



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NUMBER 1870 OF 2014

JOSEPH KYALO NZANGI.....CLAIMANT

VERSUS

ZUCCHINI GREENGROWERS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant averred that he was employed by the resident in 2007 as a driver on an annual contract and at a gross salary of Kshs.7,873/= the further averred that owing to his special skills and insight in his work his contract was renewed annually from 2007.
2. Around August 2014, the claimant fell sick and was admitted at Athi River Shallom Community Hospital, a fact that was communicated to the respondent.
3. In September, when he resumed duties, he averred his services were terminated unfairly and without justifiable cause.
4. The claimant further averred that while dismissing him, the respondent neither gave him an opportunity to be heard nor call witnesses in his defence.
5. The respondent on the other hand averred that the claimant was always on sick off and that when the respondent's administration asked him how he was feeling; the claimant himself admitted that his health was poor and could serve the respondent well as a driver.
6. The respondent further averred that the claimant by himself requested to terminate his services and is a good gesture the respondent agreed to pay the claimant his dues.
7. In his oral evidence in court, the claimant reiterated his averments in the statement of claim. In cross – examination he stated that he was admitted for two weeks. He further admitted signing the statement of his dues found at page 29 of the respondent's bundle of documents. He further conceded that they used to sign acknowledgment upon receipt of service pay at the end of each annual contract.
8. The respondent on its part called as witness one Stella Mulu who stated that the claimant was terminated due to illness and that he was a danger to himself since his legs were not coordinating well hence would not safely drive. According to the witness, the claimant's health was generally deteriorating and was given a sick off for two months.
9. Ms Mulu further stated that the claimant was informed of the intention to terminate his services and

pay him his terminal dues. The witness further confirmed that service was paid at the expiry of each annual contracts. According to Ms Mulu, the termination was by mutual consent.

10. In cross-examination she admitted that the respondent never took the claimant for any medical checkup and that she never knew what disease the claimant was suffering from.

11. Termination of employment is governed by the Employment Act. It set minimum procedural as well legal steps which must be met while entering contract of employment and separation therefrom. What this means is that parties cannot by their own conduct and agreement contract out of the minimum set by the Act.

12. It is not in dispute that the claimant herein was facing medical problems. However, it is contested between the parties whether the claimant's medical condition was such that it prevented him from discharging his duties under the contract of employment. The claimant does not think it did hence the commencement of this suit. The respondent on the other hand contended that the claimant's medical condition made it dangerous for him to continue working as a driver.

13. The respondent through its witness Stella Mulu, however conceded in cross –examination that the respondent never took the claimant for any medical test to ascertain the nature of the ailment and further that the respondent did not know what the claimant was suffering from.

14. In termination of employment cases, the onus of proof of reasons for termination of employment rests with the employer. The admission therefore on the part of respondent that it neither took the claimant for medical checkup nor knew what he was ailing from is evidence of failure on the part of the respondent to prove the reason for the termination of the claimant's services. Where an employer fails to prove or justify the reason for the dismissal or termination of an employee's services, the court is obliged by the Act to reach a finding that such termination or dismissal was unfair and award appropriate compensation.

15. Concerning the signature on the document evidencing receipt of final payment of dues to claimant, the court states and as observed earlier in this judgment that, the fact that such document is couched to show that the receipt of such payment is in full and final settlement does not operate as a bar to the employee concerned from challenging the finality of the payment where such payment is done in contradiction or contravention of the Employment Act. The court will however factor such payment in any award it ultimately makes.

16. In conclusion, the court so finds and holds that the claimant's services were unfairly terminated and enters judgment against the respondent as follows; -

(a) Seven months' salary as compensation for unfair termination of services of Kshs.121,317/=.
(subject to taxes and statutory deductions)

(b) Costs of the suits

17. It is so ordered.

Dated at Nairobi this 16th day of June 2017

Abuodha J. N.

Judge

Delivered this 16th day of June 2017

In the presence of:-

No appearance for the Claimant

Kagiri for the Respondent

Abuodha J. N.

Judge