



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 260 OF 2015

VINCENT MAKOMERE OLUYAYI

CLAIMANT

v

HAGGAI MULTI-CARGO HANDLING

SERVICES LTD

RESPONDENT

JUDGMENT

1. This is an undefended Cause.
2. Vincent Makomere Oluyayi (Claimant) commenced action against Haggai Multi-Cargo Handling Services Ltd (Respondent) on 15 September 2015 and he stated the issues in dispute as
 - (i) Unfair termination
 - (ii) Unpaid terminal dues
 - (iii) Underpayment.
3. According to an affidavit of service filed in Court on 14 October 2015, the Respondent's Administrator acknowledged service of Notice of Summons and Memorandum of Claim by stamping and signing.
4. A copy of the stamped and signed Notice of Summons was annexed to the affidavit of service.
5. The Respondent therefore ought to have filed a Response on or before 19 October 2015, but none was filed.
6. When the Cause was mentioned in Court on 19 November 2015, the Court being satisfied with the service fixed hearing for 24 March 2016, with a directive to the Claimant to serve a hearing notice.
7. Come 24 March 2016, the Respondent was not represented and on file was an affidavit of service sworn by George Rasugu and filed in Court that morning, attesting to service of hearing notice upon one Benson Kilonzo on behalf of the Respondent.
8. The Court consequently allowed the hearing to proceed and the Claimant gave sworn testimony and after close of hearing filed written submissions on 31 May 2016.
9. The Claimant testified that he was employed by the Respondent on 31 August 2010 as a Clerk, initially in Nairobi, and he produced a copy of a 1 year renewable contract of employment. Later, he was

transferred to Nakuru.

10. He also stated that the Respondent had been contracted by Kapa Oil Refineries to supply it with personnel (outsourcing).

11. According to the Claimant, he was promoted to Supervisor in 2013, and that on 21 April 2015, one of the Respondent's Manager's called Mohammed summoned him to head office in Nairobi where the director Mr. Haggai fixed an appointment to meet him on 23 April 2015 at Kenol Kobil petrol station near City Cabanas Hotel, but the meeting did not materialise and he returned to Nakuru.

12. On the separation, the Claimant stated that he did not return to work because the aforesaid Mohamed had informed him that the director had given instructions he should not report back to the workplace, though no reason or notice was given.

13. The Claimant also contended that he was underpaid and he produced several pay slips. According to him he was earning Kshs 7,500/- instead of Kshs 13,772/-.

14. In a dispute concerning unfair termination, a Claimant, by dint of section 47(5) of the Employment Act, 2007 has a low threshold obligation to show there was unfair termination of employment.

15. Pursuant to section 35 of the Employment Act, 2007, an employee paid by the month should be given written notice of termination of at least 28 days.

16. The Claimant's testimony that no notice was given is unchallenged/uncontroverted and the Court reaches the conclusion that there was unfair termination of employment.

17. Further, the law requires an employer to demonstrate that it complied with the requirements of procedural fairness (section 41 of the Employment Act, 2007), and also to prove the reasons for termination (section 43 of the Act), and that the reasons for the termination are valid and fair (section 45 of the Act).

18. The Respondent failed to file a Response and or appear during the hearing with the consequence that the facts as asserted by the Claimant are not challenged or disputed.

19. The Court finds that the Respondent has failed to discharge the evidential and legal burden placed upon employers in disputes such as this and therefore the termination of employment was also substantively unfair.

Appropriate remedies

Compensation

20. Considering that the Claimant served the Respondent for about 5 years, the Court is of the view that the equivalent of 6 months gross wages would be appropriate and fair (Claimant's gross wages for December 2014 was Kshs 17,846/-).

Service pay

21. According to the copies of pay slips produced, the Claimant was contributing to the National Social Security Fund and in terms of section 35(5) & (6) of the Employment Act, 2007 he is not entitled to service pay.

Underpayments

22. The Claimant premised the claim for underpayments on various unlisted Regulation of Wages (General) (Amendment) Orders.

