



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 388 OF 2013

STEPHEN OTIENO AUMA.....CLAIMANT

- VERSUS -

SUPER EXPO LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th June, 2014)

JUDGMENT

The claimant filed the statement of claim on 08.11.2013 through Wambua Kigamwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **A declaration that the claimant was unfairly and unlawfully terminated.**
- b. **One month's salary in lieu of notice Kshs.28,528.00; 12 months' salary as compensation Kshs.342,336.00; 3 years unpaid leave Kshs.85,584.00; and total claim being Kshs.456,448.00.**
- c. **Costs and interest.**

The respondent filed the response on 26.11.2013 through Kidiavai & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The claimant was employed by the respondent as a supervisor in October, 2011 and at termination, the claimant's monthly salary was Kshs.28,528.00. The claimant's case is that he served diligently until 2.10.2013 when he was unfairly terminated. The respondent's case is that the claimant absconded duty and his employment thereby came to an end without any termination decision.

The 1st issue for determination is whether the claimant was unfairly terminated. The claimant's testimony was that on 2.10.2013, he reported at work at 8.00 am as usual. The respondent's director one Riman then called him at about 10.00 am and told him to go home as he had been terminated from employment.

The claimant testified that the reason for the termination was not given by the director but the director told him that the terminal dues including salary were ready. The claimant lamented that he was not given a termination notice or a hearing and no reason was given for his termination.

The claimant testified that on 8.10.2013, he was paid his September salary of Kshs.28,528.00. The claimant testified that he could not abscond on 2.10.2014 because he relied on the salary for his livelihood and that he went for his pay on 7.10.2013 and then on 8.10.2013 showed that he had not engaged in any misconduct or poor performance as was alleged for the respondent.

RW1 **Gilbert Kipkorir** was the respondent's transport and logistics officer. He testified that the claimant was paid his September, 2013 salary on 2.10.2013 and on 3.10.2013, he absented himself from duty and never came back to work. RW1's testimony was that the claimant's absence was to avoid the meeting of 4.10.2013 convened by the director to discuss missing tyres. RW1 also admitted that he handled the store's key when the director was away so that, in the finding of the court, the claimant could not have been responsible for the tyres that allegedly went missing from the stores.

RW2 **Hillary Kipchirchir** was the respondent's tyre inspector. His testimony was that the claimant was not a good worker because he did not report to management about the inspection reports. RW2 also confirmed that decisions on tyres to be taken from the store were made by RW1 and the director.

The court has considered the evidence. It is clear that the director and RW1 were responsible for the control of the tyres to be taken from the store. It is also clear that before or after 2.10.2013, the respondent did not prefer disciplinary proceedings against the claimant on account of the alleged lost tyres. It is further clear that after 2.10.2013, the respondent did not prefer disciplinary proceedings against the claimant for absence from duty as alleged for the respondent. Thus, the court finds that the claimant's account of the circumstances of his termination is credible. The court finds that the claimant was dismissed verbally without notice and a hearing as envisaged under section 41 of the Employment Act, 2007. The court finds that the termination was unfair.

The court has considered that the claimant had served for 2 years, did not contribute to his termination and considers that 9 months' gross salaries being **Kshs.256,752.00** will meet the ends of justice in this case. The claimant served for only 2 years and the court finds that he is entitled to 2 months' salaries in lieu of annual leaves making **Kshs.57,056.00** and is further entitled to one month pay in lieu of the termination notice being **Kshs.28,528.00**. Finally, the claimant is entitled to the certificate of service under section 51 of the Employment Act, 2007.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the termination was unfair.
- b. The respondent to pay the claimant **Kshs.342,336.00** by 1.08.2014, failing, interest to be payable at court rates from the date of the judgment till full payment.
- c. The respondent to deliver to the claimant the certificate of service by 1.08.2014.
- d. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday 20th June, 2014**.

BYRAM ONGAYA

JUDGE