



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 131 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BROWN TOM ACHANGACLAIMANT

-Versus-

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION LTDRESPONDENT

JUDGEMENT

The Claimant was employed by the Respondent as a Plant Mechanic at its workshop on 1st November, 2012. He was dismissed on 20th May, 2014. The ground for dismissal was that he colluded with drivers to syphon diesel and was taking bribes from drivers.

According to the Claimant, he was never given an opportunity to be heard and was never issued with a letter of dismissal.

The Respondent on the other had states that following complaints by drivers who alleged that the Claimant charged them shs.600 per week failing which their lorries were not repaired in the event of a break down and that he opened padlocks for drivers for purposes of syphoning fuel. The Respondent's position is that the claimant was invited for a hearing but failed to attend following which he was summarily dismissed.

The letter inviting claimant for hearing dated 17th May, 2014 and the letter of dismissal dated 20th May 2016 were annexed to the Respondent's list of documents.

At the hearing the Claimant testified on his behalf while the Respondent called Mr. ZOU CHANGWEI its personnel officer. The parties thereafter filed and exchanged written submissions.

Issues for Determination

The issues for determination was whether the Claimant was unfairly terminated by the Respondent and whether he is entitled to the reliefs sought.

The Employment Act (the Act) provide for the procedure of termination of employment at section 41 while section 43 provides for valid reason for termination.

I find that the letter from drivers complaining about the Claimant charging them Shs.600 per week to ensure repair of their vehicles whenever they broke down was sufficient ground for the Respondent to

discipline the Claimant in line with section 43 of the Act.

On procedure the Claimant was never given a hearing. There is however a letter inviting him for a disciplinary hearing on 19th May, 2014 which sufficiently gives the grounds of disciplinary hearing. The Claimant however states that the letter was not served upon him. The Respondent's witness who gave evidence Mr. Changwei was on leave at the time the Claimant was terminated and could not confirm that the letter was delivered to the Claimant. No delivery confirmation was produced and the Claimant's evidence that all letters were delivered through a delivery book was not contested. Mr. Changwei on the other hand stated the Claimant was called and informed of the date of hearing and the letter delivered through someone who knows the Claimant whose name was not disclosed.

I find that the Respondent has not demonstrated that the Claimant was given an opportunity to be heard and find that the dismissal was thus far unfair.

Remedies

The Claimant prayed for salary for days worked upto 19th May, 2014 which the Respondent confirmed he had not collected. I therefore award him the sum Claimed being Shs.13,680 as it was not contested.

I further award him Shs.14,720 claimed as overtime as this too was not contested by the Respondent.

The Claimant further prayed for payment to date of retirement being 2 years at Shs.34,000 per month. The Claimant however did not submit any evidence that his contract was subject to a retirement age nor that he was on permanent employment. He also did not submit any evidence of his age.

The Employment Act does not provide for a retirement age and this is a term that can only be provided for in terms of employment.

Even if the claimant's employment was subject to a retirement age he would still not be entitled to payment to retirement age as there is a presumption of law that all contracts are terminable by notice as provided in section 35 of the Act or for misconduct as provided in section 44. There is further a provision in the Act that should an employee be unfairly terminated he would be entitled to one of the remedies provided in section 49 being compensation up to a maximum of 12 months salary, reinstatement or re-engagement.

Having found that the Claimant was unfairly terminated and taking into account that he had worked for only one and a half years, I award him one months salary as compensation for unfair termination of employment at the rate of shs.34,000 this being the rate he used as his monthly pay which the Respondent did not contest.

I further award him 50% of costs in view of the fact that his main claim has been dismissed and he failed to collect his terminal benefits.

Judgement Dated, signed and delivered this 23rd day of June, 2016

MAUREEN ONYANGO

JUDGE