



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 555 OF 2014

NZYOKI NDETO YUMBWA.....CLAIMANT

V

FARM PARTS LTD.....RESPONDENT

JUDGMENT

1. Nzyoki Ndeto Yumbya (Claimant) in a Memorandum of Claim lodged with the Court on 30 October 2014 against Farm Parts Ltd (Respondent) alleged unfair termination of employment.
2. A Response was filed on 4 December 2014 to which the Claimant filed a Rejoinder on 17 July 2015 and the Cause was heard on 2 November 2015 and 28 January 2016. The Claimant filed his written submissions on 4 February 2016.
3. The Respondent's submissions were not on file by this morning.
4. The issues for determination are, *whether the termination of the Claimants employment was unfair and if so appropriate remedies, including statutory/contractual entitlements.*

Whether termination of employment was unfair

5. The Claimant stated in his testimony that he was not issued with a letter of termination of employment.
6. On the immediate circumstances leading to the separation, he stated that on 2 October 2014 he had sought permission to be away to secure new accommodation from one of the Respondent's Directors Mr. Mahesh Patel after his house had been broken into but the said director told him to leave and not return.
7. He also stated that no hearing was held prior to the separation and that he was not given a letter dated 15 October 2014.
8. The Respondent called one of its Managers, Jaimin Patel to testify on its behalf. He stated that he never interacted with the Claimant and that his testimony was based on the Claimant's employment records.
9. According to the witness, the Claimant was not sacked but left on 25 September 2014, when he was given permission by a director to go move house but never returned to work.
10. Absence from duty without permission is one of the reasons listed in section 44 of the Employment Act, 2007 as warranting summary dismissal.
11. Such absence amount to repudiation of contract on the part of the employee.
12. However, such conduct amounts to *misconduct*, for which a hearing is required by virtue of section 41 of the Employment Act, 2007.
13. Assuming that the Claimant left with permission but never resumed duty, the Respondent ought to have asked him to show cause why disciplinary action should not be taken against him and or explain his absence.
14. The Respondent did not demonstrate that it issued any ultimatum to the Claimant to explain his

- absence or risk dismissal. At all times, the Respondent must have had the Claimant's contact details.
15. In the view of the Court, it is more probable that the Respondent's named director told the Claimant to leave and not return as he testified.
 16. This probability is reinforced by the fact that the said director was not called to testify nor was the failure explained.
 17. The Court, in the event finds that the Claimant was dismissed without complying with the statutory requirements of section 41 of the Employment Act, 2007.
 18. With the conclusion, it is not necessary to examine whether the Respondent has satisfied the test placed upon employers by sections 43 and 45 of the Employment Act, 2007.

Statutory/contractual entitlements

Notice

19. Pursuant to section 35 of the Employment Act, 2007 the Claimant was entitled to notice of at least 28 days. Because no such notice was given, the Claimant is entitled to pay in lieu of notice.

Underpayments

20. The Claimant testified that he was a driver and that at employment on 18 October 2012 the monthly wage was Kshs 10,450/- and that he was not getting house allowance.
21. The Respondent's witness admitted that the Claimant was a driver and that the prescribed minimum wage in 2012 was Kshs 10,687/- for drivers of light vans. The minimum wage for 2013 was Kshs 12,184/25.
22. He made reference to Claimant's salary vouchers for February 2013 showing a basic wage of Kshs 10,450/-, July 2014 of Kshs 14,012/-, August 2014 Kshs 14,012/- and September 2014 Kshs 14,012/-.
23. Considering that the prescribed minimum wages do not include house allowance, and that by practice and custom, house allowance has been pegged at 15% of basic wage, and further that the Respondent did not issue a written contract to the Claimant in terms of section 9, 10 and 31 of the Employment Act, 2007, the Court is satisfied that the Claimant was underpaid as set out in the Memorandum of Claim.

Overtime

24. Although the Claimant testified as to the reporting hours, he did not disclose the contractually agreed working hours or the prescribed statutory minimum working hours within the sector/industry the Respondent was operating in, and the Court is therefore unable to determine whether he is entitled to overtime as claimed.

Leave

25. The Claimant's testimony that he did not go on leave was not challenged or controverted, and the Court finds he has established a right to commuted leave pay on a balance of probabilities.

Compensation

26. Having reached the conclusion that the termination of the Claimant's employment was procedurally unfair, the Court finds he is entitled to compensation, and based on the length of service, the Court finds that the equivalent of 3 months gross wages would be fair.

Conclusion and Orders

27. The Court finds and holds that the employment of the Claimant was terminated unfairly and awards him and orders the Respondent to pay him

- a. 1 month pay in lieu of Notice Kshs 14,012/-
- b. Underpayments(inc. of house allowance) Kshs 47,298/80

- c. Leave Kshs 17,059/35
- d. Compensation Kshs 42,036/-

TOTAL Kshs 120,406/15

28.Claimant to have costs.

Delivered, dated and signed in Nakuru on this 6th day of May 2016.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kerubo instructed by Wambeyi Makomere & Co. Advocates

For Respondent Mr. Matiri instructed by Matiri Mburu & Chepkemboi Advocates

Court Assistant Nixon