



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

CAUSE NO. 235 OF 2013

(Originally Nairobi Cause No. 625(N) of 2009)

DAVID MWAURA KIMANI

CLAIMANT

v

FRANCIS MACHARIA NDEU

T/A PONTIFICA FREIGHTERS

RESPONDENT

JUDGMENT

1. David Mwaura Kimani (Claimant) filed a Memorandum of Claim against Francis Macharia Ndeu t/a Pontifica Freighters (Respondent) on 22 October 2009 and he stated the issues in dispute as
 - (a) Nonpayment of salary Kshs 60,000/-
 - (b) Salary in lieu of Notice Kshs 20,000/-
 - (c) Unfair termination.
2. On 4 December 2009, the Respondent filed a Defence through the firm of Muthanwa & Co. Advocates.
3. The firm of B.G. Kariuki & Co. Advocates filed a Notice of Change of Advocates on 25 August 2010 to come on record for the Respondent.
4. The new firm of Advocates filed another Defence on 6 September 2010.
5. After many false starts, Mr. Olonyi for the Claimant informed the Court on 5 March 2014 that his client was in Sudan and therefore he wished to rely on the record and would not call any witnesses.
6. The Court thereafter directed that the Respondent's case be taken on 31 March 2014 and that the Respondent be served through registered post.
7. On 31 March 2014, the Respondent appeared in person and he requested for 14 days to instruct an advocate. The Court allowed the plea and set the Cause for mention on 15 April 2014 to confirm whether the Respondent had instructed a new advocate.
8. It appears the Cause was not mentioned as scheduled. On 23 October 2014, the Claimant appeared in the registry and fixed the Cause for mention on 26 November 2014.
9. On this latter date, the Court fixed the Cause for hearing on 3 February 2015 and directed the Claimant to serve a hearing notice upon the Respondent.
10. On 3 February 2015, when the Cause was called, the Respondent was not represented. On record was an affidavit of service deposing that the firm of B.G. Kariuki & Co. Advocates had been served with a hearing notice through registered post. A copy of the certificate of registered posting

- was attached to the affidavit.
11. Being satisfied with the service, the Court ordered that the Respondent's case be deemed closed and directed the Claimant to file submissions, which were filed on 17 February 2015.
 12. The Claimant's pleaded case is that the Respondent employed him on 1 June 2009 as a truck driver (registration number KAV 669T trailer number ZC5801) at a monthly wage of Kshs 20,000/-.
 13. He further pleaded that towards the end of August 2009, the Respondent summarily and without notice dismissed him and that he was not paid any wages for the 3 months he worked.
 14. The Claimant attached to the Memorandum of Claim several receipts to demonstrate that in the course of duty he made several trips to Southern Sudan. He also annexed several delivery notes.
 15. The Claimant also pleaded that after the dismissal, his Advocate made a demand and the Respondent's Advocate responded by stating that the Claimant was a casual employee and he was entitled to only Kshs 20,000/- wages for one month.
 16. In the two Defences filed by the Respondent, the Respondent denied that there existed an employment relationship with the Claimant. He also denied the claim for salary arrears for 3 months.
 17. The Respondent contended that the Claimant deserted duty and caused damage worth about Kshs 223,000/-.

Issues for determination and evaluation

18. The questions arising for determination are, whether there was an employment relationship between the parties, whether there was unfair termination and appropriate relief.

Employment relationship

19. On the basis of the Respondent's Advocate letter dated 23 September 2009 in reply to the demand letter and the delivery notes with the driver name indicated as *Mwaura*, the Court is satisfied that there was an employment relationship between the Claimant and the Respondent.
20. Further and on the basis of the receipts and delivery notes with dates from June 2009 to July 2009, the Court is of the view that it is more probable that the Claimant served the Respondent upto end of August 2009 as pleaded.

Unfair termination

21. The obligation to demonstrate that a dismissal is both procedurally (section 41 of the Employment Act, 2007) and substantively fair (sections 43 and 45 of the Employment Act, 2007) is placed upon the employer.
22. The Respondent having failed to attend Court to discharge the burden, the Court can only conclude that the Respondent dismissed the Claimant without complying with the law. Such dismissal was unfair.

Relief

Salary arrears

23. The Claimant sought Kshs 60,000/- being salary arrears for 3 months. The Court would award him the same.

Salary in lieu of Notice

24. Pursuant to section 35(1) (c) of the Employment Act, 2007, the Claimant should have been given one month written notice.
25. Because no notice was given, the Court would award him Kshs 20,000/- as one month salary in lieu of Notice.

