



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

CAUSE NO. 940 OF 2015

MWALIMU CHARO TAABU.....CLAIMANT

VERSUS

IMED HEALTHCARE LIMITED.....RESPONDENT

Ndung'u for claimant

Mutabazi for respondent

JUDGMENT

1. The claimant seeks maximum compensation for wrongful and unfair termination of employment and payment of terminal benefits to wit;

(i) Salary in lieu of notice Kshs.14,000.

(ii) Service pay for five (5) years at fifteen (15) days salary for each completed year of service Kshs.35,000.

(iii) Salary arrears for August 2011 to October 2014 [thirty nine (39)] months Kshs.540,000.

(iv) House allowance for five (5) years Kshs.126,000.

2. The suit is based on memorandum of claim filed on 2nd June 2015.

Facts of the claim

3. The claimant testified that he was employed by the respondent as a driver on 1st September 2009 and produced letter of employment as exhibit I dated 16th September 2009.

4. The terms and conditions of employment are set out therein.

5. The claimant served diligently until 1st August 2011 when the respondent suspended the claimant from work on allegations of driving carelessly and causing an accident.

6. The suspension was on half pay. The claimant remained in suspension and the respondent did not communicate to him at all until the 30th October 2014 when the claimant wrote to the respondent demanding his terminal benefits.

7. The claimant prays that the court declares the termination of the employment of the claimant, wrongful and unfair and pay the compensation and terminal benefits set out in the memorandum of claim.

8. The claimant testified under oath in support of the particulars of claim and also called CW2 Josephine Ndunga who testified that she worked with the claimant and that she was doing marketing. She confirmed the suspension of the claimant on half pay.

9. The two witnesses were not cross examined by counsel for the respondent Mr. Mutabazi who protested that he was not ready for trial.

10. The matter was listed for the hearing of the main suit and the court had made a determination of the preliminary objection raised by the respondent on time bar on 3rd November 2015 in presence of both parties. The court refused the adjournment there being no good reason for an adjournment.

11. The claimant testified that he did not get a letter of termination nor did he get a letter to resume work.

12. The respondent filed a memorandum of response on 19th June 2015 in which the respondent admits having suspended the claimant from work for negligence resulting in a traffic accident on 28th July 2011 involving respondent's motor vehicle.

13. The respondent avers that, the claimant was requested to resume duty on 15th September 2011 on terms indicated in the letter dated 12th September 2011 but he declined to return to work and was summarily dismissed by the respondent vide a letter dated 15th September 2011 for failure to resume work.

14. The respondent having declined to participate in the trial did not adduce any evidence nor produce the documents attached to a witness statement of one Chris M. N. Bichage filed on 13th January 2017.

15. There is therefore no evidence adduced to contradict the sworn testimony of the claimant and CW2.

Determination

16. The issues for determination are;

(i) Whether the claimant was placed on suspension on half pay and is entitled to payment for the period of suspension

(ii) Whether the claimant's employment was wrongfully and unfairly terminated.

(iii) Whether the claimant is entitled to the remedies sought.

Issue i, ii

17. From the testimony of the claimant and CW1 which is not rebutted, the claimant was suspended from duty on half pay on 1st August 2011 from a traffic accident in the course of duty. The claimant remained in suspension on half pay, even though he did not receive the half pay until the 30th October 2014, when the claimant instructed Kutuo cha Sheria to write to the respondent a demand letter. The demand letter was responded to on 5th November 2014 in which the respondent purported that the claimant was dismissed from employment on 15th September 2011 after absconding duty.

18. The respondent attached letters which the claimant testified were never received by him and says that they are a mere fabrication, and after-thought.

19. The testimony by the claimant is collaborated by that of CW2 regarding suspension.

20. The respondent also admits having suspended the claimant. The court has no reason to believe that the claimant was recalled back. The court also believes from the testimony before it that the claimant was not paid any salary at all during the period of suspension.

21. The court further finds that the claimant was not recalled at all back to work and his employment was terminated from the date the respondent responded to his demand letter declining to recall him on the pretext that his employment had been terminated with effect from 5th September 2011.

22. The dismissal of the claimant did not follow a fair procedure in that he was not asked to show cause why he should not be dismissed from work nor was he subjected to a disciplinary procedure.

23. The claimant has proved on a balance of probability that the respondent had no valid reason to terminate his employment and the termination was not in terms of a fair procedure and the court so finds.

Issue iii

Terminal benefits

Notice pay

24. The claimant was already at home on suspension when he realized that he was no longer required back to work.

Under clause 2.1 of the letter of employment, the employment of the claimant was to be terminated upon being given one month notice or getting paid in lieu of notice.

The respondent did not give the one month notice nor pay in lieu of notice.

25. The court awards the claimant Kshs.14,000 in lieu of notice.

Service gratuity

26. The claimant served the respondent for a period of five (5) years. There is no evidence that he was registered with NSSF or that the employer contributed the pension dues on his behalf.

27. In terms of section 35(5) and (6) of the Employment Act, the claimant is entitled to service pay upon termination. The claimant seeks the same to be calculated at fifteen (15) days salary for each completed year of service. The court awards him Kshs.35,000 service pay.

Salary arrears from August 2011 to October 2014

28. The claimant has proved on a balance of probability that he was suspended from work on 1st August 2011 on half pay and was not paid the half pay until he wrote a letter of demand of 30th October 2014 to know his status. The respondent admits the fact of suspension in the memorandum of response. The court awards the arrear salary for the period in the sum of Kshs.546,000.

House allowance

29. The contract of employment provided for a basic salary of Kshs.14,000. The agreement does not provide for a house allowance. The respondent has not shown that he was underpaid by the respondent in terms of the general wage orders for the relevant period for the position of a driver so as to claim underpayment categorised as 15% house allowance. The claim is dismissed for want of proof.

Compensation

30. The court has found that the termination of employment of the claimant was not for a valid reason and same was not effected in terms of a fair procedure.

31. The respondent deprived itself of the opportunity to establish that there was a valid reason to terminate the employment of the claimant, by suspending him for a prolonged period without pay and by failing to give him opportunity to answer to any charges that may have led to a lawful and fair termination.

32. Accordingly, the respondent violated section 45 of the employment Act and the claimant is entitled to compensation in terms of section 49(1) (c) of the Employment Act, 2007 as read with section 49(4) of the Act.

33. The maximum compensation payable in terms of 49 (1) (c) is equivalent of twelve (12) months gross pay. The claimant had served for five (5) years. The claimant was kept in limbo for a prolonged period without pay. The claimant contributed to the suspension for getting involved in a road traffic accident although the circumstances of the accident were not interrogated due to the failure by the respondent to convene a disciplinary hearing or participating in these proceedings.

34. The claimant was desirous to continue working. He said he had a good record at work. He was not paid any terminal benefits upon termination. He suffered loss and damage and the court awards him the equivalent of five (5) months salary for the wrongful and unfair dismissal in the sum of Kshs.112,000.

35. **In the final analysis the court enters judgment in favour of the claimant as follows;**

(i) Notice pay Kshs.141,000.

(ii) Service gratuity Kshs.35,000

(iii) Salary arrears kshs.546,000

(iv) Compensation Kshs.112,000.

Total award Kshs.707,000.

36. Interest on the award at court rates from date of judgment till payment in full.

37. Costs of the suit.

Dated and delivered at Nairobi this 14th day of July, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE