



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1889 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 12<sup>th</sup> June 2017)

ROBERT CHAKA NDUPHA.....CLAIMANT

VERSUS

CROWN BUS SERVICES .....RESPONDENT

JUDGMENT

1. The Claimant filed suit through the firm of Nyabena Nyakundi & Company Advocates on 20.11.2013 seeking damages for unfair and wrongful termination.
2. He states that he was employed by the Respondent on 23.10.2011 as a Mechanic earning a basic salary of 26,000 per month exclusive of house allowance. That the contract of employment was an oral one which was never reduced into writing and claims that this was an unfair labour practice.
3. He states that he worked for the Respondent with due diligence and faithfulness until on or about 4<sup>th</sup> September, 2013, when the Respondent willfully and wrongly terminated his employment on allegations of gross misconduct and inciting other mechanics.
4. He contends that he was never given a show cause letter contrary to provisions of Section 41 of the Employment Act, 2007. Further that he was not paid his salary arrears and other dues contrary to provisions of the law and the principles of natural justice.
5. The Claimant further avers that the Respondent did not have a valid reason to terminate employment because he never committed any acts of gross misconduct.
6. He contends that he was never granted annual leave nor was he paid house allowance as required by law. That he also worked for 19 public holidays but was not paid and was never compensated for working overtime as he reported to work at 6.00 am and left at around 11.00 pm daily.
7. He prays for the Claim to allowed.
8. The Respondent filed a Response on 2.7.2014 wherein they deny existence of any dispute between the parties and state that the dismissal was above board and in accordance with the law. They further deny that the Claimant's basic salary was Kshs. 26,000/= and that the contract of employment was willfully and wrongly terminated and invite the Claimant to strict proof.

9. The Respondent contends that due process was followed. The Claimant was adequately warned of his conduct not being in tandem with the rules and regulations of the Respondent's duties but blatantly ignored. They allege that the Claimant breached statutory duties and particularized them as follows:

- a. Acting in breach of the Respondent's rules and regulations in his duties.*
- b. Refusing to take instructions from the workshop manager and the supervisor.*
- c. Acting contrary to the workshop manager's instructions by opening the engine of motor vehicle registration number KBK 099J bus scheduled to travel from Nairobi to Mbale – Uganda.*
- d. Inciting fellow employees of the Respondent with an intention to paralyze the Respondent's operations without any justifiable cause.*
- e. Inciting fellow employees not to write job cards from incoming buses and forcefully demanding increments of daily allowances without following due process.*
- f. Inciting other employees of the Respondent to neglect work without any justifiable cause.*
- g. Refusing and willfully neglecting to undertake work and assignments as instructed by the operations manager.*
- h. Rallying and inciting fellow employees not to undertake their lawful duties.*
- i. Being absent from his official duties without justifiable cause.*
- j. Always coming late to work and inciting fellow employees to do so.*
- k. Acting in a manner which was incompatible with faithful discharge of his duties at work place.*

10. They contend that the termination was justified and within the applicable provisions of the law. They challenge the authenticity of the attendance register relied on by the Claimant and invite Claimant to strict proof. They state that all dues were paid to the Claimant and invite him to strictly prove otherwise. They pray for the Claim to be dismissed with costs.

### **Evidence**

11. The Claimant led evidence according to his pleadings and produced the attendance register showing that he reported to work at 6.30 am and left at 2.45 am. He also stated that he worked without off days, worked on public holidays and he never took his annual leave. That he was dismissed without reason and due process was not followed.

12. He prays for the Court to order the Respondent to issue him with a certificate of service and pay him all his dues. He denied allegations of misconduct alleged by the Respondent.

13. The Respondent put up one witness one Abdullah Hassan Mohammed the Respondent's Operations Manager who led evidence to the effect that indeed the Claimant was their employee and worked as a mechanic. That the Claimant reported for duty at 6.30 am and would leave at 5 pm with a break for breakfast and a one hour lunch break.

14. He denied the attendance register and stated that their employees never used to sign anywhere on reporting for duty. That the Claimant was dismissed for the reasons mentioned in the Response to the Claim and was paid all his dues amounting to Kshs. 47,000/=. That he was warned severally against inciting of fellow employees which warnings he did not heed.

## **Submissions**

15. The Claimant submits that the Respondent did not have a valid reason to terminate him and failed to prove the allegations raised in the Response to Claim. That no letter was adduced to prove that he was invited to show cause why his services should not be terminated and as such the burden placed on the employer by Section 43 and 45 of the Employment Act, 2007, was not discharged.

16. It is also submitted by the Claimant that the Respondent did not follow procedural fairness in terminating him as envisaged in Section 42 of the Employment Act, 2007, which is couched in mandatory terms. He was not given any notice of termination, and no disciplinary proceedings were carried out.

17. The Claimant submits that he is entitled to payment of Kshs. 26,000/= in lieu of notice as none was given. He also seeks house allowance which he claimed was never paid and quantifies it at 15% of his basic salary as provided under Section 31 of the Employment Act, 2007.

18. He also seeks for payment of overtime which was not being paid by the Respondent amounting to Kshs. 1,161,216/=. Further that he worked during 19 public holidays and he seeks for payment of Kshs. 19,000/= in lieu thereof. He also prays for gratuity payment and compensation for unlawful dismissal and a certificate of service to be issued.

19. The Respondent submits that there was an oral contract of employment and it is as such difficult to determine the Claimant's salary and that it should be left for the Court to determine. They rely on the case of **Rabai Musinzi Vs. Sadfar Mohammed Khan (2012)eKLR** where Mbaru J stated:

***“Where an employer fails to document the terms and conditions of employment, it is left to the court to interpret these terms.”***

20. That in payment of the Claimant's terminal dues, they paid him 20,000/= as his basic salary and therefore the assertion that his basic salary was 26,000/= is false. That the document dated 31<sup>st</sup> August, 2013, which is admitted by both parties, the Claimant was paid a consolidated salary of 28,000/= and as such the Respondent does not owe the Claimant any further dues.

21. It is the Respondent's submission that they were justified in dismissing the Claimant and chose to do so in accordance with Section 35(4)(b) of the Employment Act, 2007. They state that they proved that the reason for termination was acts of gross misconduct as provided in Section 44(4) (e) of the Employment Act which provides as a ground for summary dismissal:

***“If an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”***

22. That evidence was led that the Claimant by his line Manager that he disassembled the engine of the bus registration number KBK 009J as a result of which the Respondent suffered losses. Further the Respondent's witness testified that the Claimant incited fellow employees not to write job cards for incoming buses and others to demand an increase of daily allowances without following the required procedure which caused the Respondent losses.

23. They cite the case of National Union of Mineworkers and Another and the Commission of conciliation Mediation and Arbitration, Case No. JR 2512 of 2007 where it was observed that an employment relationship can only exist in an atmosphere of trust and subject to an employee acting in good faith. That in the instant case the Claimant's conduct was objectionable and the decision to terminate him summarily was to safeguard a peaceful working environment for the Respondent.

24. They also submit that the Claimant was given an opportunity to defend himself before the Managing Director and RW1 where he was informed of the wrongs committed and he was given time to make representations. That after the meeting the Claimant disappeared for a whole month without permission

and all these actions were interpreted by the Respondent as gross misconduct leading to his termination.

25. It is the Respondent's view that the Claimant did not discharge the legal burden of proving that he was unfairly dismissed whereas they were able to prove that the Claimant was legally dismissed. This position they state was canvassed in the case of **David Muthui Ndungu vs. Riley Falcon Security Limited, Nakuru Cause No. 611 of 2014.**

26. The Respondent submits that RW2 led evidence to the effect that that day shift mechanics reported to work at 6.30 am and leave at 5.00 pm after the workshop is closed and therefore the allegation that he worked upto 11 pm is untrue. The Claim for overtime should thus fail.

27. On dues for working on public holidays, the Respondent submits that this allegation is false none of its employees worked on Sundays and public holidays and as such it should not be awarded. The Respondent also submits that gratuity and salary in lieu of notice was paid and should also not be awarded.

28. The claim for compensation for wrongful termination they submit should not stand as his termination was proper. As for house allowance they state that it was always paid and cannot be awarded now. On his off duty days worked per month, the Respondent states that the Claimant came to work willfully and therefore the claim is not valid. As to the certificate of service, the Respondent states that the Claimant never asked for the same during and after employment.

29. The Respondent prays for the claim to be dismissed with costs.

30. I have examined all evidence submitted by both parties. The issues for determination are as follows:

- 1. Whether there were valid reasons to terminate the Claimant's services.**
- 2. Whether due process was followed before Claimant was terminated.**
- 3. Whether the Claimant is entitled to remedies sought**

31. On the 1<sup>st</sup> issue, the Claimant was terminated vide a letter dated 31<sup>st</sup> August 2013 whereby the Claimant was informed as follows:

**"TERMINATION FROM EMPLOYMENT**

*We refer to the above.*

*It is apparent to the Management that has come to understand that you on your own without the permission of your line Manager went ahead and decided to open the engine of bus registration number KBK 099J sometime in June (facts are all within your knowledge). This is gross misconduct considering the sensitivity of opening an engine of a bus which was scheduled to Mbale – Uganda next.*

*During the month of June, 2013 you provoked other employees to disrespect the Workshop Manager by calling a meeting without his permission, inciting other mechanics not to write job cards from incoming buses in the morning and forcefully demanding increments of daily allowance by collecting signatures from workshop employees. We would not know for sure your intention of doing the same. We therefore have no option but to terminate you from employment forthwith.*

*Kindly acknowledge this letter and clear with the Accounts Department who shall pay your terminal dues thereafter*

*Thank you.*

*Yours Sincerely,*

*For Crow Bus Service*

**M.J. AWALE**

32. From this letter reasons given for Claimant's termination is opening the bus engine and incitement of other employees. In answer to this allegation, the Claimant denied opening the engine of motor vehicle KBK 099J as alleged. He also denied inciting other workers as alleged. He also denied being rude at work.

33. The Respondent was not able to call evidence to prove these reasons for the termination. No employee was called to testify about the incitement nor any action about the dismantling of the engine as alleged. He who alleges must prove.

34. Under Section 43 of Employment Act:-

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

35. The reasons as such must be tangible reasons and not based on mere suspicion or allegations. I therefore do not find the reasons as given were valid to warrant termination of the Claimant.

36. On the 2<sup>nd</sup> issue, the Claimant avers that he was not given an opportunity to defend himself over the allegations against him.

37. The Respondents position is that when they warned the Claimant he didn't come to work and disappeared for 1 ½ months and he reappeared in August. They decided to terminate his services.

38. The disciplinary process envisaged by the law is provided under Section 41 of Employment Act which anticipates that before termination, an employee should be allowed an opportunity to defend himself against allegations leveled against him. He should be allowed an opportunity to call evidence and also cross examine witnesses called by the employer against him. Ample notice should be given of the said disciplinary hearing.

39. In the case of the Claimant, the Respondent indicate that they gave the Claimant an hearing but there is no evidence of the minutes of this hearing and therefore it is my finding that the Claimant was not given a fair hearing before he was terminated.

40. Having found as above, it is this Court's position that the Claimant's termination was unfair and unjustified under Section 45(2) of Employment Act:

***(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.***

41. The Claimant has prayed for a raft of prayers ranging from damages for unlawful termination, house allowance, payment of gratuity, notice and certificate of service among others.

42. In relation to prayers sought, it is my position that the Respondent failed to issue Claimant with a letter of appointment which would have established the terms of this employment relationship under Section 10(7) of Employment Act:

***“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.***

43. In absence of a letter of appointment, it is the Respondent to prove or disapprove alleged terms of employment. The Claimant has stated that he was being paid Kshs.26,000/= per month.

44. The Respondents on their part state he was being paid Kshs.20,000/=. The Respondent failed to provide the Claimant with a payslip or an appointment letter and therefore they ought to have provided proof of the exact amount the Claimant earned even through payment vouchers. This, they did. I will therefore find that the amount Claimant earned is 26,000/= as he has told Court and it's upon this amount that any order given will be calculated.

45. The Claimant stated that he was not paid house allowance which he was entitled to an per Section 31 (1) of the Employment Act which states as follows:

***“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation”.***

46. It is my finding that indeed there is no proof that the 26,000/= he was paid was inclusive of house allowance and therefore he is entitled to payment of house allowance as alleged which is equivalent to 15% of the salary.

47. Having been employed on 23.10.2011 and dismissed on 4<sup>th</sup> September 2013 – he served Respondent for about 22 months so house allowance payable is 15% of 26,000 x 22 = **85,800/=**.

48. I also award Claimant 1 months' salary as notice = **26,000/=**.

49. The Claimant is also entitled to the following additional remedies:

- ***Gratuity for 2 years = 15 days salary for 2 years = 26,000/=.***
- ***Payment for 4 days off days = 4 x 26,000/30 x 22 months = 72,267/= .***
- ***Payment for 14 holidays for 2 years = 14 x 2 x 26,000/30 = 14 x 2 x 866 = 24,267=.***
- ***8 months compensation as damages for unlawful termination = 8 x 26000= 208,000/=***

***Total awarded = 442,334/=.***

- ***Certificate of service.***
- ***Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.***

Read in open Court this 12<sup>th</sup> day of June, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent