



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 340 OF 2013

GEORGE MUTUKU KATIKA.....CLAIMANT

v

DRACKO HAULAGE CO LTD.....RESPONDENT

JUDGMENT

Background

1. George Mutuku Katika (Claimant) filed a Statement of Claim against Dracko Haulage Co Ltd (Respondent) on 11 October 2013 seeking a declaration that the termination of his employment was arbitrary, unfair and unlawful, and reinstatement, compensation and consequential terminal dues.
2. The Respondent was served with Notice of Summons and on 25 October 2013 it filed a Memorandum of Appearance through the firm of B.W. Kenzi & Co. Advocates.
3. The rules of the Industrial Court, unlike the Civil Procedure Rules do not envision the filing of a Memorandum of Appearance after service of Notice of Summons and Statement of Claim, but a substantive Response. This is in line with the principle objective of the Industrial Court Act for expeditious and just disposal of employment disputes.
4. On 5 December 2013 the Cause was mentioned before me and Mr. Ngaira holding brief for Mr. Kenzi for the Respondent sought more time to file a Response.
5. No reasons were given why the Response had not been filed in time (within 14 days of service of Summons) but the Court granted the Respondent 14 days within which to file a Response. Mention to confirm compliance was set for 26 February 2014.
6. On 26 February 2014, Ms. Mati holding brief for Mr. Kenzi informed the Court that the Respondent had not given Mr. Kenzi the Claimant's file to enable him file a Response. Ms. Mati sought a further 7 days. Mr. Nyange for the Claimant objected on the ground that the Respondent was not keen to defend the claim and sought a hearing date.
7. In a brief ruling, the Court found that the Respondent had not given sufficient reasons for not having filed a Response as directed and ordered that the hearing proceed on 26 March 2014.
8. On 26 March 2014 when the Cause was called for hearing Mr. Kirui informed the Court that he had been appointed by the Respondent the previous day (25 March 2014) to act for it and sought 15 days to file a Response. He also indicated the Respondent was keen to settle the matter out of court. The record bears out that the firm of Kirui & Co. Advocates had filed a Notice of Change of Advocate on 25 March 2014.
9. Mr. Matheka for the Claimant informed the Court that he had not been served with the Notice of Change of Advocate and that settlement was not forthcoming and therefore he was ready to proceed with the hearing.

10. The Court rejected the application by the Respondent on the basis that the Respondent was not keen on expeditious determination of the Cause because on 5 December 2013 the Respondent had sought time and was granted 14 days to file a Response but it did not comply and that another application on 26 February 2014 had been rejected.
11. The Cause, in the event proceeded to hearing without a written Response from the Respondent. The Respondent further opted not to cross examine the Claimant.

Claimant's pleadings/case

12. The Claimant pleaded that he was employed by the Respondent as a turn boy at a salary of Kshs 6,600/- per month and that he served under this term from May 2011 until 26 March 2013.
13. On the circumstances regarding the termination, it was pleaded that on 24 November 2011 the Claimant was seriously injured after being attacked by robbers while in the course of employment when the Respondent's motor vehicle he was in stalled when it ran out of fuel.
14. After the accident the Respondent allocated the Claimant less strenuous work but he also sought compensation for the injuries but was dismissed through a letter dated 26 March 2013. The Claimant pleaded that the dismissal did not follow procedure and there was no reasonable cause/legal justification. The termination was unfair.
15. The Claimant also pleaded that he did not go on leave in 2012 or get paid salary owing.
16. In testimony, the Claimant stated that he was employed by the Respondent as a turn boy in 2008 and that on 24 November 2011 he was attacked by robbers at Shimanzi on his way to Sudan after the lorry he was in run out of fuel. He stayed in hospital for one month but he was discharged prematurely because of the doctors' strike. He reported back to work after 6 months with doctor's recommendation to be put on light work and worked for about 4 months.
17. In the course of time one of his bosses Vaisal called him and told him he wanted to pay him for the injuries and that around February 2013 he was dismissed and issued with a dismissal letter on 26 March 2013 and paid about Kshs 11,000/-. He did not take leave in 2012.
18. He further stated he was not given notice of termination but the letter of termination gave the reason for termination as disappearance of some documents from his file.
19. The Claimant stated he was seeking service pay.

Evaluation

20. The complaint before Court is one of unfair termination and the statute has set out the burden placed upon the shoulders of both employees and employers. In this respect sections 41, 43, 45 and 47(5) of the Employment Act are particularly applicable.
21. The burden upon an employee is not as onerous as the one on an employer. An employee's burden is to demonstrate that an unfair termination has taken place.
22. The letter terminating the services of the Claimant left no doubt that he was being terminated immediately. He was on a monthly salary. He was entitled to a month's notice pursuant to section 35(1)(c) of the Employment Act. The unchallenged evidence is that no notice was given. This was a case of summary dismissal.
23. Section 41 of the Employment Act requires an employer to observe what in employment law has been called procedural fairness. The employer should notify the employee of the reasons contemplated for termination and hear any representations by the employee.
24. The Claimant was not notified of the reasons nor given an opportunity to respond. This means the Respondent did not consider any representations by the Claimant before dismissing him because there was no procedural fairness. The rules of natural justice were not observed.
25. On this ground alone, the Court is satisfied that the Respondent did not comply with the requirements of procedural fairness and therefore the dismissal was not fair. This conclusion is fortified by section 45(2)(c) of the Employment Act.
26. Sections 43 and 45 of the Employment Act on the other hand deal with substantive fairness of a termination. An employer has the burden of proving the reasons for termination and that the reasons were valid and fair reasons. The Respondent failed to file a Response or call evidence to support its case or discharge the burden placed upon it.
27. By failing to respond and call evidence, the Respondent has failed to discharge its statutory

Delivered, dated and signed in open Court in Mombasa on this 6th day of June 2014.

Radido Stephen

Judge

Appearances

for Claimant Mr. Matheka instructed by Musinga & Co. Advocates

for Respondent Mr. Kirui instructed by Kirui & Co. Advocates