



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 95 OF 2013

DONALD MUMO MOSES

CLAIMANT

v

MID-WAVE FREIGHTERS LIMITED

RESPONDENT

JUDGMENT

1. Donald Mumo Moses (Claimant) lodged a Statement of Claim against Mid-Wave Freighters Ltd (Respondent) on 25 April 2013 and the issue in dispute was stated as *unfair labour practices of Donald Mumo Moses by Mid-Wave Freighters Ltd*.
2. On 4 June 2013, the Cause was placed before Makau J and the Claimant informed him that the Respondent had been served. The Judge therefore fixed hearing for 17 July 2013.
3. On 17 July 2013 the Claimant, in person and Mr. Eliud Kariuki Warue, Respondent's Finance Manager both informed the Court that they were ready to proceed. I directed the Cause to proceed.
4. In the course of proceedings, I directed the County Labour Officer to prepare and file a report on the dispute but the same was not done. A letter from the Respondent to the Labour Officer dated 11 October 2013 was however produced.
5. Further, the Respondent despite appearing in Court through its Managers did not file a Response or give an explanation why it had not filed one. No leave or time was sought to file one out of time. The Respondent's representative however cross-examined the Claimant.

Claimant's case

6. The Claimant's case is that he was employed by the Respondent on 1 March 2011 as a port Clerk but was not issued with an employment letter. He was earning Kshs 12,000/- per month.
7. In testimony, the Claimant stated that on 1 October 2012 he was sent on unpaid compulsory leave by Humphrey Maina, the Respondent's Director. On 2 November 2012 he was paid Kshs 6,000/- as part of wages and informed by the Director he would call him but he did not get the call.
8. Consequently, on 27 February 2013 he sought legal advice from Kituo Cha Sheria which in turn addressed demand notices to the Respondent to explain why the Claimant was on unpaid/compulsory leave since 1 October 2012, and to seek refund of unlawful salaries deductions of Kshs 4,110/- and Kshs 5,410/- from January and October 2012 in respect of National Hospital Insurance Fund. The letter demanded refund of Kshs 21,520/- .
9. The letter also informed the Respondent that the Claimant should be on full pay while on the compulsory leave and sought to know when he should report back on duty.
10. On 4 December 2012 the Respondent responded to Kituo Cha Sheria informing it that the tenure of the Claimant had experienced a lot of complaints of missing items from the port but a final decision to terminate had not been taken.

11. On 13 March 2013, Kituo Cha Sheria wrote to the Respondent again seeking Kshs 46,300/- on account of accrued leave, unlawful salary deductions, wages for November and December 2012 and refund of National Hospital Insurance Fund deductions not remitted.
12. In a letter of response dated 14 March 2013, the Respondent informed Kituo Cha Sheria that the Claimant had deserted his duties without giving notice or handing over.
13. The Claimant stated that he was seeking balance of salary for October 2012, salary arrears from November 2012 to time of hearing, accrued leave and certificate of service.
14. In submissions filed with the Statement of Claim, the Claimant contended that he has never been legally terminated and is therefore entitled to payment of salary for the period he has been waiting for communication from the Respondent. He further asserts he has been subjected to unfair labour practices.

Issues

15. The facts asserted by the Claimant are generally uncontroverted. By failing to file a Response there are no real disputed facts. The Court in these circumstances need only to discuss the application of the law to the facts.

Whether the Claimant has been legally terminated

16. The Claimant's evidence is that he was sent on suspension on 1 October 2012. The suspension was oral. The Respondent's letter dated 4 December 2012 suggests that the Claimant was suspended. The letter states in part '*His tenure of 2012, had been experienced with lot of complains of missing items from the port and had vowed to discontinue with our services but the management has not yet decided further action.*'
17. As of the time of hearing there was no material placed before Court to show that the Respondent had taken the *further action*.
18. In the letter dated 14 March 2013 the Respondent seemed to suggest that the Claimant had deserted duty.
19. With these two contrasting positions from the Respondent, the Court is inclined to believe the Claimant that he was suspended pending further action which has not been forthcoming.
20. The Respondent has not decided on the further action. If the Claimant had deserted as suggested by the Respondent, the Respondent would have been entitled to dismiss him after complying with the due process demanded by section 41 of the Employment Act.
21. Again the Respondent had the opportunity to dismiss the Claimant. Dismissal should be communicated in clear and unequivocal language.
22. But the Respondent has not acted. Keeping an employee on suspension for so long is an unfair labour practice.
23. The Court is satisfied that the Respondent has not legally terminated the services of the Claimant but by its conduct has repudiated the contract of employment between it and the Claimant. And for the repudiation the Claimant is entitled to appropriate relief.

Appropriate relief

Compensation

24. Compensation equivalent not more than 12 months gross wages is one of the primary remedies for unfair termination. The Respondent has kept the Claimant in abeyance for an inordinately long period of time.
25. The Court is obliged to consider any, some or all of the 13 factors set out in section 49(4) of the Employment Act when awarding compensation.
26. The Respondent has kept the Claimant in limbo without unequivocally informing him whether his services had been terminated or not. The circumstances of the termination mirror unfair labour practice. The Claimant has also incurred expenses as a result of lodging the complaint in Court.
27. In the view of the cited factors, the Court finds this is an appropriate case to award the maximum compensation. Evidence before Court is that the Claimant was earning Kshs 12,000/- per month.

