



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 790 OF 2015

BETWEEN

JOSEPH KARIUKI KARANJA.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Njeru & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 23rd October 2015. He states he was employed by the Respondent as a Driver on the 6th June 2009, earning a salary of Kshs. 26,552.

2. On 14th October 2013, the Claimant was told by the Human Resource Manager Mr. Ngetich, that the Claimant used the Respondent's vehicle KBP 156 Y, make probox, for the Claimant's own use, driving the vehicle to an unknown destination.

3. The Claimant was suspended on the same day. Suspension was indefinite. He was not told when he would report back to work. He was not told whether his contract had been terminated, and when he would be paid his terminal dues. He considered himself to have been constructively dismissed. He states Respondent's decision was unfair and unlawful. He prays for Judgment against the Respondent for:-

a) 1 month salary in lieu of notice at Kshs. 26,552.

b) Salary for 14 days worked in October 2013 at Kshs. 14,297.

- c) Unpaid salary from 14th October 2013 to the date of filing the Claim at Kshs. 637,248.
- d) Refund of uniform deposit at Kshs. 3,500.
- e) Gratuity at 15 days' salary for each year completed in service at Kshs. 91,910.
- f) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 318,624

Total...Kshs. 1,096,137

- g) A declaration that termination was unfair and unlawful.
- h) Costs and interest.

4. The Respondent filed its Statement of Response, on 15th February 2016. It concedes to have employed the Claimant as a Driver, on terms and conditions of employment contained in the contract of employment. He was required to report his vehicle's movement to the controller. He failed to do so. He was suspended to facilitate investigations. He was issued with particulars of his offence and given a fair chance to answer the allegations against him. He was summarily dismissed through the letter dated 26th November 2013. There were various cautions and warnings issued upon the Claimant, prior to dismissal. He was offered terminal dues at Kshs. 65,957 before tax. The Claimant refused to clear with the Respondent and return company property in his possession. Termination was fair. The Claim should be dismissed with costs to the Respondent.

5. Parties agreed on 5th October 2016 to have the Claim determined on the strength of the record. They confirmed filing of Closing Submissions at the last session on 6th December 2016.

The Court Finds:-

6. Parties agree the Claimant was employed by the Respondent, on the terms and conditions of service shown in the letter of employment. They agree the Claimant was suspended by the Respondent on suspicion he used Respondent's vehicle without authorization by the Respondent. The Claimant states he was suspended on 14th October 2013.

7. Parties do not agree on what happened after 14th October 2013. The Claimant's position is that he received no further communication from the Respondent. He was not called to a disciplinary hearing. He was not told he had been dismissed. He considered himself to have been constructively dismissed.

8. The Respondent's account is that it suspended the Claimant to allow for investigations into his irregular activities. He was advised of the charges against him; provided with documentary evidence supporting the charges; advised he could bring witnesses to give evidence at the hearing; he was given the opportunity to ask for any documents in the custody of the Respondent; informed on the procedure to be followed at the hearing; advised on possible sanction in event he was found culpable; advised on his right to be accompanied to the hearing under Section 41 the Employment Act 2007; and advised he could seek clarification or assistance from the Respondent on any issue. He was summarily dismissed as shown in the letter dated 26th November 2013, at the end of this procedure.

9. There is no record availed to the Court showing the Respondent indeed took the procedural steps stated above, between 14th October 2013 when suspension issued, and 26th November 2013, the date of the summary dismissal letter.

10. There is no investigation report; there are no charges forwarded to the Claimant; and there is no hearing of any form, shown to have taken place between 14th October 2013 and 26th November 2013.

11. The procedural steps the Respondent alleges to have taken in fulfillment of the requirement for fair procedure under Sections 41 and 45 of the Employment Act, are just ideals contained in Respondent's Closing Submission; these ideals were never applied in dismissal of the Claimant. They were not put into practice. There is no record of their application.

12. The letter of summary dismissal cites 2 reasons in justifying the Employer's decision; deterioration in Claimant's performance; and failure to hand over company property in his possession after suspension. The letter refers to an incident of 28th August 2013, where the Claimant was alleged to have returned to base in Respondent's probox vehicle at about 3.30 a.m. with a cracked windscreen. This was the incident comprising 'deterioration of performance.' There is an e-mail dated 14th October 2014 from an Officer named Kamenyi, to Respondent's Personnel Office, indicating the Claimant paid for the cracked windscreen upon the demand of Kamenyi.

13. There were previous occasions where the Claimant had failed to deliver certain items while instructed to do so by the Respondent. Another Driver would be used, and the extra mileage incurred charged on the Claimant.

14. In the absence of a disciplinary hearing, it is not possible for the Court to appreciate why, on one occasion the Respondent would opt to recover the loss incurred to the Respondent as a result of the Claimant's default, while on this last occasion, the Claimant was made to replace a cracked windscreen and dismissed. Without a proper record of the disciplinary hearing, it is similarly difficult for the Court to appreciate the relationship between the past cautionary and warning letters, and the ultimate letter of summary dismissal.

15. The Respondent did not specify which of its properties was retained by the Claimant on suspension. There was no letter asking the Claimant to surrender any property at the time of suspension. Head of Administration John Ochuku wrote an e-mail dated 25th September 2015 to the Claimant's Advocates, in response to the Advocates' Demand letter. He indicated the Claimant was to hand over Respondent's property in his possession to facilitate payment of terminal dues. It would appear at the time of suspension, the Respondent had predetermined Claimant's fate, requiring the Claimant to return to the Respondent what items were in his possession, for payment of terminal dues.

16. The Court does not think however, that the Claimant remained in the dark throughout, on the decision to summarily dismiss him, after 14th October 2013. The summary dismissal letter was addressed to his postal address. He did not dispute this was his address. The e-mail by Ochuku advised Claimant's Advocates about postage. There is no letter from the Claimant to the Respondent disputing postage. It is fair to assume the letter of summary dismissal was sent to the Claimant's given address and received. The Claimant did not make any written demands to go back to work, or write to the Respondent, asking for the lifting of suspension. He only issued demand through his Advocates, asking for terminal benefits and compensation, not the lifting of suspension. He knew dismissal had taken place way back on 26th November 2013.

17. The prayer for arrears of salary from the date of suspension to-date has no merit, and is declined.

18. The prayer for gratuity pay has no foundation in the Claimant's contract and in law and is declined.

19. Refund of uniform and salary for 26 days worked in October 201, are items which were offered by the Respondent to the Claimant, alongside other terminal benefits, as submitted in paragraph 2 of the Respondent's Written Submissions filed 6th December 2016. These items shall be paid as offered by the Respondent.

20. ***The prayer for notice pay is allowed at Kshs. 26,552.***

21. ***It is declared termination was unfair. The Respondent shall pay to the equivalent of Claimant 6 months' gross salary in compensation for unfair termination at Kshs. 159,312.***

22. The Respondent shall pay to the Claimant, the amount of Kshs. 65,957 as offered in terminal benefits.

23. Certificate of Service to issue.

24. No order on the costs.

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

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 26,552; the equivalent of 6 months' gross salary in compensation for unfair termination at Kshs. 159,312; and terminal benefits as detailed and offered by the Respondent at Kshs. 65,957- total Kshs. 251,821.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest allowed at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 23rd day of June 2017

James Rika

Judge