



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 239 OF 2012

ALEXANDER GITHUI GATHURE.....CLAIMANT

VERSUS

TARMAL WIRE PRODUCT LIMITED.....RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 13th February 2012 and filed in court on 21st February 2012 the Claimant alleges that he was employed by the Respondent as a heavy Commercial vehicle driver with effect from 9th September 2005. He worked until 9th January 2012 when his employment was terminated. Both the engagement and termination were verbal.

His last salary was Shs. 16,800/- per month.

He prays that the court finds the termination of his employment wrongful and unlawful and makes orders that :-

i. The Claimant is entitled to be paid 12 months wages as compensation for loss of employment as provided for under section 15 (c) of the Labour Institution's Act 2007

Ksh. 19,685 x 12

Kshs. 236,220/-

Service pay for 7 years 15 x 7 x 656

Kshs. 68,880/-

iii. Leave for 6 years 21 x 6 x 656

Kshs. 82,656/-

iv. Salary under payment @ 2,888 x 12 x 3 Ksh. 103,860/-

Total

491,616/-

v. Any other award or benefit which this Honourable court may deem fit to grant in this case.

vi. The Respondent to pay cost of this suit.

The Respondent filed a Memorandum of Reply on 4th October 2012. In the Reply the Respondent admits that the Claimant was employed on 5th September 2005 but as a driver of light Commercial vehicle. The Respondent avers that the Claimant deserted duty on 23rd December 2011 and resurfaced on 9th January

2012. That the desertion was considered as gross misconduct and he was summarily dismissed under Section 44 (4) (a) of the Employment Act. The Respondent further avers that on 11th January 2012 the Claimant went to the Respondent's premises with a Labour Officer by the name Mr. Mwakime and his terminal dues were computed at Kshs. 30,369 and paid to him leaving only the payment of service pay which was to be made after consultations. The Respondent denies that the Claimant was underpaid and avers that the Claimant's claim is baseless as his salary of Shs. 16800 was agreed by the parties. The Respondent further denies that the Claimant is entitled to payment of compensation for loss of employment as the termination of the Claimant's employment was fair and legal. The Respondent further avers that having received payment in settlement of his claim the Claimant is estopped from making any further claim against the Respondent.

The Respondent prays that the claim be dismissed with costs.

The case was heard on 13th June 2013. The Claimant testified on his behalf while the Respondent called one witness Mr. TALISH ESMAIL BAGHA, one of the Managing Directors of the Respondent. Mr. Kandere instructed by S.K Opiyo & Co. Advocates appeared for the Claimant while Mr. Ohenga instructed by Sharpby Barret & Co. Advocates appeared for the Respondent. Thereafter the parties filed written submissions.

I have considered the pleadings and annexures thereto, the evidence adduced in court, the written submissions and the relevant law.

There is no contention over the main facts of the case. The Claimant was employed by the Respondent as a driver on 9th September 2005 without a letter of appointment. He learnt about his dismissal on 9th January 2011 when he reported back from the Christmas break. On 11th January 2012 the Claimant went to the company premises accompanied by a Labour Officer following which his terminal benefits were tabulated and he was paid Shs. 30,369. The parties however do not agree on the job grade of the Claimant, whether the payment made to him was what was due and on the prayers.

From the foregoing, the issues for determination are the following:-

- 1. Whether or not the Claimant was unfairly terminated?**
- 2. Whether the Claimant was paid his full terminal benefits?**
- 3. Whether the Claimant is entitled to the prayers sought?**

- 1. Whether or not the Claimant was unfairly terminated?**

The Claimant testified that he was supposed to report back to work on 7th January 2012 after the Christmas break which started on 24th December 2011. He testified that he called Mr. Bashir the Manager and Mr. Karish the Sales Manager and informed them that he had a patient, his brother whom he lived with who had been hospitalized. He was assured that all was well and he should not stay for too long. However when he reported back on 9th January, 2012 Mr. Bashir told him he did not want to work and should go home and report back the following day to collect his money. When he went back the following day he was told he would be paid one month's salary as notice.

RW1 testified that the Claimant was terminated on 9th January 2012 after failing to report back to work on 2nd January 2012 when the company reopened after Christmas break from 24th December 2011. That the Claimant was called but his phone was not getting through. RW1 confirmed that the Claimant called him on 6th or 7th January 2012 and told RW1 that he had a relative who had died and he would be back to work on 9th January 2012. That the Claimant reported back to work on 9th January 2012 but by then the company had recruited another driver as work could not be kept pending.

Section 44(4) (a) which the Respondent relied upon to dismiss the Claimant provides that when an employee, without leave or other lawful cause, absents himself from the place appointed for the performance of his work, he may be dismissed for gross misconduct. The same Section provides that the decision of an employer to dismiss an employee summarily shall not preclude an employee from disputing whether the facts giving rise to the summary dismissal constitute justifiable or lawful grounds for the dismissal.

In the present case, RW1 testified that the Claimant called him to inform him that he had a patient who had “passed on”. However when the Claimant reported back to work he was told he had been dismissed.

The Claimant testified that the office was opening around 7th January 2012 while RW1 testified that the office opened on 2nd January 2012, but the employees were not informed in writing about when to report back.

The question the court should answer is whether there was justifiable cause for dismissal of the Claimant. I do not think so. The Respondent never gave the Claimant an opportunity to prove that he had a sick patient whom he was taking care of or that he had a funeral whichever was the case. He reported back to work to find he had no job.

Is death or hospitalization of a family member justifiable cause for an employee to be absent from work? My answer to this question would be in the affirmative. All the employee should have been told is to produce proof, which he testified that he was never asked to do. RW1 also testified that the Claimant had been dismissed by the time he reported back. The issue of him producing records to prove his allegation of death or hospitalization of his brother was never raised.

Section 41(2) of the Employment Act provides that where an employer is contemplating the dismissal of an employee under Section 44(3) or (4) he shall hear the employee as well as the person who has accompanied the employee before making the decision to dismiss the employee.

The Claimant was never given a hearing . In the words of RW1 “ By 9th we had already hired someone else” and “We thought he had already quit.”

From the foregoing, it is clear that the Claimant had a valid reason to be absent, and was dismissed without being given an opportunity to be heard inspite of having called on 7th to explain the reasons for his absence. It is also apparent that the reporting date was not properly communicated to the Claimant and he was under the belief that the office was opening on 7th January 2012 when he called to seek permission to report back on 9th January 2012.

I find that the dismissal of the Claimant was unfair procedurally and was without valid reason.

2. Whether the Claimant was paid his terminal benefits?

Both parties are in agreement that the Claimant was paid Shs.30,369 excluding service when the Claimant went to the Respondents premises with a labour officer. The Respondent alleges this was the full settlement. The breakdown of the items paid for has not been given. Parties also agree that no payment was made for service pay.

Since service pay had not been paid, the payment made to the Claimant was not his full terminal benefits.

3. Is the Claimant entitled to the prayers sought?

The Claimant has prayed for compensation, service pay, leave for 6 years and Salary underpayment.

a. Compensation

Having found that the Claimant was unfairly dismissed he is entitled to compensation under Section 49 (1) (c) of the Employment Act. He seeks maximum compensation of 12 months.

Having worked for just over 6 years, it is my opinion that 8 months' salary is reasonable compensation taking into account all the circumstance of the case and Section 49 (4) of the Act. For purposes of calculating the terminal benefits of the Claimant I will adopt the minimum wages for 2011. The statutory minimum wage for driver (heavy commercial vehicle) was Shs. 17,118. With house allowance of 15% the rate was Shs. 19,685.70.

I therefore award the Claimant Kshs. 157,485.60

b. Service Pay

The Claimant confirmed through NSSF statement that he was not a member thereof. He is therefore entitled to service pay at the rate of 15 days per completed year of service for 6 years in the sum of Kshs. 59,057.10. I award him the said sum.

c. Annual leave

The Respondent admitted through RW1 that the Claimant never took leave. He only had a break during December when the company closed. It was not stated whether it was communicated to employees that the break would constitute annual leave. No records were produced by the Respondent on leave days earned and leave days taken by the Claimant.

When the Labour Officer intervened for the Claimant was paid 21 days leave without deduction of any days, but only for one year.

Section 10 and 74 (1) (f) of the Employment Act require an employer to keep employment records of an employee's annual leave entitlement, days taken and days due as specified in Section 28. Section 10 (7) provides that in any legal proceedings where an employer fails to produce written records prescribed in Subsection (1) the burden of proving or disproving an alleged term of employment shall be on the employer.

In the present case the Respondent employer has failed to produce the relevant records.

I therefore hold that the Claimant is entitled to annual leave for 6 years and 3 months at 21 days per year worked and pro-rated for any months that do not constitute a year. The Claimant is entitled to 131.25 days. This works out at Kshs. 86,124.90.

The Respondent is entitled to recover the one year's annual leave payment already paid to the Claimant.

d. Salary underpayment

The Claimant alleges that he was a heavy commercial driver. The Respondent avers in the Reply to the Memorandum of claim that the Claimant was a driver of a light Commercial vehicle. Under the wages order, there are only 3 categories of drivers; these are driver (cars and light vans); driver (medium sized vehicle) and driver (heavy commercial vehicle). The Respondent did not submit any proof of the vehicles that the Claimant drove which could easily be proved from records of the vehicles. No question was put to the Claimant or RW1 on the size of vehicle the Claimant drove. On the other hand the Claimant attached a copy of his driving licence to the claim showing that he is a qualified heavy commercial driver.

From the foregoing I find that the Claimant was employed as a heavy commercial driver.

The salary for a heavy Commercial driver for 2011 was Shs. 17,118. With house allowance of 15%, the

rate was Shs. 19,685.70. Since the Claimant did not tabulate the minimum wages for all the years he worked and the rate of pay he earned over the years I will only award him underpayments for the last 12 months. His last salary was Shs. 16800. He was therefore underpaid by Ksh. 2,885.70. For 12 months this amounts to Kshs. 34,628.40. I award the Claimant underpayments in the said sum of Shs. 34,628.40.

e. Costs and Interest

The Respondent will pay the Claimant's costs for this suit. The decretal sum will attract interest at court rates from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant

Mr. Ohenya for Respondent