



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 61 OF 2014

RICHARD NDIRANGU GIKONYOCLAIMANT

VERSUS

PRIME FUELS[K] LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair/unlawful dismissal of the claimant from employment by the respondent on 26/4/2013. The total amount claimed is ksh.567,250 as particularized in paragraph 4 of the amended claim.
2. The respondent has denied liability and averred that the dismissal was proper because the claimant had grossly misconducted himself by deviating the truck he was driving from the route he was assigned to follow.
3. The suit was heard on 31/7/2014 when the claimant testified as CW1 but the defence called no witness.

CLAIMANT'S CASE

4. CW1 was employed by the respondent from 19/1/2010 as a driver for long distance trucks. His contract of employment was contained in the letter dated 19/1/2010 which he produced as exhibit 1. He was to work for 6 days a week, from Monday to Saturday. He was entitled to rest on all holidays. He was also entitled to a 30 minutes break after every 4 ½ hours in a journey of 9 hours per day. His starting salary was ksh.20000 which was later increased to ksh27000 gross. The letter provided for disciplinary procedures including summary dismissal and warning letters.
5. On 26/4/2013, CW1 was served with a dismissal letter dated 28/3/2013 after returning from a long distance trip on 25/4/2013. The reason cited for the dismissal was that he had deviated from the assigned route on 28/3/2013. CW1 explained that before the said date he drove from Nakuru to DRC Congo through Eldoret- Busia road. After delivery of the cargo to DR Congo, CW1 returned to Kenya and surrendered the delivery documents dated 27/3/2013 (Exh 2.) plus the OBC print-out for the trip because the truck had tracking device fitted on it. According to him he received no complaint or warning letter about that particular trip. He was therefore surprised to receive the dismissal letter after making 2 other trips to DR Congo.
6. He contended that his dismissal was unfair because he had not done anything wrong and he was not heard before the dismissal. He was also not paid his dues after dismissal.
7. He prayed for the ksh.567,250 plus costs. He contended that during his service he worked on all the public holidays because they found him on the road. He also used to work on Sundays

- because they were not allowed to stop on the road as the trips were timed. He contended that the record to prove his allegations of Sundays and holidays worked are with the respondent including her OB Manager. He maintained that he was never compensated for the 20 holidays and 104 Sundays worked between 19/1/2010 and 28/3/2013 and prayed for ksh.13320 and ksh.69264 respectively.
8. On cross examination by the defence counsel, CW1 confirmed that he was not supposed to deviate from the assigned route because they involved KRA checks. He maintained that his employment was governed by the contract and laws of Kenya and his dismissal was supposed to be in compliance with the relevant law.
 9. He contended that on the material date he followed the route plan as assigned by Safety Manager being Nakuru, Bungoma through Busia. He maintained that he worked during all holidays and Sundays from 19/1/2010 against the express terms of the contract. According to him he worked for over 300 days without taking a rest day. He however admitted that in 2012 he took 45 days leave which excluded compensation for rest and holidays.
 10. On re-examination CW1 explained that route plan was prepared by the Transport Manager or the Safety Manager. The compliance with the route plan was confirmed by OBC print out by the OBC Manager which CW1 gave to the Transport Manager. CW1 clarified that he never went for leave in 2010 and 2011 but in 2012 he took 45 days leave. He further clarified that he could not stop the truck on the road on Sundays or holidays because the trips had limited number of days. He also maintained that the holidays and Sundays found them on the road while travelling.
 11. After the close of the hearing the counsel agreed to have the decision on liability on this case applied to Industrial Court case No. 62 of 2014 and 63 of 2014 because the dismissal therein arose from similar circumstances. The counsels agreed to file written submissions on this case which the court has carefully considered herein.

ANALYSIS AND DETERMINATION

12. There is no dispute that the claimant was employed by the respondent as pleaded. There is also no dispute that the claimant was dismissed for alleged gross misconduct of deviating from the assigned route. There is also no dispute that CW1 just like the claimant in ICC No. 62 of 2014 and ICC 63 of 2014 was not afforded a hearing before the said dismissal.
13. The issues for determination is whether the dismissal was unfair and whether the relief sought ought to issue.

Unfair dismissal

14. The claimant states that he was served with the dismissal letter on 26/4/2013 dated 28/3/2013 after returning from DR Congo for official duty. According to his uncontested evidence he was never given any hearing for the alleged misconduct which he maintains that it was not true. He further maintains that the route he followed was the one assigned by the Safety Manager and confirmed by an OB print out from the OB Manager. According to him he received no complaint after the said trip until he was served with the dismissal letter. Based on the foregoing uncontested evidence, the court finds on a balance of probability that CW1 has discharged his burden of proving unfair dismissal against the respondent under Section 47 of the Employment Act.
15. Under section 45 of the said Act, termination of employment is deemed unfair unless the employer proves that it was founded on a valid and fair reason and that it was reached after following a fair procedure. Fair procedure is provided for under Section 41 of the Act which is simply to accord an oral hearing to the employee and a colleague of his choice and in a language he understands. This is what has become known as disciplinary hearing or inquiry. In this case the said hearing was not done. In addition the reason for the dismissal was not proved to have existed at all. Under Section 43 of the said Act, the burden of proving the reason for dismissal is upon the employer whenever a dispute like the present one is brought to court. In this case, however, no witness was called and court was only treated to mere denials in the respondent's defence. It follows therefore that the alleged deviation from the assigned route by the claimant was not proved. Consequently, and on balance of probability, the court finds that the dismissal of the claimant in this case and in ICC 62 of 2014 and 63 of 2014 was unfair and unlawful both

procedurally and substantively.

Reliefs awarded

16. Under Section 49 of the Employment Act an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. The claimant is therefore awarded one month salary in lieu of notice, compensation for the rest and holidays worked and 4 months gross salary as compensation for unfair termination. The reason for the 4 months salary award is that CW1 was able to secure an alternative employment within that period. On the other hand the respondent has not produced any record to rebut the claim for rest and holidays worked. The employer has the legal obligation not only to keep all employee's record of employment under Section 74 and 10(7) of the Employment Act but also to produce them in court to rebut any oral allegation by the employee in a suit like this one.
17. The claimant will get ksh.27000 being one month salary in lieu of notice. He will also get pay for 20 holidays worked according to Kenyan constitution and 104 rest days worked between 19/1/2010 and March 2013 as prayed. The court grants the amount as prayed because the amount payable could be higher than prayed considering that such holidays and rest days attract pay at double rate.
18. The prayer for seven days worked in April is dismissed because the CW1 admitted in evidence that he was paid his salary for March and April 2013. He will however get Ksh.108000 being 4 month gross salary for unfair termination.

DISPOSITION

19. For reasons stated above judgment is entered for the claimant for Ksh.217,584 plus costs and interest.

Orders accordingly.

Dated, signed and delivered this 24th October 2014

O. N. Makau

Judge