



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1845 OF 2013

CHARLES MUSYOKI WANZA.....CLAIMANT

VERSUS

BHAGHUBHAI BHAILAL..... RESPONDENT

Claimant in person

Mr Chege Mungai for Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 2nd June 2012 and worked continuously until 10th August 2013 when the Respondent terminated his services.
2. The Claimant earned Kshs 15,000 per month at the time of termination and claims;
 - i. 1 month salary in lieu of notice Kshs 15,000
 - ii. Kshs 9,500 in lieu of 21 leave days
 - iii. Service pay for 1 year Kshs 7,500
 - iv. House allowance for 1 year Kshs 31,000
 - v. Bus fare for June 2012 to August 2013 of Kshs 65,500
 - vi. Compensation for unlawful dismissal for 12 months Kshs 180,000
 - vii. Prorata leave and gratuity for four months served above one year

Facts of the Claim

3. The Claimant worked as a driver and was employed from 2012 until 10th August 2013. He worked at the house of the Respondent in Highridge in Nairobi. The Respondent had employed two drivers one was accommodated by the Respondent but Claimant was not allowed to stay in the compound. The Claimant paid bus fare, house rent and other expenditure in the rented house.
4. The Claimant had written letter of appointment. The claimant was not given any reason for termination on 10th August 2013. On 12th August 2013, he was recalled by a son of the Respondent named Satchin and was given another car not in good condition until 19th August 2013 when he was dismissed by the Respondent again without payment of final dues.
5. The Claimant was not given notice nor was he paid in lieu of notice; he was not paid in lieu of leave days not taken; was not paid service charge nor house allowance. The Claimant was not given any reason for the dismissal nor was he given a chance to explain why he ought not to be dismissed. The Claimant states that the dismissal was wrongful and unfair and seeks compensation thereof.

Response

6. The Respondent filed a reply to the memorandum of claim on 22nd October 2014 in which the Respondent denies he ever employed the Claimant as a driver as alleged in the statement of Claim or at all. The Respondent further denies all the particulars of claim and puts the Claimant to strict proof thereof.
7. The Respondent admits that a notice of demand was made by the Claimant but states that the entire suit has no basis and same should be dismissed. The Claimant filed a reply to the memorandum of defence and reiterates that he was employed by the Respondent as a driver in June 2012 and joins issues with the Respondent on all the particulars of claim.
8. The Claimant testified under oath in support of the claim in which he repeats averments in the memorandum of claim. More importantly he placed himself in the homestead of the Respondent where he chauffeured the family of the Respondent working from Monday to Saturday from 7 am to 5 pm and on Saturday he worked upto 1 pm.
9. The Claimant stated what transpired on the day he was dismissed from work. That it was a Saturday and he was supposed to leave at 1 p.m., however, the Respondent sent him to the market with a different old car which had old tyres and no insurance. The vehicle had no brakes and at the city park, he hit another vehicle. The claimant called the Respondent who came to the scene and he blamed the Claimant for the accident. The Respondent towed the motor vehicle and book it for repair at the end of the month and deducted the whole salary for the month on repair charges.
10. The Respondent again sent the Claimant to the market with the old car. The Claimant refused to drive it. The Claimant was told to leave without notice or reason assigned and the Respondent did not allow the claimant to defend himself. The Claimant was not paid any terminal benefits.
11. The Claimant was closely cross examined by counsel for the Claimant and withstood the test well. The evidence by the Claimant was consistent and in court's view credible on the material particulars of employment and dismissal.
12. The Respondent also testified in support of his case and said that he knew the claimant and admitted that the Claimant was employed as a driver. The Respondent added that the Claimant was employed by Alex Mills Ltd, a company owned by his son. No documentation was produced to that effect though.
13. The Respondent added that the Claimant drove a car owned by the Respondent and that he was not housed by the Respondent. The Respondent admitted that a 2nd driver by the name of Julius who was employed earlier than the Claimant lived in the compound and he earned more than the Claimant.
14. The Respondent denied giving the Claimant a faulty car, he said the car was insured and it had good tyres. The Respondent blamed the accident on the negligence of the Claimant.
15. In the final analysis the Respondent denied he was the employer of the Claimant and therefore he did not pay him any terminal benefits nor did he give him letter of dismissal. The witness stood by the narrative during cross examination by the Claimant but was unable to produce documentation on the alleged company of his son.

Determination

- i. Was the Claimant ever employed by the Respondent?
- ii. If answer t (i) above is in the affirmative, was the termination wrongful and unfair?
- iii. What remedies if any are available to the Claimant?

Issue I

16. It is the considered opinion of the court that the Claimant has proved on a balance of probability that he was employed by the Respondent to serve his family as a driver at a monthly salary of Kshs 15,000 a month.
17. That the Claimant worked diligently and continuously for a period of one year and two months. That the Claimant was dismissed by the Claimant when he refused being asked to drive an old unserviced car which had led him to cause an accident on a previous occasion and the Respondent had deducted his whole salary to cover the repair of the car.

18. The Claimant was dismissed from employment without notice and without being paid in lieu of leave days not taken totaling 13 $\frac{3}{4}$ days in the sum of Kshs 12,200 and in lieu of notice in the sum of Kshs 15,000. The Claimant was not housed but the salary of 15,000 was above the minimum wage of a salon car driver at the time.
19. The claimant was not entitled to house allowance over and above the salary paid. The Claimant was also not entitled to transport allowance in absence of any contract to that effect.
20. It is clear that the Claimant was not registered with the National social Security Fund (NSSF) for the period of 1 year and two months he served the Respondent and he is therefore entitled to payment of service gratuity calculated at half the salary for the 14 months in the sum of Kshs 7500.
21. The Claimant is entitled to compensation for the wrongful dismissal without notice. He clearly intended to continue working and was abruptly dismissed without any valid reason and without the Respondent following due process. He did not receive a certificate of service and was not paid any terminal benefits.
22. The Claimant suffered loss and damage and in terms of section 49(1) (c) as read with Section 49 (4) of the Employment Act, the court awards the Claimant four (4) months salary compensation since he had served for only a short period even though without blemish in the sum of Kshs 60,000.
23. In the final analysis the award by the court to the Claimant against the Respondent is;
 - i. Kshs 60,000 compensation
 - ii. Kshs 15,000 in lieu of one month notice
 - iii. Kshs 12,200 in lieu of 13 $\frac{3}{4}$ leave days
 - iv. Kshs 7,500 service charge and;
 - v. Certificate of Service within 30 days

Total Award Kshs 94,700

24. The award is payable within 30 days from the date of this judgement with interest at court rates from date of this judgement till payment in full.
25. The Respondent is also to pay the costs of the suit

Dated and delivered at Nairobi this 6th day of November 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE