



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 132 OF 2015

STEPHEN MUTINDA MUTHINI.....CLAIMANT

VS

SUDHIR J. DHUTIA T/A SUDHIR AUTOSPARES.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment by the respondent on 2.3.2015. The respondent has denied the allegation that she terminated the claimant's employment and averred that it was the claimant who deserted work without notice on 2.3.2015 after reporting to work at 9.30am which was later than the required time.

2. The suit was heard on 29.6.2016 when the claimant testified as Cw1 but the respondent and her counsel did not attend court despite the hearing date having been fixed by the consent of the counsel.

Claimants case

3. Cw1 testified that he was employed by the respondent as a driver on 3.8.2003. His salary was kshs 25000 per month. That on 2.3.2015, his employment was verbally terminated by the respondent. That the termination was illegal and unlawfully done because Cw1 was not served with any prior notice and no reason was given for the termination. In addition, he was not given any hearing despite his request for the same.

4. He denied the allegation by the defence that he deserted work and maintained that he was dismissed abruptly and his Driving Licence detained by the respondent. That the licence was not released to him until he reported the matter to the police and also made a demand through his Lawyer.

5. He prayed for 3 months salary in lieu of notice, 24 leave days, leave travelling allowance, Gratuity, salary arrears for February 2015, over time, House allowance and 12 months salary as compensation for the termination. In total he prayed for kshs.4,214,635, Certificate of service, costs and interest.

Analysis and Determination

6. There is no dispute that the claimant was employed by the respondent from 3.8.2003 to 2.3.2015 when he was terminated. The issues for determination are:

a. Whether the termination was unlawful and unfair.

b. Whether the relief sought ought to issue.

Unfair termination

7. Cw1 contends that his termination was unfair because he was not served with any prior notice neither was he given any reason for the termination nor was he given a hearing before the same. The said evidence was not rebutted by the respondent because he deliberately failed to attend court to give evidence.

8. Under section 45 (2) of the Employment Act (EA), termination of employment is unfair unless the employer proves that it was founded on a valid and fair reason and that it was done after following a fair procedure. Fair procedure has been provided under section 41 of the Employment Act as involving the explanation of the offence by the employer to the employee in the presence of a fellow employee or shop floor union representative of his choice, and thereafter inviting the employee and his chosen companion to air their representations for consideration before the dismissal is decided. That the said proceedings now, commonly known as disciplinary hearing, must be conducted in a language of the employee's understanding.

9. In this case the respondent never tendered any evidence in defence and as such he did not discharge his duty of proving the reason for dismissing the claimant. That, even if there was any valid and fair reason, which has not been proved, the respondent has also not proved that he followed a fair procedure before dismissing the claimant on 2.3.2015. In the result, I find and hold that the termination of the claimant's employment contract was unfair and unlawful.

Reliefs

Declaration

10. In view of the foregoing finding, I make declaration that the termination of the claimant's employment by the respondent on 2.3.2015 was unfair and unlawful. I further declare that the claimant is entitled to Certificate of Service and hereby direct the respondent to issue one to him forthwith.

Notice

11. The claimant prayed for 3 months' salary in lieu of notice. No basis was shown for the same. Under section 35 and 36 of the Employment Act the claimant is entitled to a notice of one month before a normal termination or one month salary in lieu of notice. He is therefore awarded kshs.25000.

Leave

12. The claimant prayed for 21 days leave earned in 2014 and 3 days in respect of 2015 on pro-rata basis. No leave records were adduced in evidence to disprove that prayer. I therefore award kshs.19,000 to the claimant in respect of the 24 leave days which is less than what was his rightful amount.

Leave Travelling Allowance

13. No evidence was adduced to prove that the claimant was entitled to that leave travelling allowance under his employment contract. I therefore dismiss that claim.

Gratuity

14. The claimant prayed for gratuity at the rate of 15 days per year of service for the 12 years he served. No evidence to support that claim. Gratuity is not the same as service pay which is mandatory award unless the employee is disqualified by the law due to his membership to NSSF, Pension or Gratuity

scheme in which his employer contributes. Gratuity by its very nature is discretionary unless it is provided for under the terms of the employment contract. In this case gratuity will not be awarded for lack of evidence to prove that the claimant was entitled to the same under his employment contract.

Unpaid salary

15. The claim for balance of salary for February 2015 being kshs 21,000 has not been denied. Paragraph 6 of the defence states that it is the claimant who refused to collect the unpaid salary. I therefore award the said kshs.21000 to the claimant as prayed.

Overtime

16. The claimant prayed for 12 hours overtime worked in February 2015. No particulars or evidence was adduced to substantiate the said prayer and as such I dismiss it.

House Allowance

17. The claimant prayed for House allowance for 12 years he worked at the rate of kshs6000 per month. No particulars or evidence were provided to substantiate the said claim. I therefore dismiss it.

Compensation

18. I award to the claimant kshs. 200,000 as 8 months salary for the unfair and unlawful termination. The reason for awarding the 8 months pay is in consideration of the claimants long period of service being 12 years.

Disposition

19. For the reasons given above, I enter judgment for the claimant declaring termination of his employment contract by the respondent unfair and awarding him **kshs.265,990** plus certificate of service, costs and interest.

Signed, Dated and Delivered this 29th day of July 2016.

ONESMUS MAKAU

JUDGE