



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 833 OF 2012

ANTHONY MBINDA MUTINDA CLAIMANT

VERSUS

DELINA GENERAL ENTERPRISES LTD.1ST RESPONDENT

DAVIS MOSHA 2ND RESPONDENT

EMMANUEL MOSES 3RD RESPONDENT

M/s Wangai Ndirangu for the Claimant

Mr. Wachira for the Respondent

JUDGMENT

1. The Claimant seeks payment of various terminal benefits and compensation for unlawful and unfair termination of employment.
2. The memorandum of claim dated 8th May 2012, seeks;
 - a. salary for May 2011 in the sum of Kshs.57,500.00;
 - b. salary for Seven (7) days worked in June in the sum of Kshs.13,462.00;
 - c. payment in lieu of notice in the sum of Kshs.50,000.00;
 - d. house allowance for nineteen (19) months in the sum of Kshs.142,500.00;
 - e. severance pay calculated at fifteen (15) days salary for each completed year of service in the sum of Kshs.28,845.00;
 - f. payment in lieu of thirty three (33) rest days in the sum of Kshs.63,459.00;
 - g. payment in lieu of sixteen (16) public holidays worked in the sum of Kshs.30,708.00;
 - h. payment in lieu of thirty three (33) accrued leave days in the sum of Kshs.73,074.00
 - i. ten thousand three hundred sixty eight (10,368) hours payment in respect overtime in the sum of Kshs.2,492,467.20;
 - j. compensation of Kshs.69,000.00; and
 - k. costs of the suit.

Facts of the case

3. The Claimant was employed by CMC as a mechanic. He was lured by the Respondents to leave CMC and join the employ of the 1st Respondent.

4. The Claimant was not given a written contract and was paid Kshs.50,000 a month with effect from 1st December 2009. The business premises was at Kangundo Road, Industrial Area.
5. The Claimant worked continuously until 7th June 2011 when he learnt his name had been removed from the payroll. He was not paid salary for the month of May 2011.
6. On the material day, the Claimant was informed that the 2nd and 3rd Respondents had instructed that he leaves his employment immediately. The Claimant did not receive a letter of dismissal, was not given any reason for the dismissal nor was he given any notice of dismissal.
7. The Claimant reported the dismissal to the Labour Office and the Respondents were invited to a conciliation meeting but they did not attend.

A reminder was sent to the Respondents and the Respondents responded to it on 10th June 2011, stating that the Claimant was not terminated from employment but his salary for the month of May was withheld pending investigations on costs incurred by the company as a result of his negligence.

8. The Respondent however never called the Claimant to a disciplinary hearing nor did they provide him with a letter of dismissal.
9. The Claimant in his oral testimony in Court denied that he was negligent as alleged or at all stating that he only followed instructions by the Respondents to arrange for the towing of a truck from Kiboko, along Nairobi Mombasa Road to Nairobi. The truck had stalled on its way from Mombasa to Nairobi. The Respondent had ruled out the truck being carried to Nairobi. That the Claimant had taken precaution before the truck was towed by removing the propeller shaft to avoid damaging the gear box.
10. The Claimant later learnt that CMC had stated that the truck was damaged while being towed.

Response

11. The Respondents filed a statement of Response dated 29th June 2012 in which the Respondents deny having employed the Claimant at all in paragraphs 5, 6, 7 of the statement of Response.
12. At the same time and in contradiction to the earlier averments, admitted under paragraph 9, of the statement of Response, having dispatched the Claimant to attend to a truck that had broken down at Kiboko along Nairobi, Mombasa road. The Claimant had instructions to assess the extent of damage and report to the Respondents by telephone.
13. The Respondents in their averments blame the Claimant for having not taken proper precautions to prevent damage to the truck during towing from Kiboko to Nairobi.
14. The Respondents allege in paragraphs 14 and 13 of their Response that they notified the Claimant to show cause why "*his piece work contract should not be terminated.*" No letter to show cause was produced.
15. That the Claimant failed to show cause as instructed and was summarily dismissed in terms of Section 44(4)(c) of the Employment Act Cap 226 of Laws of Kenya.
16. The Respondents did not call any witness in support of the averments made in the Statement of Response. The sworn evidence by the Claimant adduced in Court remained entirely uncontroverted.
17. The Respondent admitted having received the notices to attend conciliation at the Labour Office.
18. Determination
 - i. Was the Claimant an employee of the Respondents?
 - ii. If the answer to (1) above is in the affirmative, was the employment terminated for a valid reason and in terms of a fair procedure?
 - iii. What remedies if at all are available to the Claimant

Issue 1

19. The Claimant gave particulars of his employment as a mechanic by the Respondents in his Memorandum of Claim and gave oral testimony under oath in support of the particulars of employment and termination.

20. The Respondent made contradictory averments in the statement of Response in that while denying that they ever employed the Claimant at all, admits on the other hand, having given the Claimant 'piece work' from time to time to repair their fleet of motor vehicles.
21. In the same statement of Response, the Respondents allege that the Claimant was summarily dismissed from employment for negligence.
22. The Respondents also admit that, they stopped payment of the Claimant's salary for May 2011, while conducting investigations.
23. The contradictory averments by the Respondents do not constitute a reasonable and sustainable defence against the claim for termination of employment by the Claimant. No wonder, the Respondents opted not to adduce any oral evidence in Court to avoid embarrassment.
24. The Claimant's testimony was candid, consistent and most probably true. The evidence is supported by the documentation attached to the statement of claim.
25. The Court therefore finds that the Claimant was employed by the Respondents as a mechanic and he worked continuously for the Respondents for a period of 2½ years.

Issue 2

26. The Court finds that the employment of the Claimant was not terminated for a valid reason and the termination was not done in terms of a fair procedure.
27. This is because, instead of the Respondents providing reasons for summarily dismissing the Claimant, they denied having employed the Claimant at all in the first place.
28. When the Respondents were summoned by the Ministry of Labour, they wrote a letter in which they denied having terminated the employment of the Claimant but admitted having stopped his May salary to conduct investigations.
29. The Respondents did not produce any notice to show cause or record of charges and report of investigations conducted in the matter. No minutes of a disciplinary hearing was produced by the Respondents. It is clear that the Claimant was simply chased out of the premises of the Respondents without notice and payment of salary.
30. The Court finds that the summary dismissal was unlawful and unfair and the Claimant is entitled to compensation in terms of Section 49 of the Employment Act, 2007.
31. With regard to the various terminal benefits claimed, the averments in the Statement of Claim supported by oral testimony under oath remain largely uncontroverted, the Respondents having chosen to make generalized bare denial that the Claimant was not at any one time their employee.
32. The Court having found that the Claimant was employed for a period of 2½ years by the Respondents is therefore entitled to the following;
 - a. One month's salary in lieu of notice in that he was summarily dismissed without notice in the sum of Kshs.50,000.00;
 - b. Salary for the month of May 2011, in the sum of Kshs.50,000.00;
 - c. Salary for seven (7) days worked in June 2011 in the sum of Kshs.13,462.00;
 - d. Service gratuity calculated at fifteen (15) days for the one completed year of service and prorata for the half year until 7th June 2011 in the sum of Kshs.28,845 because, the Claimant was not paid for NSSF by the Respondent.

The Claimant failed to prove that he was entitled to house allowance over and above the monthly salary he was paid by the Respondent. Equally the Claimant did not prove that he was entitled to payment in respect of rest days and public holidays as claimed or at all. Equally, no evidence was adduced in respect of overtime worked.

- e. The Claim for Kshs.73,074.00 in respect of thirty three (33) leave days taken is sufficiently proved, the Claimant having worked for 2½ years and the Respondent did not allege that the Claimant had taken any leave during the period nor was any documentary proof comprising of leave application and approval forms were produced by the Respondents as is required by the law.
33. With respect to compensation, the Claimant had been lured from CMC to join the employ of the Respondent. He was unceremoniously summarily dismissed for unproven claims of negligence

and has suffered loss and damage. His career advancement was curtailed. The bare denial by the Respondents that they had not employed the Claimant is evidence of dishonesty, by an employer, which should be discouraged by this Court. The Claimant got no terminal benefits upon termination including notice pay and severance pay. The Claimant had a clear wish to continue working.

34. The Claimant was not given notice and was not prepared for the sudden loss of income. The Claimant did not receive a certificate of service to enable him acquire alternative employment.

35. The Court awards the Claimant six (6) months' salary being compensation for the unlawful and unfair dismissal in the sum of Kshs. 300,000.00.

36. In the final analysis the Award to the Claimant as against the Respondents, jointly and severally is as follows;

- i. Kshs.300,000.00 compensation.
- ii. one month salary in lieu of notice in the sum of Kshs.50,000.00
- iii. salary for May 2011, Kshs.50,000.00
- iv. seven (7) days' salary for June 2011, Kshs.13,462.00
- v. service gratuity for 2 ½ years Kshs.28,845.00
- vi. thirty three (33) days in lieu of leave 73,074;

Total Award Kshs. 515,381.00

37. The Award is payable with interest at Court rates from date of this Judgment till payment in full.

38. The Respondents are to pay the costs of the suit.

Dated and Delivered this 25th day of September, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE