



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 99 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

BARRACK MUSUMBA OLUOCH CLAIMANT

-Versus-

NDUGU TRANSPORT COMPANY LTD RESPONDENT

JUDGMENT

Introduction

This suit was filed by the Claimant against the Respondent his former employer, vide memorandum of Claim dated 30th March 2015 and filed on 1st April 2015, alleging that his employment was terminated unfairly. He prays for the following orders-

- a) Kshs.941,018.40/- as per paragraph 16 above.
- b) Costs of the suit.
- c) Interest on (a) above.
- d) Any other further relief that the court may deem just and fit to grant.

The Respondent filed a Reply/Defence to Memorandum of Claim denying the allegations of unfair termination and avers that the termination of the Claimant's employment was fair and he was paid full terminal benefits which signed for in full and final settlement.

At the hearing the Claimant testified on his behalf and the Respondent called its Transport Manager Mr. Albert Akech Atieno who testified on its behalf. The parties thereafter filed and exchanged written submissions.

The Facts

The main facts of this case are not in dispute. The Claimant was employed by the Respondent as a driver in January 2010 and was dismissed from employment in December 2014. The grounds for dismissal are that the Respondent's mechanic found an empty jerry-can of fuel and pipe in the vehicle the Claimant was assigned to drive when the lorry went for repair. The Respondent concluded that the jerry-can was used by the claimant for siphoning fuel from the lorry hence the dismissal. Both the Claimant and Mr. Atieno who testified on behalf of the Respondent stated that the Claimant denied any knowledge of the jerry-can and pipe when questioned about the same.

Although in the Reply/Defence to Memorandum of Claim the Respondent pleads that the Claimant was given a hearing before dismissal Mr. Atieno did not refer to any hearing in his testimony. Mr. Atieno testified that because there had been queries about the fuel consumption of the vehicle assigned to the Claimant it was assumed that the Claimant used the pipe and jerry-can to siphon fuel from the vehicle and was summarily dismissed.

Determination

From the evidence on record the issues for determination are the following:

1. Whether the summary dismissal was fair?
2. Whether the Claimant is entitled to prayers sought.

Fair dismissal

For dismissal to be fair an employer must prove both valid reason for dismissal as provided in section 43 of the Employment Act and fair procedure as provided in section 41.

In this case both the Claimant and Mr. Atieno for the Respondent did not refer to any disciplinary hearing although the Respondent pleads in the Reply/Defence to Memorandum of Claim that the Claimant was heard by a disciplinary committee which found his explanation unsatisfactory. No date has been given for the disciplinary committee meeting nor minutes of the said meeting or any other evidence to prove that such meeting took place been availed to the court. The court therefore concludes that no disciplinary hearing took place.

As has been held by this court before, however valid and grave the reasons for termination of employment, if the employee is not taken through a disciplinary process as provided in section 41 any resultant termination of employment is unprocedural and unfair. As provided in section 45(2)-

(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;*
- (b) that the reason for the termination is a fair reason—*
 - (i) related to the employee's conduct, capacity or compatibility; or*
 - (ii) based on the operational requirements of the employer; and*
- (c) that the employment was terminated in accordance with fair procedure.*

Section 41(2) further underscores the importance of a hearing and provides that-

*(2) Notwithstanding any other provision of this Part, **an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.***
[Emphasis added]

There being no proof of a hearing in respect of the Claimant's case, I find and hold that the summary dismissal of the Claimant was unprocedural and therefore unfair.

Remedies

The Claimant prayed for pay in lieu of notice, leave allowance house allowance, underpayments,

compensation and certificate of service. From the evidence on record, what is referred to as leave allowance is pay in lieu of annual leave.

It is not disputed that the Respondent paid the Claimant a sum of Kshs. 52,525.50 on account of leave allowance (pay in lieu of leave) for the years 2011 to 2014. The Claimant pleads that the same may be recovered from what is due to him.

Before establishing what is payable to the Claimant the court has to determine what the statutory minimum wage for the Claimant should have been. The Claimant has based his claim on the minimum wage for heavy commercial driver while in the Reply/Defence to Memorandum of Claim the Respondent pleads that the Claimant was employed to drive a medium sized vehicle.

The solution to the issue is found in the Evidence of Albert Akech Atieno, the Respondent's witness where he states "*Motor vehicle KAY 707 was used to ferry ballast. It is a heavy commercial vehicle.*" The Claimant himself testified that he was driving a 30 tonne lorry registration No. KAY 707 L. Under the Regulation of Wages and Conditions of Employment Act, "driver (medium-sized vehicle)" means a person employed to drive a vehicle over 2 tons weight or heavy commercial vehicle of less than 8 tons capacity with or without trailer, in both cases including handling to and from tailboard and is in possession of a driving licence for the class of vehicle concerned.

The Claimant was thus a Driver, Heavy Commercial Vehicle under the Regulation of Wages and Conditions of Employment (General) Order and his basic minimum wage excluding 15% house allowance over the period he worked for the Respondent was as follows:

	Statutory Minimum Gross Salary	Paid
January 2010-April 2011	Kshs. $15,216 + 2267.70=17483.70$	15,100
May 2011-April 2012	Kshs. $17,118+2567.70=19685.70$	15,500
May 2012-April 2013	Kshs. $19,360.50+2904.10=22264.60$	15,500
May 2013-April 2014	Kshs. $22,070.95+3310.60=25381.60$	16,603
May 2014- December 2014	Kshs. $22,070.95+3310.69=25381.60$	16,603

The Claimant was therefore underpaid as based on payslips in the Respondent's bundle of documents as follows:

January 2010-April 2011	Kshs. 38,139.20
May 2011-April 2012	Kshs. 50,228.40
May 2012-April 2013	Kshs. 81,175.20
May 2013-December 2014	Kshs.197,632.00
Total	Kshs.367,174.80

The Claimant was therefore underpaid by Kshs. 367174.80 which I award him.

Having found the dismissal of the Claimant unfair he is entitled to pay in lieu of notice of one month and not 3 months as prayed. I award him Kshs. 25,381.60 being one months' gross salary as provided under section 49(1) as read with section 35(1) of the Employment Act.

On the Claimant's prayer for compensation it is my opinion that four months' salary is reasonable taking

into account the length of his service and all other relevant factors. This works out to Kshs. 101,526.40 which I award him. The Claimant is also entitled to certificate of service under section 51 of the Employment Act which I direct the Respondent to issue to him within 30 days from date of judgement.

Having been successful in his claim I award the Claimant costs of this suit.

Dated and signed and delivered this 15th day of JUNE, 2017

MAUREEN ONYANGO

JUDGE