



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1198 OF 2012

FRANCIS NDANYI MUSERA.....CLAIMANT

VS

MOTORWAYS CONSTRUCTION COMPANY.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim against the Respondent brought by way of a Statement of Claim dated 4th July and filed in Court on 16th July 2012 is for unfair termination of employment and refusal to pay terminal dues. The Respondent filed a Statement of Defence and Counterclaim on 9th August 2012 with Mr. Nyabena appearing for the Claimant and Miss Muigai for the Respondent.
2. Both the Claimant's and Respondent's cases were presented on 19th September 2013. The Claimant testified on his own behalf and the Respondent called Patrick Ngigi Karue, Muchiri Muya and Lucas Livondo, all employees of the Respondent.

The Claimant's Case

3. According to the Claimant, he was employed by the Respondent as a Steel Fixer on 15th June 2011 at a salary of Kshs. 21,521. The Claimant worked for the Respondent until 21st March 2012 when his employment was terminated verbally without notice. It was the Claimant's case that there was no valid reason for the termination of his employment and that prior to the termination he was not given an opportunity to be heard. At the time of termination of his employment, the Claimant was not paid his dues.
4. The Claimant therefore claims the following:
 - a. A declaration that the termination of his employment was unlawful and unfair
 - b. One month's salary in lieu of notice.....Kshs. 21,521.00
 - c. Salary for March 2012.....21,251.00
 - d. Prorata leave.....13,067.75
 - e. Service gratuity.....15,840.75
 - f. Overtime

- g. 12 months' salary in compensation for unfair termination.....258,252.00
- h. Certificate of service
- i. Costs and interest
- j. Any other relief the Court may deem just to grant

The Respondent's Defence and Counterclaim

5. In its Statement of Defence and Counterclaim, the Respondent denied employing the Claimant as a Steel Fixer effective 15th June 2011 stating that the Claimant was employed in August 2011 as a general worker and later as a turn boy for the Respondent's mixer trucks.

6. On 14th March 2012, the Claimant drove one of the Respondent's Actros trucks without authorisation and not being a competent driver, he lost control and hit a new concrete batching plant, causing extensive damage to the plant and the truck. As a result of the damage, the Respondent suffered loss and damage to the tune of Kshs. 158,580, which the Respondent claims from the Claimant by way of counterclaim.

7. Following the accident, the Claimant absconded duty never to return. The Respondent therefore denied terminating the Claimant's employment. It was the Respondent's case that the Claimant was only entitled to Kshs. 6,186/= being his net salary for the days worked in March 2012.

8. By way of counterclaim, the Respondent claims the following from the Claimant:

- a. Repairs.....Kshs. 116,580
- b. Panel beating.....35,000
- c. Fibre glass.....7,000

Total.....Kshs.158,580

Findings and Determination

9. Before determining the Claimant's claim for unfair termination, I need to dispense with the issue of the effective date of his employment. It was the Claimant's case that he was employed by the Respondent on 15th June 2011. The Respondent on the other hand gave August 2011 as the effective date of the Claimant's employment. To support its assertion on this score, the Respondent produced a staff list for August 2011 showing the Claimant as a new general worker as at 19th August 2011.

10. Section 9(2) of the Employment Act, 2007 places the responsibility of drawing a contract of employment on the employer. Apart from the staff list for August 2011, the Respondent did not produce any other document to evidence the Claimant's employment. I therefore find that the Respondent failed to discharge its mandate under the law and invoke Section 10(7) of the Act thus adopting 15th June 2011 the date given by the Claimant as the effective date of his employment with the Respondent.

11. With regard to the claim for unfair termination, Counsel for the Respondent, citing Section 45(3) of the Employment Act submitted that the Claimant having been employed for less than 13 months could not sustain a claim for unfair termination. On this score I am persuaded by the decision of Lenaola J in the case of **Samuel G. Momanyi Vs. the Hon. Attorney General & SDV Transami Kenya Ltd [2012 eKLR]** in which he declared Section 45(3) unconstitutional on the

ground that it discriminates against employees who have worked for less than 13 months. I will therefore examine the circumstances surrounding the separation of the Claimant from the Respondent's employment against this background.

12. Section 47(5) of the Employment Act, 2007 provides that:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

13. The Claimant told the Court that on 21st March 2012, Lucas Livondo told him to go home promising to call him back but he was never recalled. No reason was given for Livondo's instructions to the Claimant. Upon further inquiry at the Respondent's office, the Claimant was told by one of the Directors that his employment had been terminated.

14. The Respondent's witness number 1, Patrick Ngigi Karue testified that on 14th March 2012, the Claimant was washing the Respondent's truck when he switched on the engine causing the truck to move and being unable to control it, the truck hit a batching plant. Both the truck and the batching plant were damaged. Thereafter, the Claimant absconded duty.

15. The Respondent's witness number 2, Muchiri Muya told the Court that the Claimant was assigned as a turn boy for truck registration number KBM 369Z which was driven by Muya. One of the duties assigned to the Claimant as a turn boy was to clean the truck. After 14th March 2012, Muya did not see the Claimant again.

16. Lucas Livondo testified that he employed the Claimant on 19th August 2011 as an Assistant in the Steel Fixing Department. The Claimant was later deployed as a turn boy for truck registration number KBM 369Z. On 14th March 2012, the Claimant called Livondo notifying him that he had caused an accident at the Respondent's site at Kileleshwa. Livondo later saw the damage on the truck and batching plant. Thereafter the Claimant absconded duty and on 15th March 2012, he told Livondo that he would not report back to work because he feared being arrested.

17. Livondo's testimony was corroborated by Patrick Ngigi Karue who was at work with the Claimant on 14th March 2012 when the accident occurred. The Court found both Livondo and Karue to be credible witnesses and believed their account of the events leading to the separation of the Claimant from the Respondent's employment and consequently rejected the Claimant's account.

18. The claim for unfair termination of employment therefore fails and is dismissed. The claim for notice pay also fails. From the pay slip submitted by the Claimant, it would appear that the Claimant received leave pay on a monthly basis. Further, the Claimant was a contributing member of the National Social Security Fund (NSSF). The Claims for prorata leave and service gratuity therefore fail and are dismissed.

19. The only amount the Claimant is entitled to is Kshs. 10,042 being salary for 14 days worked in March 2012 subject to statutory tax. The Claimant is also entitled to a certificate of service.

20. With regard to the Respondent's counterclaim, the Respondent produced a sales receipt for purchase of some spare parts as well as petty cash vouchers on account of panel beating charges and fibre glass expenses. There were however no details linking these expenses to the damage caused to the Respondent's truck and batching plant on 14th March 2012. The Respondent's counterclaim against the Claimant was therefore not proved and is dismissed.

Each party will bear their own costs.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY
OF FEBRUARY 2014**

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*