



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 180/2013

(BEFORE HON. JUSTICE HELLEN WASILWA ON 30TH APRIL, 2014)

JAPHETH M. ERAZIA CLAIMANT

-VERSUS-

BUDGET DRIVING SCHOOL RESPONDENT

JUDGMENT

The claimant herein Japheth M. Erazia filed his Statement of Claim on 27.6.2013 through the firm of Anassi Momanyi & Co. Advocates. The claimant's case is that he was employed by the respondent in May 1998 as a driving instructor. On 26.3.2012 he was sacked on allegations that he was training his own private students. His dismissal letter was produced as *Exh JME 2*. Before dismissal, the claimant had been sent on compulsory leave from 16.3.2012 for 1 month. He went on his compulsory leave as instructed.

However his dismissal letter stated that he failed to take the compulsory leave as instructed and continued visiting the centre and hanging around the office. That he also refused to surrender the key to the post office box which allegations the claimant refutes.

The claimant further told court that he never went for annual leave all the time he worked and worked from Monday to Friday 6 am to 6 pm and on Saturday from 7 am to 5 pm and therefore worked overtime for 4 hours daily for which he was never paid. He told court that he was an instructor and not a messenger. He insists that the post office authority card was always signed by the manager and he only signed it in the absence of the manager. The claimant told court that it was evident from respondent's documents i.e Budget Driving School instructions that work started from 7 am to 7 pm Monday to Friday and on Saturday 8 am to 1 pm.

The claimant further produced in court a copy of his national identity card, driver's instructions license, demand notice from his counsel, certificate of incorporation of the respondent and demand notice reply from the respondent. The claimant's prayer is to be reinstated or to be compensated for unlawful termination. Claimant in cross examination told court that he was employed in 1998 but got the instructor's license on 31.10.2007. he admitted he used to go to the post office but he was a driving instructor. He told court he was being paid Ksh 6,000/= per month. He further told court that the driving school was the one to give him an instructor's license.

The claimant called one witness who used to work with the claimant. He said he was also an instructor and he also used to work from 7 am to 6 pm.

The respondents on the other hand filed their response to memo of claim on 3.9.2013 through the

firm of Otieno, Yogo, Ojuro & Co. Advocates. It is the respondent's case that indeed the claimant worked with them but as an office messenger. She also told court that people worked from 7 am to 7 pm but the claimant worked from 6 am to 3 pm. However the respondent's witness told court that in February 2012, an audit was carried out in the office and it was discovered that work was reducing. Investigations were carried out and claimant was sent on compulsory leave which he used to go.

The witness also told court that some staff worked overtime at sometimes and were usually paid. She also told court that the claimant proceeded on leave every October as per their master roll and he used to be paid Ksh 6,000/= per month. Further that claimant was an NSSF contributor.

In cross examination she told court that she had no evidence that the claimant was an office messenger nor did she have his job description. She admitted that claimant was never served with any warning letter for not following instructions. She admitted that claimant had an instructor's license. The respondent's witness produced the master roll from their records for the years 2008 to 2011. That it showed that he went on leave. However on leave page of 2005, the court noted that it was marked in pencil and with overwriting and also for October 2007 the same had been rubbed at the entry on leave. In the master roll of October 2005, there was an indication that he was on leave and also on duty.

I have considered evidence of both parties and the issues for determination are as follows:-

1. **Whether the decision to terminate the claimant's services by the respondents was fair and justified.**
2. **Whether the claimant proceeded on leave during the period he worked.**
3. **Whether the claimant is entitled to the remedies he has sought.**

On the 1st issue, there is no denial that the claimant worked for the respondents firm before 2007. No appointment letter was issued to him. The respondent's alleged he was a messenger but no evidence of this appointment has been adduced. The claimant produced his instructor's license dated 31.10.2007 and I therefore find that his position was of an instructor. He was later sent on compulsory leave to pave way for some investigation. He was later dismissed for some allegations which were not put to him. He was not accorded any hearing as envisaged under Section 41 of Employment Act which states as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub –section (1) make.”

He was also dismissed without establishing the allegations levelled against him as envisaged under Section 43 of Employment Act which states:-

“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

His termination was therefore not in line with the law and I find it unfair and unjustified.

The next issue is leave. From evidence of claimant he never went on leave. The respondents attempted to show he did but the evidence of the master roll was found incredible and therefore not believable as respondents admitted it had been rubbed and had rubbings, showing it was doctored. In the circumstances I do find that claimant never went on leave as he stated.

The last issue concerns the remedies he has sought. Given that he was dismissed unfairly, I award him as follows:-

1. **1 month salary in lieu of notice based on his rightful scale of his salary as per Legal Notice No. 86 of 2011 at time of dismissal in March 2012**

= under the name of Machinist (wheeled tractor driver) light = Ksh 8,233/=

2. **Underpayment of wages based on the 8,233 for year 2010 to 2011**

= 12 X 2233 = Ksh 26,796

Other years of underpayments are not demonstrated.

3. **I award overtime pay at 4 hours per day for 6 years**

= 8640 hours X 205

= 120 per month

= 120 X 12 per year = 1440 hours

= 1440 X 205 hourly rate

= KSH 295,200/=

4. **I also award him 12 months salary for damages for unlawful termination**

= Ksh 98,796

5. **Leave allowance = 6 X 8233 = 49,398**

TOTAL = KSH 478,423

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6. **Respondent should issue claimant with certificate of service.**

7. **Respondent to pay costs of this suit.**

HELLEN WASILWA

JUDGE

30/4/2014

Appearances:-

Momanyi for claimant present

Abande for respondent present

CC. Wamache