



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

CAUSE NO. 951 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th December 2017)

LINUS MUKALO SHISANYA.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein Linus Mukalo Shisanya filed his Memorandum of Claim on 9th June 2014 through the firm of Wilbur Sherwin Advocates. He alleges unfair termination of employment by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent vide a contract of employment dated 25th March 2016 on permanent and pensionable basis. The salary attached to this job was Kshs.9,564/= and a house allowance of 1,435/= (appendix 1).
3. He avers that he was confirmed in employment vide a letter of employed dated 21st October 2011 (Appendix 2). He states that on or about November 2011 while on duty, a safe fell on his leg and he sustained serious injuries. He stated that he is still receiving treatment for the said injuries todate.
4. He avers that on 14th March 2013, he sought 10 days leave to enable him attend burial of his former employer Messrs Sayed Ahamed of Ahamed and Ahamed Advocates (Appendix 3). That while on leave the injured leg developed complications and he had to visit the hospital. He also visited the Respondent's Headquarters to explain his predicament to the HR Department but he was denied access to the premises. He attached a medical prescription for 19th March 2013 as Appendix 4.
5. That on or about the 10th April 2013, he was issued with a letter terminating his services ostensibly because of desertion (Appendix 5). That the Respondent never accorded him an opportunity to be heard. At the time he was earning 13,385/= salary and 2,008 house allowance – total = 15,393/=.
6. He avers that during his employment, the Respondent unlawfully deducted Kshs.15,699/= from his salary as per Appendix 7 being copies of his September, October and November pay slip.
7. He has made a demand to the Respondent to compensate him for unlawful termination for which the Respondent has failed to pay hence this claim.
8. He wants the Court to make a declaration that his termination was wrongful and unfair and therefore be paid as enumerated in paragraph (a) to (o) of his prayers in the claim.

9. The Respondents on the other hand filed their Memorandum of Response on 17th July 2014 through the firm of Juma, Awiti and Associates Advocates.

10. The Respondent concede that they had employed the Claimant as a driver but deny unfairly terminating him. They aver that the Claimant terminated his own employment through desertion.

11. They also aver that the Claimant was deployed to the CIT Department from 1st June 2012 and is thus not entitled to the CIT allowance for the entire period. They also aver that the Claimant was a member of NSSF.

12. They also aver that the Claimant never sought permission and was never allowed 10 days leave to attend burial of his former employer as alleged. They aver that they declared him a deserter and offered to pay him his terminal dues which he refused to accept and instead chose to refer the matter to Court.

13. The Claimant reiterated his claim in his reply to the Respondent's Response. He however add that he was involved in an accident sometimes in September 2011 while on duty as a chase car in the CIT Department. It is after this accident that the Respondent started making unlawful deductions from his salary as noted in Appendix 7 which are deductions in respect of vehicle expenses/repairs of Kshs.15,669/=.

14. I have examined all evidence on record from both parties plus the submission filed herein.

15. There is no contention that the Claimant was an employee of the Respondent as pleaded. However, on 14th March 2013, he purportedly sought leave of 10 days from work. His Appendix 3 is the letter he wrote to the Respondent's Branch Manager at Nakuru. There is no indication that this letter was received by the Respondents as it is neither stamped received nor the application for leave accepted. In either case the action by the Claimant to proceed to absent himself after the 14th March 2002 is tantamount to a desertion because his leave was never approved.

16. In this case, it is my finding that the Respondent had a valid reason to terminate the Claimant's case. This is in tandem with Section 43 of Employment Act 2007 which provides that an employer can only terminate an employee's services for valid reasons.

17. The presence of valid reasons however would not mandate the employer to terminate an employee's services without following due process.

18. The Respondents wrote a letter to the Claimant on 10th April 2013, terminating his services. This was received by the Claimant and there is an indication that his address was known to the Respondents. There is however no indication that they gave him an opportunity to defend himself in a fair hearing process before terminating him.

19. Section 41 of Employment Act 2007 states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

20. There is no indication that the above process was ever followed. In the circumstances, I find the Claimant's termination unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

(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.

21. In terms of prayers sought, I find for Claimant and award him as follows as admitted by the Respondent in their Appendix 5 and tabulated in Appendix 9:-

1. March 2013 salary = 13,385/=

2. House allowance upto March 2013 = 2,008/=

3. Uniform refund for March 2013 – 4,000/=

4. Overtime upto March 2013 = 6,864/=

5. CIT allowance upto March 2013 = 15,750/=

6. 52 days leave = 23,200.67

7. Motor vehicle repair refunds = 15,699/=

Total = 50,600/=

8. I also in addition award the Claimant 8 months salary as damages for unlawful termination = 15,493 x 8 = 123,144/=.

Total awarded = 183,744/=

9. The Respondent will also pay costs of this suit and also interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 5th day of December, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omino for the Respondent

Claimant - Present