



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 108 OF 2015

(Before D. K. N. Marete)

DAVID CHEMWOR.....CLAIMANT

VERSUS

S.B.I INTERNATIONAL HOLDING (AG) LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of Amended Memorandum of Claim dated 22nd February, 2017. The issue in dispute is herein cited as;

“Unlawful dismissal of the claimant”

The respondent in The Respondent’s Memorandum of Response dated 27th April, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that at all material times to this claim, he was an employee of the respondent and unionized. He was employed on 7th December, 2010 as low Loader cum semi trailer driver at Kshs.32,238.00 per month, inclusive of house allowance. He offered diligent performance to the respondent.

The claimant’s further case is that his employment involved working late hours which would involve taking taxis as an alternative form of transport after work. He made a claim for reimbursement of this expenses but this was not done.

The claimant’s other case is that during his stint of service, his salary for the month’s of may, june and july 2012 amounting to Kshs.79,008.00 was unlawfully withheld on allegations that he was on leave. This was not the case as he had not executed any leave forms for this period. He filed a complain on this but the issue was never resolved.

It is the claimant’s further case that on 23rd October, 2013, at about 1630 hours, while at work and driving the respondent’s truck from the yard at Mamboleo when he was hit by another truck belonging to a contractor in the locality. The other driver was driving on the wrongside of the road. The matter was reported to the respondent’s transport manager, one, Muchiri who invited traffic police to come for an assessment of the accident. This was done and both vehicles were driven to the police station with instructions that they be detained until otherwise instructed by the transport manager. Later the lorry was taken for repair.

The claimant would subsequently be summoned by a Mr. Dann who blamed him for the accident but he vehemently denied the same. He was instructed to report to Mr. Ondieki and await further instructions but on 4th November, 2013 he learnt that Mr. Muchiri had removed his time card which meant that he was no longer in employment. Again, the respondent released a memo dismissing him and others from employment. It is his averment that this termination was most unfair and unprocedural.

The claimant's penultimate case is that he reported the dispute to the minister for conciliation but due to the reluctance of the respondent, this collapsed. The conciliator issued a certificate of disagreement in the circumstances.

He claims as follows;

a. A service gratuity for 2 years

$$\text{@ Kshs.32,238/26} \times 15 \text{ days} \times 2 \text{ years} = 37,198/=$$

b. Unpaid leave

$$\text{Kshs.32,238/26} \times 2.225 \times 11 \text{ months} = \text{Kshs.30,688/=}$$

c. Unpaid leave

$$\text{Kshs.32,238} \times 2 \text{ months} = \text{Kshs.64,476}$$

d. Payment in lieu of notice

$$\text{Kshs.32,238} \times 1 \text{ month} = \text{Kshs.32,238/=}$$

$$\text{Total} = \text{Kshs.164,600/=}$$

He prays thus;

a. A declaration that the termination of the claimant was most unfair and unlawful.

b. Kshs.199,100/= being terminal benefits for the grievant claimant.

c. Kshs.79,008/= being the unlawfully withheld salary for the months of May, June and July 2012.

d. 12 months salary as compensation for unlawful loss of employment.

e. A sum of Kshs.1,546,829/= being unlawful deductions from the claimant's salary.

f. Interest on B, CD, & E above.

g. Cost of the claim.

The respondent's case is largely a denial of the claim. She, in agreement, admits that the claimant was employed as a low loader driver but however denies that he work with any diligence as claimed. In the contrary the respondent avers that the claimant caused three accidents leading to a slow down of works and exposing the company to financial loss in repairing the vehicles and paying off damages to the other vehicles messed up by his careless driving. This led to his summary dismissal.

The respondent again denies the claimant's contention on taxi expenses and deems this as an attempt at unjust enrichment through falsehood. It is her case that all times he provided and still provides transport to those working late and other needy cases by a supply of a small vehicle and a bus. Cases of taxi expenses reimbursement, by policy would require authorization on her part.

The respondent denies liability and even illegality in dismissal of the claimant. It is her case that the claimant was taken through disciplinary process involving the issue of a show cause letter and appearance before a disciplinary panel thereby justifying the procedural aspects of dismissal.

The respondent penultimate case is that the grievant was paid all his terminal dues and is therefore disentitled to the relief sought.

The matter came to court variously until 20th November, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful? The claimant in his written submissions dated 11th December, 2017 reiterates his case and further relies on section 45 (1) and (2) of the Employment Act, as follows;

45 (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

- a. That the reason for termination is valid;*
- b. That the reason for the termination is a fair reason –*
 - i. related to the employees 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*

It is his submission that his dismissal was unfair and unlawful for violating the requirements of substantive and procedural fairness as espoused by statute.

The respondent's submission dated 5th December, 2017 opens with a recital on her case. It comes out that the claimant was terminated from employment due to poor performance of work. He had caused numerous accidents as outlined in the respondent's evidence through her list of documents at pages 1 – 3 and 13 – 19 herein. This is besides the evidence of Stanley Wafula Sarai as expressed in his witness statement filed on 4th May, 2016. This is as follows;

14. ... this was the fourth accident that the claimant was being involved and the second one in a row in the year 2013, which led to the Respondent to take necessary action upon him. These accidents have been outlined by the Respondents witness, the former security officer (Stanley Wafula Sarai in his witness statement filed on 4th May, 2016 as follows;

- i. The first accident was on the 20th February, 2012 along Kericho Nakuru road while driving the respondent's vehicle Reg No. KAX 772 where he was charged in traffic case no.109/2012.*

See respondents bundle on page 13 – 19

ii. *The second accident happened on 27th May, 2013 where he caused a trailer to overturn which was booked under OB/29/25/5/2013.*

See respondents bundle on page 1 – 3

iii. *The rest are as outlined in the Respondents witness statement as further described in the respondent's bundle of documents filed in court.*

15. ...the occurrences of the numerous accidents which have not been opposed by the claimant could not be condoned any more as they had an economic effect on the respondents in the costs that were involved in repairing their vehicles and defending suits against them for the accidents caused by one driver.

The respondent also relies on section 45 (2) of the Employment Act, 2007 in submission of a case of lawful termination of employment. It is her submission that in the circumstances of this case, the termination of the claimant was in tandem with the requirements of statute above cited and wholly agreeable. A case of unlawful termination does not therefore suffice. I agree.

This is another case where the respondent's case overwhelms that of the claimant. The claimant has not in the circumstances established a case of unlawful termination of employment. He has not met his burden of proof as espoused under section 47 (5) of the Employment Act, 2007 as follows;

47 (5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"

The claimant's authority as cited in his submissions is unrelated and inapplicable in the circumstances of such lack of proof. His case is hollow. This being the case, the claim fails. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a case for lawful termination of employment, the claimant is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of December 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Miruka instructed by Enoch Anyona Miruka & Company Advocates for the claimant.
2. Mr. Mwita holding brief for Mr. Kamande instructed by Professor Albert Muma & Company Advocates for the respondent.