. As such compensation is hereby assessed at 3 months gross wage paid last at Kshs.22,265.00 all being Kshs.66,795.00.

32. The Claimant shall also be paid the sum of Kshs.5, 935.00 for the 8 days worked in February, 2013 if such pay is not already paid.

33. On the Claimant for severance pay, such does not arise in a case such as this one of termination on account of matters outside the provisions of section 40 of the Employment Act which relates to redundancy and out of which a claim for severance pay should not apply.

34. The claim of loss of salary; annual increments; leave allowance; and social security where there is no reinstatement does not accrue. On the pay for time worked and compensation for the unfair termination of employment, these remedies as set out do not apply.

35. The claim for damages for inhumane treatment and harassment were not gone into in specific as being separate and apart from the unfair termination of employment. No evidence was called to demonstrate that the Respondent maliciously caused the arrest of the Claimant or that he was injured or mistreated outside of the unfair termination of employment. No damages are awarded.

Accordingly, judgement is hereby entered for the Claimant against the Respondent for compensation at Kshs.66, 795.00; salary for 13 days at Kshs.5, 935.00; and costs of the suit.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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