



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 493 OF 2014

JOHN KAMAU MUHUNGI.....CLAIMANT

VERSUS

THIKA COFFEE MILLS.....RESPONDENT

Mr. Odongo for claimant

Mr. Thuo for respondent

JUDGMENT

1. The claimant and others who worked as drivers were suspended from work pending investigations regarding suspected siphoning of fuel from the motor vehicles.
2. The claimant states that he was not recalled to work after the suspension whereas the respondent's case is that the claimant and others were recalled back upon completion of investigations and there was no concrete proof of fuel siphoning by the drivers.
3. RW2, testified on behalf of the respondent that he had been suspended together with the claimant and they were called to two meetings by the chairman of the respondent subsequent to which they were recalled back to work. RW2 testified that the claimant declined to return back to work and that to the best of his knowledge, the claimant nor other drivers were dismissed from employment.
4. The claimant worked as a *matatu* driver on route 145 driving a *matatu* registration number KAN 814A. The claimant was not candid about this fact, until it was brought out by the respondent. This was in respondent's view corroboration that the claimant no longer wished to return back to work.
5. The claimant seeks compensation for wrongful and unfair termination of employment and payment of terminal benefits including;
 - (i) unpaid salary from 1st September 2013 to 31st March 2014 in the sum of Kshs.117,509.90;
 - (ii) unpaid leave days in the sum of Kshs.27,978;
 - (iii) leave travel allowance Kshs.2,400; and
 - (iv) one month salary in lieu of notice.

Determination

6. The issues for determination are;

- (i) whether the claimant declined to return to work or his employment was terminated;
- (ii) whether the claimant has proved he is owed the terminal benefits set out in the statement of claim.

Issue i

7. The evidence by RW2, Samuel Mukiri Reru that it was established there was no fuel siphoning and therefore himself and the claimant were asked to return to work, but the claimant declined is in stark contrast to the pleadings by the respondent under paragraph 8 of the statement of defence to the effect that;

“the respondent avers that the reason for suspending the claimant and not terminating his employment was for purposes of enabling the respondent to conduct a thorough investigation and obtain a comprehensive report on the fuel consumption of motor vehicle KBK 334X to ascertain the actual fuel consumption of the vehicle over a period of time without interference by the claimant which has not been concluded and provides irrefutable proof that indeed the claimant was siphoning fuel from the said motor vehicle KBK 334X. (Attached and marked Appendix 2 is a copy of the investigation and fuel consumption report for motor vehicle KBK 334X); has now been concluded and provides irrefutable proof that indeed the claimant was siphoning fuel from the said motor vehicle KBX 334 X.”

8. This pleading is completely incompatible with the narrative by RW1 Robert Kiprono and RW2, to the effect that some of the workers were recalled including the claimant after it being established that there was no evidence of siphoning fuel against them.

9. The pleadings by the respondent which is inconsistent with the testimony by RW1 and RW2 renders credibility to the evidence by the claimant that he was suspended from work, on suspicion of having siphoned fuel but was never recalled back, nor was he subjected to any disciplinary hearing.

10. The court finds that the claimant has proved on a balance of probability that he was wrongfully and unfairly dismissed from work without an established valid reason contrary to sections 43 and 45 of the Employment Act 2007.

11. The claimant is thus entitled to compensation in terms of section 49 (1) c as read with 49 (4) of the Act.

12. The claimant served as a driver until August 2013, a period of seven (7) years. He earned a salary of Kshs.16,787 per month. The claimant had a clear record, wished to continue working, was not paid any terminal benefits upon termination and in the court's view did not contribute to his dismissal from work.

13. Accordingly, the court awards the claimant equivalent of seven months salary as compensation for the unlawful and unfair termination of his employment in the sum of Kshs.117,509.

Terminal benefits

Leave

14. Claimant told court that he did not take leave at all in the year 2013. This was not contested by the respondent since he was dismissed in August 2013, he is entitled to prorata payment in lieu of leave in the sum of Kshs.9,040.

15. Leave travel allowance is payable upon taking leave and is therefore not payable.

Notice pay

16. The claimant was dismissed without notice and is entitled to one month's salary in lieu of notice in the sum of Kshs.16,787.

17. Judgment is therefore entered in favor of the claimant for a sum of Kshs.143,336.

18. The award is payable with interest at court rates from date of judgment till payment in full.

19. Costs to follow the outcome.

Dated and delivered at Nairobi this 21st day of July, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE