



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.620 OF 2014

KASSIM ALI KADENGE.....CLAIMANT

=VERSUS=

KASSAM HAULIERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues and compensation for the unlawful termination of the claimant employment contract by the respondent on 20.8.2014. The respondent has denied liability to pay any damages to the claimant and avers that the termination of the claimant's employment was lawful and fair because he had grossly misconducted himself in several ways.

2. The suit was heard on 24.4.2015 and 30.5.2015 when the claimant testified as Cw1 and the respondent called Mr. Ibrahim Hussein to testify as Rw1. Thereafter both parties filed written submissions.

Claimant's case

3. Cw1 told the court that he was employed by the respondent as a driver from 2.2.2009 to 20.8.2014 when he was unfairly dismissed. He was never given any written contract. He was a member of NSSF and his salary was kshs.25,382 per month according to the payslips produced. He utilized all his leave upto 12.8.2013.

4. Cw1 explained that after dismissal he was not paid any terminal dues and on 2.9.2014 he went to get a statement of his Social Security at the NSSF where he was given a letter to take to the respondents HR Manager. The letter was advising the respondent to issue him with a termination letter and as result, the respondent served him with a retirement letter back dated to 1.8.2014. The letter stated that the retirement was effective from 31.7.2014. Cw1 however maintained that the retirement was premature as he was born in 1956 according to his National Identity Card.

5. On cross examination, he contended that he should not have retired until he reached 60 years. He maintained that he was dismissed on 20.8.2014 when he was denied access to the work place. Cw1 clarified that he was never served with any warning letter prior to his termination. He maintained that the reliefs sought in his suit were warranted.

Defence case

6. Rw1 is the Head of HR for the respondent. He confirmed that Cw1 was employed by the respondent as a Lorry Driver from 2.2.2009 but was terminated and later reinstated. He contended that the claimant did not have good conduct because he was delivering shortages on customers. That on 15.8.2014 he went to deliver goods to a customer in Nairobi and on his way back he abandoned the truck at Mbui Nzau as a result of which the truck was damaged and goods were stolen from the truck. That the damage on the truck was valued at kshs.1.8 million. That later the claimant returned the truck to Mombasa on 20.8.2014 and when he was questioned about the damage on the Lorry, he became violent and he was served with the termination letter dated 22.8.2014. He maintained that the dismissal of the claimant was justified because of his misconduct. He denied the claim for pending leave and contended that Cw1 had just worked for 6 months after his reinstatement to employment on 5.2.2014.

7. On cross examination Rw1 stated that he was present when Cw1 was reinstated. He also stated that Cw1 sold his leave days and maintained that the signature on the leave application forms were for the claimant. He admitted that the truck had no goods loaded when it was damaged at Mbuvi Nzau. He also admitted the claimant had no Turn boy to assist him during the journey. He further admitted that Cw1 was not served with any warning letter before his dismissal, but had been warned orally.

8. Interestingly however, Rw1 contradicted herself when she said that after retirement on 31.7.2014, Cw1 continued working until he misconducted himself and when questioned about the damage of truck, he became violent and terminated his employment through desertion.

Analysis and Determination

9. There is no dispute that the claimant was employed by the respondent as a truck driver from 2.2.2009 to 20.8.2014 when he was dismissed by the respondent. The issues for determination are:-

(a) Whether the reason for termination was valid and fair.

(b) Whether a fair process was followed before the termination.

(c) Whether the termination was unfair.

(d) Whether the relieves sought should issue.

Reason for termination

10. The respondent produced as exhibit the summary dismissal letter dated 22.8.2014. The reasons cited for the dismissal included absenteeism, abandoning the truck before reaching the assigned destination, short deliveries to customers, shorts of fuel for the assigned truck, loading unauthorized cargo between 15th and 17th August 2014 while returning to Mombasa from Nairobi and finally driving the said truck in a manner that caused damage on the same to the tune of kshs.1.8 million and when questioned he became rude, abusive and left the work on 20.8.2014.

11. Under section 43, 45 and 47(5) of the Employment Act (EA), the burden of proving and justifying the reason(s) for the dismissal lies with the employer. In this case, the respondent called only RW1 to discharge that burden. His testimony however fell short of telling the court the dates when Cw1 absented himself from work, or abandoned the truck before reaching the assigned destination. He also never proved that the claimant made any short deliveries to any customer. He further never proved that the claimant caused any shorts of fuel on the assigned truck. Finally he failed to prove that Cw1 had unlawfully loaded unauthorized cargo on the truck that was assigned to him and then drove the truck in such a manner that he caused damage on it assessed at kshs.1.8million. The particulars of the truck was not pleaded and no evidence was led to prove its identity.

12. In view of the foregoing observations, I find that the respondent has not proved on a balance of probability, that the claimant misconducted himself in the manner pleaded in the defence and particularized in the dismissal letter. I therefore agree with the claimant that he was dismissed for no

good cause. The foregoing is buttressed by the contradiction in the defence case which alleged that the respondent only retired the claimant and on the other hand Rw1 alleged that it is the claimant who terminated his employment through desertion. The said contradictions are so material that I can only interpret them against the respondent. Consequently the answer to the first issue for determination is in the negative.

Procedure followed

13. The burden of proving unfair termination lies on the employee under section 47(5) of the Employment Act while under section 45 (2) (c) of the Act the burden of proving that fair procedure was followed before termination lies with the employer. In this case the Cw1 stated that on 20.8.2014 he was denied entry to the work place and was later issued with dismissal letter and later in September 2014 he was issued with a retirement letter backdated to 31.7.2014. Rw1 on the other hand explained that the claimant returned the damaged truck on 20.8.2014 and when questioned about the damage of the truck, he became violent and left and on 22.8.2014 he was served with a summary dismissal letter. Rw1 never named the person(s) who allegedly questioned the claimant about the truck.

14. On a balance of probability I find that the procedure followed before dismissing the claimant from work was not fair within the meaning of Section 41 of the Employment Act. The said provision requires that before the employer dismisses his employee on ground of misconduct, she shall first explain the offence to the claimant in a language the employee understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter allow the employee and his chosen companion to air their defence for consideration before the dismissal is decided. In this case the respondent has not proved by evidence that she followed the said mandatory procedure before dismissing the claimant on 22.8.2014. Consequently the answer to the second issue for determination is also in the negative.

Unfair termination

15. Under section 45(2) of the Employment Act, termination is unfair if the employer fails to prove that the termination was founded on valid and fair reason(s) and that a fair procedure was followed before the termination. In this case, the employer has failed to discharge the burden of proving the said ingredients of a fair termination. Consequently, I find and hold that the termination of the claimant's employment was unfair and unjustified.

Reliefs

16. Under section 49 of the Employment Act I award the claimant one month salary in lieu of notice being kshs.25,382. I also award him ten months salary being kshs.253,820 as compensation for unfair termination. In making the said award, I have considered the fact that at the age of 58 the claimant was not likely to secure an alternative employment.

17. I also award the claimant 21 days annual leave for the year 2013 2014 being kshs.17,767.40 as prayed. The claimant will also have Certificate of Service as prayed. The claim for compensation for early retirement is however dismissed for lack of legal basis.

Disposition

18. For the reason started above, I enter judgment for the claimant in the sum of **kshs.296,969.40** plus costs and interest.

Signed, dated and delivered this 14th day of October 2016.

ONESMUS MAKAU

JUDGE