



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 28 OF 2015
BETWEEN
KARISA CHARO KIRAGA.....CLAIMANT
VERSUS
CROWN PETROLEUM [KENYA] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Onyango Advocate, instructed by Katee Omollo Onyango & Company Advocates for the Claimant

Mr. Mohammed Advocate instructed by Balala & Abed Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 28th January 2015. He states he was employed by the Respondent Company as a Driver, in April 2010, at a monthly salary of Kshs. 18,000. The salary was later reviewed to Kshs. 25,000 per month. On 13th December 2013 the Claimant sought from the Respondent, and was granted, permission to attend to his Daughter's wedding preparations. He returned after a few days and was told his Motor Vehicle had been assigned to another Driver. He had been dismissed, he was told. He was paid a paltry Kshs. 7,000 as terminal dues. He filed this Claim, alleging termination was unfair and unlawful, and seeking against the Respondent the following orders:-

- a. A declaration that termination was unfair.
- b. A declaration that the Claimant was entitled to 30 days of annual leave each year.
- c. The Claimant is paid by the Respondent-

- i. 1 month salary in lieu of notice at Kshs. 25,000.
- ii. 4 years of annual leave at Kshs. 100,000.
- iii. Gratuity for 4 years of service at Kshs. 50,000.
- iv. 12 months' salary in compensation for unfair termination at Kshs. 300,000

Total..... Kshs. 475,000

2. The Statement of Response was received at the Court Registry on the 2nd March 2015. It is conceded the Claimant was employed by the Respondent as a Driver, and was allowed to attend to his Daughter's wedding preparations by the Respondent. He was not replaced with another Employee after he returned. He absconded, and went searching for another job with a different Company. The Respondent denies to have terminated the Claimant's contract. It prays the Claim be dismissed with costs to the Respondent.

3. Parties agreed to have their Witness Statements on record, adopted as their evidence, and the dispute considered and determined on the strength of those Statements, Pleadings, Documents and Submissions under Rule 21 of the Industrial Court [Procedure] Rules 2010. Respective Submissions were confirmed filed at the last mention in Court on the 16th March 2016.

The Claim

4. The Claimant's position is that once he returned from his daughters' wedding preparations, he was sacked without the benefit of a notice and reason. He had been granted permission to attend to his daughter's occasion. He was advised to keep his mobile phone line open. He was called by Respondent's Turn Boy, and told his Truck was loaded and ready for take-off. He went back to his workstation, but was surprised to be told by the Director that his Truck had been assigned to another Driver, and that the Claimant had been dismissed.

5. He did not abscond as alleged by the Respondent. The Respondent was aware of the Claimant's whereabouts on 19th December 2013, when the Claimant was alleged to have abandoned employment. The Respondent acknowledged its Director Hassan Sharif granted the Claimant leave to attend to his daughter's occasion. The Respondent did not show the Court it made any attempt in any case, to call the Claimant back, to explain his alleged absence without leave. It was not true that the Claimant left the Respondent to be employed by another company Mortex Limited. There was no letter of employment produced from Mortex, showing Mortex employed the Claimant at any time. The Claimant submits he is entitled to the prayers sought. His N.S.S.F contributions for the months of August to November 2013, amounting to Kshs. 1,600, were not remitted. The Claimant urges the Court to grant his prayers.

The Response

6. The Respondent submits the Claimant was its Employee, from the year 2010. He was on 19th February 2013, granted permission by the Director, to attend to his daughter's wedding preparations. He was advised not to turn off his phone while away. Another Company Mortex enquired about the Claimant's employment status. The Respondent informed Mortex it did not have objection with Mortex employing the Claimant, although the Respondent at the time still recognized the Claimant as its Employee. Mortex employed the Claimant and later terminated his contract in February 2014 on account of desertion. The Respondent notified the Labour Office of the Claimant's desertion on 24th December 2013, the date it came to learn the Claimant had been employed by Mortex. He was not dismissed by the Respondent. He left for another Employer and when things did not work out, he reverted to suing the Respondent.

7. He is not entitled to notice pay having deserted. Similarly he does not merit annual leave pay. He is not entitled to gratuity and compensation for unfair termination, having abandoned his job. The Respondent prays the Claim is dismissed with costs to the Respondent.

The Court Finds:-

8. The Claimant was employed by the Respondent Company as a Driver in April 2010. He left sometime after December 2013. His last salary was Kshs. 25,000 per month. Parties do not agree on the manner of the Claimant's exit from the workplace. The Claimant asserts he was dismissed and his Truck assigned to another Driver. This was after the Claimant returned from his daughter's wedding preparations. He had left with the leave of the Director Sharif. He was called by the Turn Boy, told the Truck was loaded and ready for the journey. On reporting back as advised, he was not assigned the Truck for the journey; he was advised his employment was at an end.

9. The Respondent's position is that the Claimant was granted leave to attend to his domestic matters, as stated in his evidence. However, he took the opportunity to look for greener pastures and approached Mortex Limited for employment. He did not spend the entire time away preparing his daughter for her wedding; he spent time courting another Employer. This Employer enquired from the Respondent on the status of the Claimant's employment. It was advised he was still employed by the Respondent, but that the Respondent did not object to the new Suitor settling down with the Claimant. The Respondent therefore considered the Claimant to have abandoned his job and wrote to the Labour Office on 24th December 2013 notifying that the Claimant had deserted.

10. There was no firm evidence by the Respondent to convince the Court that the Claimant deserted employment. There was evidence that he was away for his daughter's occasion from 18th December 2013, with the permission of the Respondent. There was no specific date given by the Respondent when the Claimant was to return. The advice was that the Claimant keeps his mobile phone line open. He was called by the Respondent's Turn Boy, and returned to the workplace, only to find his job had been assigned to another Employee. The Respondent did not write to the Claimant to show cause why he had not returned, if at all he had deserted. There was no process set in motion by the Respondent to terminate the contract regularly, or through a disciplinary procedure. The Claimant was not called upon to answer to the charge of desertion.

11. There was nothing objectionable in the view of the Court, in the Claimant utilizing part of his leave of absence in seeking fresh employment elsewhere. Once the Respondent was contacted by Mortex, the contact should not have been taken as a signal that the Claimant had left employment, or be taken as the justification for termination of the Claimant's contract by the Respondent. The Respondent should have asked the Claimant about his intention openly, and have the employment contract terminated regularly. It was at all times the duty of the Respondent to demonstrate the reason or reasons for the termination of the Claimant's contract. Sections 41, 43 and 45 of the Employment Act 2007 were disregarded by the Employer, and the Claimant is entitled to compensation for unfair termination.

12. In considering the amount of compensation, the Court is mandated under Section 49 [4] [k] of the Employment Act, to look at the conduct of the Employee, which to any extent caused or contributed to the termination.

13. The Claimant went for his social event without a firm date on his return. The Employer and the Employee ought to have had a clear return date. He then went searching for greener pastures, without notifying the Employer. The Employer was contacted by another Employer seeking background information about the Claimant. There was no indication from the Claimant that he intended to move to another Employer. At least not before he sought leave to attend his daughter's wedding preparations. The impression created by the Claimant, was that he perhaps used his daughter's name, as a way of getting leave to enable him scout the job market. The Respondent perhaps thought it was wise to preempt the disruption the Claimant's covert and abrupt move was likely to have on its business, by engaging another Driver, and considering the Claimant a deserter. The Court notes the Claimant herein, is a ***Claimant in Cause Number 194 of 2015 [Nakayima Hauliers Limited]***, where similar allegations of desertion against the Claimant were made by the Employer. It is not surprising that the same allegations are made with regard to Mortex. The Claimant appears to be highly mobile, changing Employers at will. He however does not always seem to move in a manner consistent to his contractual obligations. He contributed to the termination. ***He is granted a minimal 1 month salary in compensation for unfair termination, at Kshs.***

25,000.

14. The only reason given by the Respondent for not paying the Claimant annual leave pay is that the Claimant deserted employment. Desertion does not disentitle an Employee a benefit which is conferred by the law. The Claimant worked for 3 years 7 months. He did not take annual leave. The Respondent did not pay him any sum in lieu of annual leave. He claims Kshs. 25,000 for 4 years. There was no evidence given by the Claimant to show he was entitled to 30 days of annual leave. Section 28 [1] [a] of the Employment Act allows a minimum of 21 days of annual leave with full pay. He did not complete 4 years. He completed 3 years and 7 months. His daily rate would be Kshs. 25,000 divide by a maximum 26 working days in a month = Kshs. 951.50 x 75.25 days = Kshs. 71,600. **He is granted annual leave pay at Kshs. 71,600.**

15. The Respondent as concluded above had the duty to formally call the Claimant to a disciplinary forum and terminate the contract. The Respondent did not terminate the contract regularly or through the disciplinary route. **The Claimant is allowed the prayer for 1 month salary in lieu of notice at Kshs. 25,000.**

16. Gratuity of 4 years computed at Kshs. 50,000 was not explained through evidence. The details giving the amount of Kshs. 50,000 as gratuity are missing. It was not made clear if this gratuity was contained in a wage instrument, the contract of employment, a collective agreement or a law. If by gratuity the Claimant intended to pray for service pay under Section 35 of the Employment Act, he would be ineligible as he was subscribed to the N.S.S.F. He makes a submission for refund of unremitted N.S.S.F contributions, which is not supported by his evidence and prayers. It nonetheless confirms his membership of the Fund. There is no merit in the claim for gratuity. The annual leave entitlement need not be declared by the Court, because as seen above, it is contained in the law.

IT IS ORDERED:-

a. Termination was unfair, but the Claimant's conduct contributed to termination.

b. He is granted a minimal 1 month salary in compensation for unfair termination at Kshs. 25,000; notice pay at Kshs. 25,000; and annual leave pay at Kshs. 71,600- total Kshs. 121,600.

c. The full amount shall be paid to the Claimant by the Respondent within 30 days of the delivery of this decision.

d. No order on the costs and interest.

Dated and delivered at Mombasa this 8th day of July, 2016

James Rika

Judge