



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO.668 OF 2015
BRIAN OLUNYA AMBETA.....CLAIMANT

VS

AL- KHATRI TRANSPORTERS.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the respondent on 8.8.2012 as a Heavy Commercial Driver earning kshs. 22000 per month and worked until 27.4.2015 when he was dismissed without any prior notice or fair hearing for requesting to be assigned a Turn boy to assist him in the Lorry. The Claimant therefore avers that the termination was substantively and procedurally unfair and prays for certificate of service and damages amounting to Kshs675242.20 made up of one month salary in lieu of notice, twelve months salary as compensation for unfair termination, underpaid salary accrued leave and service pay.

2. The Respondent never entered appearance or filed defence despite being served with summons and mention notice to attend court for directions. As a result the claimant successfully sought directions to dispense with the hearing and instead rely on the pleadings, witness statement and the documentary evidence and file submissions.

3. The issues for determination in this suit are:

- a. Whether the termination of the claimant's employment by the respondent was unfair.**
- b. Whether the reliefs sought should issue.**

Unfair and unjust termination

4. Under section 45 (2) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that the it was founded on a valid and fair reason and that it was done after following a fair procedure.

Reasons for the termination

5. The respondent has not filed any defence to this suit and as such she has not discharged the burden of proving and justifying the reason for terminating the services of the claimant on 27.4.2015 as required under section 43, 45(2)(a) &(b) and 47 (5) of the Employment Act. The claimant's contention that he was

dismissed for requesting to be assigned a Turnboy to assist him in the lorry has not been rebutted. Consequently, I find that the respondent has failed to prove on a balance of probability that, the termination of the claimant's employment contract was grounded on a valid and fair reason.

Fair procedure

6. The claimant contended that he was not accorded any chance to defend himself before the dismissal as required under section 41 of the Employment Act. He also contended that he was not served with a prior notice as required under section 36 of the Employment Act. Under section 41 of the Act, the employer is barred from dismissing his employee on ground of misconduct, physical incapacity or poor performance before first explaining to him, in a language he understands and in the presence of Shop Floor Union Representative or a fellow employee of his choice, the reason for the intended dismissal and then accord the employee and his chosen companion a chance to air their representations for consideration before the dismissal is decided.

7. In this case no defence was filed and no evidence was adduced to prove that such a hearing was accorded to the claimant before the termination of his services. Consequently, I find that the defence has failed to prove on balance of probability that she followed a fair procedure before dismissing the claimant.

8. In view of the fact that the burden of proving the substantive and procedural fairness has not been discharged by the respondent as observed herein above, the court finds and holds that the termination of the Claimant's employment was unfair and unjust.

Reliefs

9. The Claimant has prayed for certificate of service and damages amounting to Kshs675242.20 made up of one month salary in lieu of notice, twelve months salary as compensation for unfair termination, underpaid salary, accrued leave and service pay.

Notice and compensation for unfair termination

10. No letter of appointment was produce as evidence and therefore under section 35 (1) (c) of the Employment Act I award one month salary in lieu of notice to the claimant, being kshs.22000 which was the salary pleaded. Further under section 49 (1) of the Employment Act, I award kshs. 66000 being three months' salary as compensation for the unfair termination of is employment contract. In making the said award I have considered the fact that the claimant had worked for the respondent for a short period and also the fact that he had not contributed to the termination through misconduct.

2 years 8 months leave

11. The claim for 2 years 8 months leave is granted on pro rata basis. He will therefore get kshs 22000 x $\frac{56}{26}$ = kshs.47385

Underpayment

12. The basis upon which the claim of underpayment is based has not been demonstrated by pleadings, evidence and submissions. It is therefore dismissed.

Service pay

13. The claimant stated that he was never a member of any pension or gratuity scheme and as such he prayed for service pay for the two complete years served at the rate of 15 days' pay per year of service. I therefore award him kshs. 22000.

Certificate of service

14. The claim for certificate of Service is granted because it is a right guaranteed under section 51 of the Employment Act.

Disposition

15. For the reasons stated above judgment is entered for the Claimant by awarding him the sum of **Kshs. 157,385** plus costs and interest. He will also be issued with Certificate of Service.

Signed, dated and delivered at Mombasa this 25th day of November 2016.

O.N. MAKAU

JUDGE