



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 264 OF 2012

JACOB ABOK OBILO.....CLAIMANT

VERSUS

SBI INTERNATIONAL HOLDINGS

A.G. KENYA.....RESPONDENT

Mrs Kamau for Claimant

Mr. Onyango for Respondent

JUDGMENT

1. The Claimant seeks compensation for alleged unlawful and unfair termination and payment of terminal benefits outlined as follows;

- a. Twenty one (21) days salary in lieu of leave days not taken in the sum of Kshs.21,749/=;
- b. Three (3) months' salary in lieu of notice in the sum of Kshs.93,210/=;
- c. Severance pay calculated at 15 days salary for three (3) years worked in the sum of Kshs.46,605/=;
- d. Arrear salary for the days worked in the month of April in the sum of Kshs.8,285/=;

2. The Respondent filed a statement of Response to the memorandum of claim in which it admits that the Claimant was employed on 15th May 2007 as a driver by the Respondent.

3. That the Claimant worked continuously for the Respondent and as at the time of termination of employment, earned a salary of Kshs.31,070/= per month.

4. That on the 21st March, 2009, the Respondent lost its Tipper registration number KAX 802C and the Claimant was arrested as a suspect and was charged with others with the offence of stealing a motor vehicle valued at Kshs.7,950,000/= contrary to **Section 278(A)** of the **Penal Code**.

4. The Claimant was acquitted of the charge laid before the Chief Magistrate, Machakos on 16th February 2011 in **Criminal Case 1964** of 2009.

The Claimant's employment was however terminated on reasonable suspicion of theft of motor vehicle by the employer.

5. The Respondent avers that the Claimant was implicated directly or colluded with others to steal the Tipper. That notwithstanding the acquittal the Respondent was entitled to dismiss the Claimant based on a lower standard of proof than that which appertains in Criminal trials.

6. That the Investigating Officer in the matter died before the criminal trial was concluded and this contributed to the acquittal of the Claimant and his co-accused persons in the criminal trial.

7. That the Respondent had lost trust in the Claimant and could no longer retain him as an employee.

8. That upon termination the Respondent paid the Claimant one month salary in lieu of notice and there was no legal basis of claiming payment in lieu of three months' notice or at all.

9. That the Claimant was registered with the National Social Security Fund and the Respondent contributed on his behalf to the fund and therefore the Claimant is not entitled to payment of severance pay for the three years served.

The payslips produced by the Claimant confirms this fact.

Leave days

11. The Respondent did not produce any leave records to dispute the claim by the Claimant that he had not taken 21 days and was entitled to payment in lieu thereof. The Respondent did not call any witness in this matter and the Court finds that the Claimant has on a balance of probability proved that he was entitled to payment of Kshs.21,749/= in lieu of leave days not taken.

Arrears salary

12. The Respondent paid the salary for the eight (8) days worked in the month of April 2009 and the claim is dismissed for want of prove.

Compensation for unlawful and unfair termination.

13. The Respondent did not lead any evidence to rebut the Claimant's allegation that he was not involved in the theft of the Tipper and that the Respondent suspected him of theft without any concrete basis.

14. That the Respondent did not provide him with an opportunity to defend himself against the suspicion wrongly held by the Respondent.

Determination

15. In terms of **Section 41(1)** of the **Employment Act, 2007**, the Respondent ought to have given the Claimant a notice to show cause why his employment ought not to be terminated and then given him an opportunity to defend himself against any charges laid against him.

16. The Respondent did not prefer any charges against him but simply terminated his employment upon what he believed was reasonable suspicion.

17. **Section 43(1)** provides that the employer;

“shall be required to prove the reason or reasons for the termination, and where the

employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

18. In the circumstances of this case, the Claimant was dismissed on mere suspicion of theft of a Tipper belonging to the Respondent. He was charged and acquitted of the offence of theft and no disciplinary hearing was held to prove the theft on a balance of probabilities.

19. The Respondent has failed to discharge the threshold placed on it under **Section 43** of the Employment Act and the Court finds that the termination of employment of the Claimant was unfair within the meaning of **Section 45(1)** and **45(2)(a)** in that the reason for the termination of the Claimant was not valid.

20. The failure to subject the Claimant to a disciplinary hearing as provided under **Section 41(1)** rendered the termination unfair and in violation of **Section 45(2)(c)** of the **Employment Act, 2007**.

21. Considerations for the assessment of compensation due to the Claimant once a finding of dismissal and / or termination has been made includes but are not limited to:

- a. the employee's length of service with the employer;
- b. the expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- c. the period of notice given by the employer to the employee prior to the termination;
- d. any terminal benefits paid to the employee in terms of the contract of employment including any exgratia payment made to the employee to ameliorate hardship as a result of the termination;
- e. the failure by the employer to provide a certificate of service to the employee to enable him to look for alternative employment;
- f. whether the termination was only unfair for failure by the employer to follow a fair procedure of employment;
- g. the extent to which the employee contributed to the termination;
- h. the extent to which the employee has mitigated the loss of employment by seeking alternative means of livelihood;
- i. any expenses reasonably incurred by the employee as a consequence of the termination.

22. These guidelines are mostly derived from **Section 49(4)** of the **Employment Act** and are not exhaustive.

In the present case, the employer did not immediately pay the Claimant any terminal benefits upon termination.

23. The Respondent further caused the Claimant to be incarcerated and prosecuted for the offence of theft but the Claimant was found innocent of the allegations.

24. The Respondent did not subject the Claimant to any disciplinary hearing and terminated him on mere suspicion of theft.

25. The Claimant had served the Respondent for a relatively short period of three years.

26. Upon consideration of these and other circumstances of this case, the Court awards the Claimant eight (8) months' salary as compensation for the unlawful and unfair termination.

27. In the final analysis the award of the Court is as follows;

- a. Kshs.21,749/= being payment in lieu of untaken leave days in the year 2009;
- b. Kshs.173,992/= being equivalent of eight (8) months' salary for the unlawful and unfair termination of employment;

Total Award Kshs.195,741/=.

- c. The award is to be paid with interest at Court rates from the date of judgment till payment in full;
- d. Respondent to pay costs of the suit.

Dated and Delivered at Nairobi this 1st day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE