



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 557 OF 2013

HENRY MANG'ERERE NDUTA.....CLAIMANT

VERSUS

ROADSTAR LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unlawful and unfair termination of his employment. He pleaded that he was terminated without just cause without warning. He thus sought 12 months compensation for unfair dismissal, unpaid salary for November and December 2012, leave pay, pay for public holidays, one month salary in lieu of notice, house allowance and NSSF dues. He also sought costs and interest. He prayed for reinstatement to his job in the Respondent company.
2. The Respondent defended the claim and denied the claim. The Respondent pleaded that the Claimant's employment to it was not terminated but the Claimant was suspended from his from his duties pending investigations into allegations of theft be servant and misuse of company property.
3. The Claimant testified as did Mr. Hanif Suleiman a Director of the Respondent. The Claimant testified that he was an employee though he had no contract of employment with the Respondent. The Claimant testified that he earned Ksh. 15,000/= a month and that he was not issued with a letter of suspension for the alleged theft of fuel. He thus sought payment of his dues as per his claim.
4. Mr. Hanif Suleiman testified for the Respondent and stated that the Claimant was suspended for suspected theft of fuel. He testified that the suspension was to last a month as investigations were carried out by his staff. He stated that the evidence showed that the Claimant was culpable in the loss of fuel for the lorry he was assigned. He testified that housing was provided and thus the claim on house allowance was unjustified. He testified that the Respondent did not permit its staff to work on public holidays. He urged the Court to dismiss the suit as it was without basis. He claimed the salary for November and December was paid.
5. The Respondent and Claimant filed submissions which reiterated their respective positions. The Claimant cited the case of **Meshack Kiio Ikulume v. Prime Fuels Kenya Limited [2013]eKLR** and urged the Court to grant his prayers for payment of salary for December and November, the leave dues for the 21 days for the 5 years of service amounting 52,500/=. Compensation, pay for public holidays, costs and interest of the suit as well as notice for 1 month.

6. The Respondent submitted that the Claimant was only entitled to salary for 16 days for the month of December 2012 and leave pay for the year 2012. The Respondent submitted the Claimant was not suspended but terminated from employment and the suspension was merited. The Respondent further submitted the Claimant was only entitled to leave pay for 2012 as the Claimant had taken leave upto and including 2011.
7. Weighing the evidence adduced, the testimony of witnesses, the pleadings and submissions of parties, it is clear there was a constructive dismissal of the Claimant. One cannot be on suspension indefinitely. An employer is bound by section 74 of the Employment Act to keep records of the employ. The records kept must contain the particulars itemized in section 74 which include annual leave entitlement, days taken, rest days, maternity leave, sick leave, particular of house provided, food rations, record of warnings or other evidence of misconduct inter alia. None of the records kept by the Respondent were availed to ascertain the Claimant was entitled to the sums due or not. There was admission salary for December was outstanding as the Claimant worked till 16th December and was “suspended” thereafter. Salary would be due in even suspension took place until the date of revocation of the suspension or unless the letter of suspension made any reference to the mode of suspension – half pay, no pay or on full pay.
8. The Respondent’s witness testified that the suspension was for a month. That means salary for December was due as well as pay for 16 days in January.

In the premises the Claimant is entitled to salary for November and December. Since no prayer was made for January pay it will not be awarded. The Claimant is entitled to notice for the dismissal. If indeed there was cause to suspend or terminate, there should have been correspondence to that effect. From testimony adduced the Claimant was housed. If he opted to rent alternative accommodation he would be at liberty to so but should have recorded this in writing. Whereas that is probably what happened the fact that there were no records availed the Court finds that the Claimant did not discharge the burden of proof as far as housing goes. The Claimant testified that he worked during public holidays and did not get paid for it. Pay on public holidays is double the rate for ordinary days. In the premises the Court awards the Claimant pay for the 9 public holidays per year for 5 years at rate of 1000/= per month amounting to 45,000/=. The Respondent has an obligation under section 10 of the NSSF Act to settle dues to the National Social Security Fund. The Court orders and directs that the Respondent pays the unremitted dues amounting to 12,800/= forthwith and avail proof of the payment to the Registrar of this Court within 7 days of today. Failure to do so will warrant payment of a fine of Ksh. 100,000/= for breach of the NSSF Act by the Respondent. The Claimant will have 2 months compensation for unfair dismissal.

9. The Claimant will also have costs of the suit as well as interest on the sums above. The dues to be subject to statutory deductions as applicable.

Orders accordingly.

Dated and Delivered at Nairobi this 15th day of May 2014.

Nzioki wa Makau

JUDGE