



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 205 OF 2013

BETWEEN

THOMAS MGHANGA WANDO..... CLAIMANT

VERSUS

KASSAM HAULIERS LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. & Company Advocates for the Claimant

Makasembo Makonyango & Company

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 16th July 2013. He states he was employed by the Respondent Company as an Electrician, on 13th January 2009. He claims his contract of employment was terminated by the Respondent, without cause and notice, on the 22nd May 2013. His last salary was Kshs. 16,000. He was not heard before termination. He holds termination was unfair and unlawful, and seeks the following orders, against the Respondent, from the Court:-

- a) A declaration that termination was unfair and unlawful.
- b) 12 months' salary in compensation for unfair termination at Kshs. 192,000.
- c) 1 month salary in lieu of notice at Kshs. 16,000.
- d) Terminal benefits at Kshs. 34,667

Total Kshs..... 224,667

e) Certificate of Service to issue.

d) Cost.

f) Interest at court rates from the date of breach.

2. The Respondent filed a Statement of Response on 31st October 2013. It denies having employed the Claimant, terminated his contract, and denies it owes the Claimant any terminal dues and compensation. The Statement of Response is a general denial. In the Statement of Witness filed by the Respondent on 18th March 2014 however, the Respondent acknowledges the Claimant was its Casual Employee. He is not entitled to the remedies sought. The Respondent urges the Court to dismiss the Claim.

3. The Claimant gave evidence and closed his case, on the 27th May 2015. On 8th February 2016 the Respondent appeared in Court ex parte, and scheduled the hearing of its case for 23rd June 2016. On 23rd June 2016, only the Claimant was in Court, and applied to have the proceedings closed. The Court marked the proceedings closed, and reserved its Award for 23rd September 2016.

4. The Claimant testified he was employed by the Respondent as an Electrician, on the 13th January 2009. He was issued a gate pass. He had travelled to Longonot to repair one of the Employer's Trucks. On return, the Employer alleged the Claimant had stolen some batteries from the Workplace. The Claimant was asked to leave. There was no report made to the Police. There was no hearing at the Workplace. There was no letter asking the Claimant to show cause why disciplinary action should not be taken against him. On cross-examination the Claimant stated he was not issued a letter of employment. He had the gate pass showing he was employed by the Respondent. The pass belonged to the Kenya Ports Authority, but bore the Respondent's name. He urges the Court to grant the Claim.

5. As stated above the Respondent did not give evidence, and the Statement of Response on record is a general denial.

The Court Finds:-

6. Although the Statement of Response alleges the Claimant was not an Employee of the Respondent, it is conceded in the Respondent's Witness Statement that the Claimant was a Casual Employee. There is nothing availed to the Court by the Respondent to show the Claimant was a Casual Employee. The evidence given by the Claimant persuades the Court the Claimant was a regular Employee, working as an Electrician for the Respondent, between 13th January 2009 and 22nd May 2013. He worked continuously. He was not in casual employment.

7. His contract was terminated by the Respondent on the 22nd May 2013. He testified the Respondent alleged him to have stolen the Respondent's batteries. The Respondent did not justify its decision at the time of termination, and did not attend Court to show such justification, as required of an Employer, under Section 43 and 45 of the Employment Act 2007. The Claimant was not asked to show cause why disciplinary action should not issue. He was not presented with any charges. He was not invited to a hearing. He was not heard in the manner prescribed under Section 41 and 45 of the Employment Act 2007.

8. Termination was unfair. There were no valid reasons, or valid reason, justifying termination. Fair procedure was disregarded. ***The Claimant is entitled to, and is granted compensation the equivalent of his 12 months' gross salary at Kshs. 192,000.***

9. ***He is allowed 1 month salary in lieu of notice, at Kshs. 16,000. Certificate of Service shall be released to the Claimant as allowed under Section 51 of the Employment Act 2007.***

10. The prayer for terminal dues of Kshs. 34,667 was not explained to the Court. It is not understood by the Court. If by terminal dues the Claimant meant service pay, he is not eligible for service pay, as he

was, by his own evidence, subscribed to the National Social Security Fund. Terminal dues should however be understood as all dues payable to an Employee on exit. In a disputed exit where the Court intervenes, it is all dues payable by an Employer, except the compensation for unfair termination. The Claimant should have explained to the Court what the sum of Kshs. 34,667 in terminal dues, represents. This item is rejected.

11. As the Respondent did not attend Court and give evidence when scheduled to do so, or endeavour settlement out of Court to save judicial and legal resources, it is ordered ***the Respondent shall pay the costs of the Claim.***

12. Interest granted to the Claimant at 14% per annum, from the date of the delivery of the Award, until payment is made in full.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant compensation the equivalent of the Claimant's 12 months' salary at Kshs. 192,000; and 1 month salary in lieu of notice at Kshs. 16,000- total Kshs. 208,000.

c) Certificate of Service to issue

d) Costs to the Claimant.

e) Interest granted at 14% per annum, from the date of delivery until payment is made in full.

Dated and delivered at Mombasa this 23rd day of September 2016.

James Rika

Judge