



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 444 OF 2013

JOSEPH KAMBUWACLAIMANT

VERSUS

TRANSNICK LIMITED.....RESPONDENT

J U D G M E N T

Introduction

1 The claimant brings this suit against the respondent claiming Ksh 364,850 being compensation for unfair termination and plus accrued benefits. According to the claimant the termination was unfair because it was without any reason and not preceded by any fair hearing. It is further claimant's case that he was not served with a prior notice or paid any dues.

The respondent has denied liability for unfair termination as alleged by the claimant.

2 The suit was heard on 14.7.2014 when the claimant testified as Cw1 and the parties sought adjournment to attempt amicable settlement. On 10.3.2015, the parties recorded settlement in respect of salary in lieu of Notice and leave, and the suit was fixed for defence hearing on 9.7.2015 to enable the court to determine the remaining issues of salary for July, August and September 2013, mileage balance and compensation for unfair termination. However both the respondent and her counsel never attended court and the case was closed without my evidence from the defence. Thereafter both parties filed written submissions.

Analysis and Determination.

3 There is no dispute that the claimant was employed by the respondent between 2.5.2011 and 23.9.2013. There is also no dispute that on 23.9.2013, the claimant was summarily dismissed for being unfit to serve in the respondent. The issues for determination are:

- a) Whether the termination of employment was unfair.
- b) Whether the reliefs sought should be granted.

Unfair Termination.

4 Cw1 told the court that he returned to Mombasa from Uganda on 23.9.2013 and after parking the lorry he was driving, the personnel Manager of the respondent, Mr Badi called him to the office and told him that the company had decided that the (Cw1) was not fit to serve because he had caused losses to the company and as such Cw1 was dismissed verbally. He was not given any chance to defend himself. That

piece of evidence was not rebutted by the respondent because she never called any witness. On a balance of probability therefore the court finds that the respondent terminated the claimant's services wrongfully and unfairly.

5 Under Section 45 of the Employment Act termination of employment is unfair if the employer fails to prove that there existed a valid and fair reason for termination and that the procedure followed was fair. As already observed above, the respondent never adduced any evidence to prove the said three ingredients of a fair termination of employment. She has therefore failed to discharge her obligation under Section 45 and 47 (5) of the employment Act and hence the finding of the court that the dismissal of the claimant by the respondent on 23.9.2013 was unfair and wrongful.

Reliefs.

6 In views of the foregoing findings the court makes declaration that the termination of the claimant employment by the respondent was unfair and wrongful as prayed. In addition the claimant is awarded 6 months' salary as compensation for unfair termination. In making that award the court has considered the fact that the claimant had not served the respondent for a long period. That with due diligence the claimant could secure another employment of a lorry driver within 6 months after the dismissal. Lastly the court has made the award after considering the wish of the claimant to get the compensation and not to be reinstated. Consequently the court awards him Ksh 19,3000 x 6= 115,800.

7 As regards the claim for mileage allowance the claimant testified had a balance of Ksh 7,800. In addition he testified that after being involved in an accident, the insurance compensated the respondent but respondent withheld his salary for the month of July, August and September 2013. The respondent never adduced any evidence to rebut the claim for mileage subsistence allowance for the claimant's long distance and salary arrears for the said three months. If at all she had paid the same, nothing was difficult than to produce evidence to disprove such claim. The court therefore allows the claim for mileage subsistence and salary arrears for July, August and September 2013 as prayed being Ksh 7800 and Ksh 57,900 respectively

Disposition

8 For the reasons stated above judgment is entered for the claimant declaring his dismissal unfair and wrongful and awarding him Ksh 181,500 plus costs and interest.

Dated and Delivered at Mombasa this 2nd day of October 2015.

ONESMUS MAKAU

JUDGE

2.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE