



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 453 OF 2015

PATRICK MAKAU KYULE..... CLAIMANT

VERSUS

KEVIAN KENYA LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 23rd March 2015 and filed in court on 24th March 2015, the Claimant has sued the Respondent for unlawful termination of employment.
2. The Respondent filed a Memorandum of Response on 27th April 2015 but opted not to call *viva voce* evidence. The Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a lorry driver from 27th September 2000 until 13th March 2015 when his employment was terminated. On 18th March 2015, the Claimant wrote to the Respondent asking for payment of his dues and issuance of a certificate of service but his demand was ignored.

4. It is the Claimant's case that the termination of his employment was unlawful and unfair. He now claims the following:

- a. Salary for March 2015.....Kshs. 31,166
- b. One month's salary in lieu of notice.....31,166
- c. Unpaid leave for 43 days.....44,671
- d. Compensation for unlawful termination.....373,992
- e. Severance pay for 14 years.....436,324
- f. Damages for loss of employment up to retirement
- g. Certificate of service plus a fine of Kshs. 100,000 against the Respondent

h. Damages for unlawful termination of employment

The Respondent's Case

5. In its Memorandum of Response dated 27th April 2015 and filed in court on even date, the Respondent admits having employed the Claimant as a lorry driver from 27th September 2000 until 13th March 2015 when he was summarily dismissed for gross dereliction of duty to wit:

- a. Driving dangerously thereby endangering the lives of other staff members;
- b. Failing to follow instructions and gross insubordination to his superiors despite several warning letters being served upon him;
- c. Failing to account for Kshs. 10,000 being cash he handled on behalf of the Respondent;
- d. Failing to account for the loss of one case of juice on 26th February 2015;
- e. Failing to carry out his duties diligently;
- f. Absenting himself from duty on several occasions and failing to explain his absence.

6. The Respondent states that the Claimant's dismissal was lawful and fair. Further, the Claimant was asked to collect his terminal dues and certificate of service but he failed to do so.

7. The Respondent avers that it acted lawfully after giving the Claimant numerous warning letters and affording him ample opportunity to defend himself.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

9. The Claimant's employment was terminated by letter dated 12th March 2015, stating as follows:

"Dear Mr. Makau

RE: DANGEROUS DRIVING

On 24th February 2015 at about 7.40Pm while driving KBS 152K, you dangerously drove into the loading bay for parking purposes in a manner that seriously compromised the safety of others. When questioned about this accident, you bluffed off the matter, taking the issue very casually.

For this incident amongst others you are familiar with such as the issue of the two tyres, inability to participate in the counting of stock during loading, shortages, incident with city council parking among others. We take great exception on (sic) this particular incident in which you exposed to danger some key of (sic) our senior managers for your poor driving habits and general attitude to work on this particular day. Had they not run away from the reversing and speeding Motor vehicle you would have caused a fatal accident in the premises.

Considering all the factors in place over this matter among others, a more punitive action would

have been taken but instead we have decided to terminate your services with effect from 12th March 2015 with payment of one month in lieu of notice, accrued leave and salary up to the date of termination.

Please clear to facilitate payment of your final dues.

Yours Faithfully,

KEVIAN KENYA LTD.

(Signed)

J.M Ng'ang'a

Human Resource Manager”

10. This letter accuses the Claimant of a litany of offences ranging from dangerous driving to unauthorized parking. It would however appear that the charge of dangerous driving is the one that precipitated the termination of the Claimant's employment. The Respondent did not call any evidence to support this allegation nor was the charge put to the Claimant at the shop floor for his response.

11. The result is that the Respondent failed to establish a valid reason for the termination as required under Section 43 of the Employment Act. The Respondent also failed the procedural fairness test set by Section 41 of the Act.

Remedies

12. In light of the foregoing, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the

Claimant's long service tempered with a negative employment record as evidenced by two warning letters whose receipt the Claimant acknowledged.

I have also taken into account the Respondent's conduct prior to the termination.

13. In his testimony before the Court, the Claimant admitted that he had been paid salary for March 2015, notice pay and leave pay. These claims are therefore spent. He also admitted having received his certificate of service.

14. No basis was laid for the claims for severance pay and damages for loss of employment which therefore fail and are dismissed.

15. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 249,328, being 8 months' salary in compensation.

16. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.

17. The Claimant will have the costs of the case.

18. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF DECEMBER 2017

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JUDGE

Appearance:

Mr. Ngani for the Claimant

Mr. Kabaruu for the Respondent