



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 196 OF 2015

BETWEEN
KADENGE KARISA KONDE CLAIMANT
VERSUS
COAST CLAY WORKS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Chala & Company Advocates for the Claimant

Mwakireti Ndumia & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th April 2015. He states he was employed by the Respondent Company as a Driver on 1st November 2014. He earned a basic salary of Kshs. 14,330, and a house allowance of Kshs. 2,150, total Kshs. 16,480 monthly. His contract was terminated by the Respondent on the 23rd March 2015. He avers termination was without notice and cause. He was alleged to have used the wrong gate while entering and exiting Mombasa Golf Club where he had been asked to deliver Kshs. 5,000 to Respondent's Director. He was not heard on the allegations surrounding the manner of his driving. He urges the Court to grant him, the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 14,330.
- b) Annual leave pay for 1 year at Kshs. 11,574.
- c) Underpayment at [Kshs. 25,000-14,330 =10,670 x 12 x 21] = Kshs. 2,688,840.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 25,000 x 12 = Kshs. 300,000

Total.... Kshs. 3,014,744

e) General Damages for loss of employment and expected earnings.

f) Costs, Interest and any other relief.

2. The Respondent filed its Statement of Response on the 29th September 2015. It is conceded the Claimant was employed by the Respondent as a Driver, initially on 19th August 2014. He drove the Respondent's motor vehicle negligently which led to his dismissal on the 23rd March 2015. He was engaged on monthly contracts which provided for 7 days' termination notice or payment of 7 days' salary in lieu of notice. He earned Kshs. 16,480 per month, way above the minimum wage. He did not have pending leave days on termination. He worked for less than 7 months. His Claim has no merit, and should be dismissed with costs to the Respondent.

3. Parties gave their evidence and closed their respective cases, on the 16th June 2016. The Claimant gave evidence as did Respondent's Human Resource Officer, Mr. Godfrey Mwambewa Nyambu.

4. The Claimant testified he was placed on monthly contracts from the year 2014. He was dismissed on the allegation of entering and exiting Mombasa Golf Club through the wrong gate. He had gone there to take some money to his boss. He was issued warning and dismissal letter simultaneously. He was not given any charges, or called to defend himself.

5. Cross-examined, the Claimant stated he was first employed in October 2014, and left March 2015. He served for 7 months. He earned a gross salary of Kshs. 16,480 monthly. The contracts had a termination clause. The clause provided for 7 days' notice or the equivalent days' salary in lieu of notice. He deserved to be paid a salary of Kshs. 25,000 per month according to the work he did. He did not know that the applicable Wage Order entitled him to Kshs. 13,000 monthly. The letter of termination gave reasons for termination. It states he drove recklessly. He was issued warning letter. He was forced to sign complaint register acknowledging he drove recklessly. He was compelled to sign the warning letter dated 1st January 2015. He applied for annual leave as shown at Respondent's page 5. He was absent between 21st and 28th February 2015. He was bereaved. Redirected, the Claimant told the Court the warning was about reckless driving at the Golf Club. There was no other warning. Termination was based on damage to the vehicle. The vehicle was used by other Drivers. The Claimant was not heard. The Claimant prays the Court to allow the Claim.

6. Godfrey told the Court the Claimant was first employed on 19th August 2014. He drove the Respondent's Probox car exclusively. There were many complaints about his driving. He was issued a verbal warning on the 29th January 2015. He signed the complaint register. He drove to the Golf Club through the wrong gate. He drove recklessly outside the Respondent's Administration Block endangering the lives of fellow Employees. He was warned on 23rd March 2015. He accepted warning. He was paid above the minimum wage of 2013. He was paid Kshs. 16,480 while the minimum was Kshs. 13,201. Clause 6 of the contract indicated the Claimant was not guaranteed permanent employment. There was a provision for termination through notice, under Clause 8. He went on leave as indicated in the leave application form in the Respondent's Bundle of Documents. He took 7 days' leave in February 2015. He had not completed 12 months in service to qualify for annual leave.

7. Questioned by the Claimant's Counsel, Godfrey testified he was issued verbal warnings as shown in the complaint register. These related to reckless driving and damage to Respondent's car. He was warned for wrong entry and exit of the Golf Club. He engaged in an act of gross misconduct. He was allowed to defend himself. There was no evidence he was allowed to do so. He was not given notice of termination; not even the 7 days' notice alleged to apply under his contract. Godfrey closed his evidence on redirection with the evidence that the Claimant was summarily dismissed, and no notice was required to be issued. He had been warned severally. The Respondent urges the Court to dismiss the Claim.

The Court Finds:-

8. The Claimant was employed by the Respondent as a Driver on the 19th August 2014. He worked up to

23rd March 2015, when the Respondent summarily dismissed him, on various counts of reckless driving. He served under several short term contracts, aggregating 7 months. His salary throughout was at basic salary of Kshs. 14,330 and house allowance at Kshs. 2,150- total Kshs. 16,480

9. The Claimant did not justify his prayer for underpayments. He told the Court on cross-examination “ *I deserved to be paid Kshs. 25,000 per month, according to the work I did...*” He did not in his evidence, pleadings or submissions show the Wage Instrument granting him a salary of Kshs. 25,000. Wage levels are determined through wage instruments, not through individual wishes of Employees. He did not contradict the Wage Orders produced by the Respondent showing the minimum wage for a Driver in Mombasa, at the time the Claimant was in service, was Kshs. 13,201.55. He was paid above the wage floor. His claim for underpayments is rejected.

10. Section 28 [1] [a] of the Employment Act 2007 grants Employees, after every consecutive 12 months of service with their Employers, not less than 21 working days of annual leave with full pay. The Claimant had not worked for 1 year. By his own evidence, he served for 7 months. He has no reason to claim annual leave pay for 1 year. He went on 7 days’ leave as shown in his application form. The form shows his balance of leave as nil. The Respondent had no obligation to grant the Claimant annual leave before the Claimant had completed 1 year in service. He was allowed several days of leave and should be satisfied with that. The Claim for pending annual leave days is rejected.

11. Was termination based on valid ground, and carried out fairly?

12. The Respondent gave reasons for its decision, in the letter of summary dismissal. These are:-

- On 21st March 2015, the Claimant drove the Company Vehicle carelessly at high speed, outside the Respondent’s Administration Block.
- On another occasion, he failed to report to the Respondent about dents on the car.
- On 7th January 2015, he was issued 1st warning after driving in and out of the Golf Club through the wrong gates.

The Respondent felt these incidents proved poor performance and poor work attitude on the part of the Claimant.

13. There was a verbal warning issued to the Claimant on 29th January 2015, captured on the complaint register. He was warned for reckless driving which caused damage to the Respondent’s Probox car. He signed the complaint register acknowledging the warning.

14. There was an earlier written warning dated 7th January 2015, which was indicated to be 1st warning. This related to an incident at Mombasa Golf Club where the Claimant ignored the ‘NO ENTRY’ sign, entering and exiting using the wrong gate. He acknowledged the warning by signing the warning letter.

15. The last incident which triggered summary dismissal on the 23rd March 2015, appears to have been the one which took place on 21st March 2015, where the Claimant drove at a high and dangerous speed outside the Respondent’s Administration Block.

16. These incidents were not seriously disputed by the Claimant. He was warned. In terms of validity of reasons, the Respondent cannot be faulted. The incidents happened one after the other and within the period of valid warnings. The Respondent correctly invoked Section 44 [4] [c] of the Employment Act in justifying its decision.

17. The Court however is not persuaded that the procedure was fair. The warning system itself was defective. The Respondent issued a first warning, which was in written form. There was no other written warning. It is difficult to say which the last warning, before termination, was. There was no explanation from the Respondent why verbal and written warnings were lumped together.

18. Secondly, there is no record that the Claimant was asked to show cause why disciplinary action should not be taken against him. Warnings do not obviate the need to show cause. They do not take away an Employee's right to have charges laid out against him, and the opportunity to defend those charges granted. The Respondent did not show to the Court that beyond the warnings, there were other procedural steps taken, in satisfaction of Section 41 of the Employment Act 2007.

19. For these reasons, the Court finds termination was based on valid grounds, but lacking in fairness of procedure. The Claimant had worked for 7 months. There is no reason why he should be granted the equivalent of 12 months' salary in compensation while he had served cumulatively for 7 months. Furthermore, he had committed himself to serving on 1 month renewable contracts, the last of which was, as far as the Court could tell, expiring on the 31st March 2015, about a week before summary dismissal. He did not testify whether he expected automatic renewal. He does not have good ground to claim compensation based on more months than he had served, or more months than he was expected to serve. In considering remedies under Section 50 of the Employment Act, the Court is bound to consider the length of service, and the time for which the employment might have continued, but for termination. In either case, there is no support for 12 months' salary in compensation.

20. The Respondent overlooked the demands of fair procedure, but had valid reasons to summarily dismiss the Claimant. Looked at together with the considerations discussed at paragraph 19 above, the Court is persuaded the Claimant merits a minimal compensation, which the **Court allows at the equivalent of 2 months' gross salary at Kshs. 32,960 in compensation for unfair termination.**

21. Summary dismissal was justified under Section 44 [4] [c], and the prayer for notice pay therefore has no merit and is declined.

22. There is no evidence to support the prayer for general damages for loss of employment and expected earnings.

23. No order on the costs and interest.

IN SUM, IT IS ORDERED:-

a) Termination was based on valid ground, but lacking in fairness of procedure.

b) The Respondent shall pay to the Claimant 2 months' gross salary at Kshs. 32,960 in compensation for unfair termination.

c) No order on the costs.

Dated and delivered at Mombasa this 18th day of November, 2016

James Rika

Judge