



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 115 OF 2015
ALI MUNGA MUMBA.....CLAIMANT
-VERSUS-
KETTY TOURS TRAVEL & SAFARIS.....RESPONDENT
JUDGMENT

Introduction

1. The claimant was employed by the respondent as a driver from 1991 to September 2014 when he resigned. As at the time of his resignation he was earning Kshs. 18,000 per month. He now brings this suit claiming severance pay, unpaid salary and accrued leave totalling to Kshs 395,000.
2. The respondent has denied liability to pay the dues claimed and avers that the claimant took one month leave from 17.7.2013 and never reported back to work until he voluntarily resigned by his letter dated 4.9.2014. In view of the foregoing, the respondent avers that the claim for damages for unfair termination does not arise.
3. The suit was disposed of by written submissions on the basis of the pleadings, statements and documentary evidence filed.

Analysis and Determination

4. There is no dispute that the claimant was employed by the respondent as a driver from 1991 to September 2014. There is also no dispute that the contract of employment was terminated by the claimant on 4.9.2014 through resignation. The issues for determination are:
 - (a) Whether the claimant's resignation amounted to constructive termination by the respondent.
 - (b) Whether the claimant is entitled to the reliefs sought.

Constructive termination

5. The claimant's Counsel has submitted that the resignation by the claimant was not voluntary but one forced by failure by the respondent to pay his salary. In that regard the Counsel submits that the Court should find that the said termination was unfair and award compensation to the claimant.
6. The foregoing submission by Counsel is not supported by pleadings and evidence. I therefore find that

the claimant has not discharged his burden of proving unfair termination as required under section 47 (5) of the Employment Act.

Relief

Severance Pay

7. The claimant prayed for severance pay for the 22 years worked. I however agree with the respondent that the claimant is not entitled to any severance pay because he was not terminated through redundancy. As stated herein above, it is the claimant who resigned vide his letter dated 4.9.2014.

Unpaid leave

8. This claim is also dismissed for lack of particulars and evidence.

Salary for June – August 2014

9. The claimant has admitted that he took unpaid leave and then resigned. He has not proved that the said leave had been authorised by the employer. Consequently I accept the explanation by the defence that the claimant went for an unauthorised leave. He cannot therefore benefit from his own wrong doing.

Disposition

10. From the reasons stated above the suit is dismissed. No order as to costs.

Judgment dated, delivered and signed this 9th day of September 2016

O. MAKAU

JUDGE