



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 170 OF 2015

FREDRICK KASEE KIMANTHI.....CLAIMANT

VERSUS

KASSAM HAULIERS LIMITED.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant brings this suit claiming terminal dues and compensation for wrongful and unfair termination by the respondent on 18.11.2014. He claims that he was not given any prior notice or any reason or any hearing before the termination.
2. The respondent has denied liability for wrongful and unfair termination and avers that the termination was fair, lawful and procedural. It is the defence case that the claimant misconducted himself and poorly performed his duties as a result of which given both oral and written warnings and subsequently dismissed summarily on 18.11.2014.
3. The suit was heard on 22.7.2015 and 27.7.2015 when the claimant testified as cw1 and the respondent called Mr. Makanzi Ndeti Nthiwa as RW1. Thereafter counsel for both parties filed written submissions.

Analysis and Determination

4. There is no dispute that the claimant was employed by the respondent as lorry driver from 8.1.2014 and worked until 18.11.2014 when he was dismissed summarily. There is also no dispute that his salary was Kshs. 25382 per month. The issues for determination are whether summary dismissal was wrongful and unfair and whether the relief sought should be granted.

Wrongful and Unfair Termination

5. The burden of proving unfair and wrongful termination is placed on the employee by section 47(5) of the Employment Act (EA). Cw1 testified that on 18.11.2014 he reported to work as usual but the respondent's Director Mr. Mohamed Kassam told him that his work was over. That no reason was given for the termination and Cw1 reported to the Labour officer who referred him to a Lawyer. The lawyer served a demand letter. On cross examination he admitted that he was involved in a road traffic accident on 31.8.2014 while driving the respondent's lorry number KBN 947X. That the respondent accused him of stealing a radiator, battery and alternator from the said lorry after the accident and recovered the value (Kshs. 14000) from his salary. The money was however refunded to him in November 2014. According

to the Claimant no reason was cited for his dismissal on 18.11.2014 and was not even given any hearing.

6. Rw1 is the Respondent's Fleet Manager. He is not the one who dismissed the claimant and he was not present when CW1 was dismissed by the Director. He did not know the procedure followed in dismissing Cw1. He contended that Cw1 performed his duty negligently as a result of which the respondent's lorry was damaged and written off. Rw1 admitted that he never witnessed the accident but he was only told that cw1 caused the accident by packing the lorry near the road. He confirmed however that Cw1 was never charged with any traffic offence.

7. The court is satisfied from the evidence before it that Cw1 has discharged his burden of proving that he was unfairly and wrongfully dismissed from employment. He has proved that no reason for dismissal was explained to him and no chance was given to him to defend himself before the dismissal. On the other hand, RW1 has failed to rebut the claimant's said evidence. He is not the one who dismissed Cw1 and he did not know the procedure followed in dismissing Cw1 because he was not present when the dismissal occurred. Although he alleged that cw1 was dismissed for causing an accident through negligent driving, that is just his assumption because he is not the one who dismissed Cw1. He never heard the Director tell Cw1 that was the reason for his dismissal. The only person who can contract the Cw1's evidence is Mr. Kassam himself or any other person who was present when Cw1 was dismissed.

8. Under section 45 of EA, termination of employee's employment is unfair unless the employer proves that it was founded on a valid and fair reason and that it was done after following fair procedure. In this case, no valid and fair reason was proved. The person who testified is not the one who dismissed the claimant. The reason he cited for the dismissal and the ones pleaded in the defence were not valid and fair. RW1 did not prove that cw1 was negligent in the performance of his duty. He also did not prove that Cw1 was to blame for the accident which occurred on 31.8.2014. Instead, Rw1 admitted that Cw1 was never charged with any Traffic offence. He also did not prove that Cw1 stole any items from the lorry after the accident on 31.8.2014. That is why he was refunded all the money deducted from his salary to cover the value of the lost items.

9. In addition to the foregoing, Rw1 never proved that the termination was done in compliance with section 41 of the EA. The said provision requires that before terminating the employment of his employee, the employer must explain to the employee the reason for the intended dismissal and invite him to air his defence. Such proceedings must be in a language of the employee's understanding and the employee shall be accompanied by a fellow employee of his own choice. Consequently and on a balance of probability the court finds that the termination of the claimant's employment by the respondent on 18.11.2014 was unfair and unjustified.

RELIEFS

8. Under section 49(1) of the EA, the claimant is entitled to damages. He is therefore awarded Kshs. 25382 being salary in lieu of notice as prayed. He never went for his annual leave as such he is entitled to compensation for the leave earned at the rate of 1.75 leave days per month of service on prorated basis. He worked for approximately 11 months and hence $1.75 \times 11 \times 25382 / 30 = 16286.80$. He will also get 3 months gross salary being Kshs. 76146 as compensation for unfair and wrongful termination of his employment. The reason for granting 3 months' salary compensation is because the claimants worked for the respondent for a short period of time. Secondly, the claimant could, with diligence, secure another employment as a driver within that duration of 3 months. The claimant will also be issued with Certificate under section 51 of the EA. The respondent is also ordered to remit all the NSSF dues for claimant for the months of July to November 2014 within 30 days of this judgment. The reason for the foregoing order is that the NSSF Statement produced by the claimant was not contested by the respondent.

DISPOSITION

9. For the reasons stated above judgment is entered for the Claimant in the sum of Kshs. 117,814. The respondent is further directed to issue Certificate of Service to the claimant and NSSF dues for the

claimant for July-November 2014 within 30 days hereof. The claimant will have costs and interests.

Dated, Signed and delivered this 13th November, 2015.

O. N. MAKAU

Judge