



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 167 OF 2014

**KENYA UNION OF COMMERCIAL
FOOD AND ALLIED WORKERS UNION.....CLAIMANT**

VS

**1. DOSHI IRON MONGERS LTD
2. CELLO THERMOWARE LTD.....RESPONDENTS**

JUDGMENT

Introduction

1. This is a claim for compensation and terminal dues arising from the alleged wrongful termination of the grievants' employment contract by the respondents on 17.6.2011. It is the claimants case that the reason for the grievant's termination was that he joined a trade union against the wish of his employer.
2. The respondents have admitted that the grievant was declared redundant on 17.6.2011 but denied that the reason for his termination was his union affiliation. They averred that they had excess drivers and the grievant being the last to be employed was discharged following the principle of last in first out (LIFO). They further averred that after the layoff they offered to pay terminal dues to the grievant but he declined to sign for the same.
3. The suit was heard on 23.4.2015 and 2.6.2016 when the grievant testified as Cw1 while the respondent called her Financial Controller Mr. Murtaza Amitaji Hassanali as Rw1. Thereafter both parties filed written submissions.

Claimant's case

4. Cw1 stated that he was employed by the first respondent on 12.11.2008 as a driver for both Light and Heavy Commercial Trucks. That he joined the claimant union with other workers on 24.5.2011 and on 6.6.2011 the union forwarded check off forms to the respondent for deduction of union dues. That on 15.6.2011 his Supervisor Mr. Feroz Abdula told him that the Director was not pleased that he had joined the union and as such he was going to be sacked. That on 17.6.2011, he was served with a termination letter citing redundancy as the reason for the termination. That the letter alleged that there was less work.
5. Cw1 prayed for compensation for wrongful termination. He also prayed for his accrued leave alleging that he only took 9 days leave during his entire period of service. He also prayed for overtime and alleged

that although the contract provided for 45 hours per week, he used to report to work at 7am and sometimes go home after 9pm. He also prayed for one month salary in lieu of notice as provided by the contract of employment.

6. On cross examination, Cw1 confirmed that although he was employed by the 1st Respondent in 2008, the second respondent started paying him salary from May 2010. He denied existence of any formal communication to terminate his services from the first respondent or to transfer him to the second respondent. He however appreciated that the two respondents were sister companies. He maintained that he was dismissed for his membership to the union and for being the contact person between the union and other employees in the company. He denied that he was the last to join the respondent and contended that other employees found him there.

7. Cw1 admitted that the termination letter offered him one month salary in lieu of notice, accrued salary upto 17.6.2011, accrued leave upto 17.6.2011 and severance pay. He however refused to sign because of the way the calculation of the dues was done. He further maintained that he was a Heavy truck driver because he used to drive Long Chase Canter Mitsubishi Registration KAN331C and 10 wheeled Lorry registration KAP 068A. He however admitted that he also used to drive light cars. He denied that he used to receive cash in lieu of leave and contended that his outstanding leave was 43.5 days. He contended that all the days he was absent, his salary was deducted and the days treated as leave.

Defence case

8. Rw1 confirmed that Cw1 was employed by the 1st Respondent on 12.11.2008 as a driver. That later the 1st Respondent split the business and the 2nd Respondent took over Cw1 alongside other employees from the 1st Respondent. That each employee including Cw1 were transferred in the same capacity they were working in the 1st Respondent and they did not object. That due to reduction of work, the grievant was declared redundant and was offered one month salary in lieu of notice, salary, 5 days leave and severance pay totaling to kshs.34,746 less deduction of kshs.33,380.50 leaving a net pay of kshs.1,366 but he refused.

9. On cross examination, Rw1 maintained that Cw1 was employed to drive saloon cars. He denied that he was dismissed for joining a trade union. He contended that the transfer of the grievant from 1st to 2nd Respondent was a continuation of service and not a termination. He was not sure whether Cw1 used to drive KAP 068A Lorry to distribute goods. He however confirmed that he used to receive kshs.11,304 as basic salary per month and not kshs.15,216.

10. Rw1 confirmed that Mr. Feroz was the boss for Cw1 in the sales Department. He did not know whether Mr. Feroz told Cw1 that he would be dismissed for joining a Trade Union. He maintained that there was no enough work to keep many drivers. He did not know whether a notice was served on the claimant before the redundancy. He confirmed that the terminal dues were not paid to the grievant because he refused to take it.

Analysis and Determination

11. There is no dispute that the grievant was employed by the 1st Respondent in 2008 and in May 2010 he was transferred to the 2nd Respondent, a sister company, to continue with the same work and under the same terms of service. There is also no dispute that Cw1 among other employees joined the claimant union on 24.5.2011 and the union forwarded check off forms to the respondent on 6.6.2011 to commence deductions of union dues. There is also no dispute that Cw1 was threatened by his immediate boss Mr. Feroz that he was going to be sacked because the Director was not pleased that he had joined the union. Finally there is no dispute that on 17.6.2011 Cw1 was terminated on redundancy and was offered terminal dues but he rejected it. The issues for determination are:

(a) Whether the redundancy declared on the grievant amounted to wrongful termination of his employment.

(b) Whether the reliefs sought should issue.

Wrongful termination

12. Under section 40 of the Employment Act, the employer is barred in mandatory terms from terminating employment contract of an employee on account of redundancy unless he:

(a) serves the employee or his union (if a member of union) and the Labour Officer with at least one months notice in writing before the date intended for termination.

(b) follows a fair selection process.

(c) pays all accrued benefits.

(d) pay not less than one month salary in lieu of notice.

(e) pays the terminated employee severance pay at the rate of at least 15 days pay for each completed year of service.

13. In this case the respondent never served the grievant, or his union and the Labour Officer with at least one month notice in writing, of his intention to terminate the employment on account of redundancy. On that ground alone, I find that the termination of the grievant's employment was procedurally wrongful. On a balance of probability Cw1 has discharged his burden under section 47(5) of the Employment Act by proving on a balance of probability that he was wrongfully laid off. The answer to the first issue for determination is therefore in the affirmative.

Reliefs

Notice and Compensation

14. Under section 49 of the Employment Act, I award one month salary in lieu of notice being kshs.13,000 plus 12 months salary as compensation for wrongful termination. In making the maximum award, I have considered the fact that the grievant did not contribute to his dismissal through misconduct. Under section 2 of the Employment Act, redundancy is defined as termination of employment at the initiative of the employer and not due to the employee's wrong doing. I have also considered the fact that the termination was a form of victimization of the grievant for joining a trade union in exercise of his Constitutional right. Although Rw1 maintained that Cw1 was not terminated for joining the trade union, he was not present when Cw1 was threatened by his Supervisor Mr. Feroz on 15.6.2011. In addition, the Director did not give evidence to deny that he send Mr. Feroz to tell Cw1 that he was going to be sacked for joining the claimant union. I therefore award him kshs.156,000 being gross salary for 12 months.

Leave

15. The respondent alleged that Cw1 had only 5 leave days outstanding. Cw1 alleged that he took only 9 days leave and the rest of the days which he was absent were treated as leave but the pay was deducted from the salary. The foregoing allegation is evidenced by the deductions in the bundle of payslips produced as exhibits. The leave records produced correspond with the said payslips in corroborating the grievants contention that all of the days he was absent were converted to unpaid leave because the pay was deducted. I agree with the claim that the absent days did not form part of his paid annual leave of 21 days as per the employment contract. If that was to be so, the employer would not punished him with salary deduction. I therefore award him leave for 2 ½ years being 52.5 less 9 days utilized equaling to 43.5 days whose value was kshs.21,750.

Severance pay

16. In view of the fact that I have faulted the redundancy and treated it as wrongful termination, the

award of 12 months salary as compensation shall be enough remedy to the grievant. I will not therefore not order payment of severance to the grievant.

Salary under payment

17. The employment letter expressly states that the claimant was employed as a Driver. It did not state whether he was Heavy Commercial Vehicle driver or Saloon car driver. Cw1 has also admitted in evidence that he used to drive different sizes of vehicle including canter, 10 wheel truck and Saloon cars. The court was therefore not given sufficient evidence to support the contention that the Cw1 was a Heavy commercial driver. Consequently, I find that the claimant has failed to prove on a balance of probability that his salary was underpaid.

Salary for June 2011

18. There is no dispute that Cw1 worked for 17 days in June 2011. I therefore award to him kshs.13,000 as salary for the 17 days worked in June 2011.

Disposition

19. For the reason stated above, I enter judgment for the claimant and on behalf of the grievant in the sum of **kshs.190,750** plus costs and interest.

Dated, signed and delivered at Mombasa this 2nd day of December, 2016.

O.N. MAKAU

JUDGE