



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2267 OF 2012

RENSON GITHU KARANJA.....CLAIMANT

VERSUS

TRANSNICK LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent his erstwhile employer following a road accident. He pleaded that he was a turnboy in the Respondent's motor vehicle registration number KAU 562 H trailer ZC 2773 which was driven carelessly by the driver of the Respondent causing an accident. He averred that his services were terminated on 31st May 2010 on medical grounds. He thus sought pay in lieu of notice, service gratuity for 3 years, leave dues for leave not taken in 2 years. He also made claims in respect for the injury which claim will be referred to the Magistrates Court to deal with.
2. The Respondent duly served entered appearance on 1st August 2013 through the firm of Muturi Gakuo & Kibara Advocates but failed to file a defence. The cause thus proceeded as an undefended cause.
3. The Claimant testified on 25th May 2015. He stated that he was a farmer at present having been a turnboy for the Respondent. he testified that he was employed by the Respondent in 2007 and was on duty on 4th November 2008 along Mombasa Road when the driver of the lorry he was in, drove carelessly and caused an accident with another lorry. He testified that the Respondent's driver was speeding and that after the accident he reported the matter to the police at Sultan Hamud and obtained a P3 form from there. he testified that he was not permitted to resume his duty with the Respondent after his healing and was instead given a termination letter dated 31st May 2010. He stated that at the time of the time of the accident he was earning Kshs. 7,639/- nett. He produced his statement which confirmed this figure. He thus sought payment of notice, service gratuity for the 3 years of service and payment for leave for 2 years.
4. The Claimant was undoubtedly employed by the Respondent. In the termination letter of the Claimant dated 31st May 2010 the Claimant was advised by the Respondent (in *pare materia*) as follows:-

This is to inform you that your employment with Transnic (sic) Limited is terminated with the immediate effect date 31st May 2010 under the medical grounds which led to your disability.

5. The Employment Act 2007 makes provision for dismissal from service on account of disability. Section 41 makes provision as follows:-

41 (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (underline mine)

6. Section 45. (2) of the Act goes on to provide that:

45. (2) A termination of employment by an employer is unfair if the employer fails to prove –

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

7. The dismissal was in this vein abrupt, without notice and therefore unfair. No explanation was given to the Claimant in terms of Section 41 of the Employment Act. The fact that termination was contemplated on account of disability the Respondent was bound to adhere to the dictates of the law. Procedural fairness is now a cardinal principle of the labour market and the failure to comply with the law renders the Respondent liable. The Claimant was entitled to notice before termination and prior to the notice he should have been notified of the intention in the presence of a peer or person of his choice. I find that the Claimant has proved his case and is entitled to the reliefs sought.

8. In the final analysis I enter judgment for the Claimant against the Respondent for:-

a. Kshs. 7,999/- as notice

b. Kshs. 15,998/- being leave dues for 2 years

c. Kshs. 11,458/- as service gratuity

d. Kshs. 95,988/- being 12 months compensation for the unlawful dismissal

e. Costs of the suit

f. Certificate of service

Orders accordingly.

Dated and delivered at Nairobi this 10th day of June 2015

Nzioki wa Makau

JUDGE