



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 407 OF 2013

TOBIAS O. KALAE.....CLAIMANT

v

BURHANI EXPRESS LOGISTICS LIMITED.....RESPONDENT

JUDGMENT

1. Tobias Odhiambo Kalae (Claimant) was employed by Burhani Express Logistics Ltd (Respondent) as a port clerk on 10 March 2001 at a monthly salary of Kshs 5,000/-.
2. On 23 April 2013 the Respondent wrote to the Claimant informing him of the immediate termination of his services and asking him to hand over. The Claimant being dissatisfied with the termination lodged in Court a Memorandum of Claim against the Respondent on 22 November 2013.
3. The Memorandum of Claim and Notice of Summons were served upon the Respondent on 20 December 2013. According to the affidavit of service sworn by Duncan K. Muusya the pleadings and Summons were served upon one Aliasger S. Mohamedali, who introduced himself as Respondent's director but he refused to acknowledge service by signing or stamping the documents.
4. On 25 March 2014, when the matter was mentioned, the Court being satisfied with the service fixed hearing for 15 May 2014 with an order that the Respondent be served with a hearing notice. The Court further granted leave to the Claimant to amend the Memorandum of Claim and serve the same upon the Respondent. Respondent was given liberty to file a Response within 7 days of service.
5. On 15 May 2014 the Cause came up for hearing and the Claimant informed the Court that he had served. On record was an affidavit of service sworn by Duncan K Muusya deposing that he had served both the Amended Memorandum of Claim and hearing notice. Being satisfied with the service, the Court allowed the Cause to proceed.
6. In the event the Cause proceeded as an undefended Cause because the Respondent did not file a Response or appear at the hearing.
7. In his testimony, the Claimant stated that he was employed by the Respondent in 2001 as a port clerk and in 2006 the Respondent promoted him to Branch-in-charge, Mombasa with designation of Operations Manager.
8. The Claimant further stated that on 23 April 2013 he received a termination letter and the reason given in the letter was negligence. The Claimant contended that he did not know why his services were

terminated and that he was not given any warning or notice.

9. The Claimant seeks the reliefs set out in the Memorandum of Claim.

10. Because the Respondent failed to file a Response and or appear at the hearing the facts asserted by the Claimant remain uncontroverted and or unchallenged. The legal effect is that there are no real disputes as to the facts.

11. From the termination letter, it is clear that the case under consideration is one of summary dismissal. Section 41(2) of the Employment Act requires an employer in cases of summary dismissal to hear and consider any representations to be made by an employee facing the sack. From the content of the letter, it appears this process was not followed.

12. Further, the Respondent by failing to file a Response or attend at the hearing has failed to discharge the statutory burden placed upon employers by sections 43,45 and 47(5) of the Employment Act to prove the reasons for the termination and that the reasons were valid and fair reasons.

13. Under these circumstances, the only logical conclusion the Court can reach is that the termination was unfair both procedurally and substantively.

Appropriate relief

Service pay

14. Pursuant to section 35(5) of the Employment Act, an employee whose services have been terminated is entitled to service pay unless excluded by section 35(6) of the Act. There is no material before Court to show Claimant was a member of any of the schemes enumerated therein.

15. Although the rate of calculating service pay has not been set, the notorious, certain and reasonable practice has been to calculate the same at the rate of 15 days pay for each year of service.

16. Material before Court is that the Claimant was earning Kshs 20,000/- per month at time of termination. He had served the Respondent for 12 years. He would be eligible for service pay of 180 days. Using the correct formula the Claimant is entitled to service pay of Kshs 138,461/-.

One month pay in lieu of Notice

17. The Claimant was being paid by the month. Pursuant to section 35(1)(c) and 36 of the Employment Act he should have been given one month notice. He is entitled to Kshs 20,000/- on account of notice pay.

Compensation

18. In the Amended Memorandum of Claim, the Claimant sought the maximum compensation.

19. An award of compensation is one of the primary remedies for unfair termination. The Court has reached the conclusion that the termination of the services of the Claimant was unfair. The Claimant has been put to legal expenses because of the termination. He had served the Respondent for some moderately long time.

20. Considering the expenses reasonably incurred and length of service of 12 years, the Court is of the view that an award equivalent to 5 months' gross wages, assessed at Kshs 100,000/- would be just.

Certificate of service

21. An employee is entitled to a Certificate of Service as of right. The Respondent is enjoined by statute

to issue him with one.

Conclusion and Orders

22. The Court finds and holds that the termination of the Claimant was unfair and awards him and orders the Respondent to pay him

a. Service pay (180 days)	Kshs 138,461/-
b. One month pay in lieu of Notice	Kshs 20,000/-
c. 5 months wages as compensation	Kshs 100,000/-

TOTAL **Kshs 258,461/-**

23. The Respondent to issue Claimant with a Certificate of Service.

24. There is no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 20th day of June 2014.

Radido Stephen

Judge

Appearances

Claimant in person

Respondent not represented/did not appear