



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 327 OF 2011

DISMAS MURANGALA ALMASACLAIMANT

VERSUS

MR. H. S. THETHY1ST RESPONDENT

SHER SHUTTLE SERVICES LIMITED2ND RESPONDENT

Mr. Onyatta for the Claimant

M/S Ouma for the Respondent

JUDGMENT

1. The Claimant seeks payment of compensation for alleged unlawful termination of employment and terminal benefits due and owing to the Claimant as follows;

- i. arrear salary for January 2011;
- ii. uniform refund Kshs.7,000/=;
- iii. accrued leave days for two and a half (2¹/₂) years;
- iv. two (2) years severance pay at fifteen (15) days salary per year;
- v. overtime; and
- vi. house allowance at 15% of the basic salary.

2. The claims are founded on the particulars of claim as follows;

That on 17th June 2008, the Claimant was employed as a driver for the Respondent under a verbal contract of service at a monthly salary of Kshs.11,000/=.

That the employment continued for two (2) years until the 3rd January 2011 when the 1st Respondent unlawfully gave the Claimant a notice of termination on account of redundancy.

That the dispute was reported to the union but same was not settled.

3. That the Claimant worked from 6 a.m. to 10 p.m. daily amounting to sixteen (16) hours but was not paid overtime.

That he got two (2) off days a week but was not granted any leave days.

That he was not paid any severance pay inspite of being declared redundant because the contract for transport between the Respondents and Sarova Hotels had come to an end.

4. That he did not contribute to the termination of the transport contract between the Respondents and Sarova Hotels as alleged or at all.

That he was unlawfully and unfairly subjected to termination and seeks compensation.

5. He is also entitled to a refund of uniform purchase price in the sum of Kshs.7,000/= which he now claims.

6. The Claimant also states that he was only paid a basic salary and was not given a house nor paid housing allowance. He claims a house allowance calculated at 15% of the basic salary in terms of the General Wage Order.

Response

7. The Respondents filed a memorandum of Response to the claim dated 11th May 2011.

8. The 1st Respondent at paragraph 4 of the memorandum of claim denies having any direct relationship with the Claimant as an employer or at all and states that the claim is ill conceived and it be dismissed with costs.

9. The 2nd Respondent admits that it employed the Claimant as a driver and the said relationship persisted for a period of two (2) years until when the relationship was terminated following due process and the said termination was lawful.

10. The 2nd Respondent contends that the employment of the Claimant depended on a contract to offer shuttle and other transport services to its clientele.

11. That in particular the employment of the Claimant depended on the maintenance of a transport contract with M/S Sarova Hotels Limited who the Claimant served for the period he worked for the 2nd Respondent.

12. That on 31st January 2011, the 2nd Respondent's contract with Sarova Hotels Limited was terminated as a result of misconduct by the Claimant in the course of his employment.

13. That the 2nd Respondent suffered severe loss of business as a consequence thereof.

14. That the Claimant was aware of the full particulars of his misconduct and the 2nd Respondent reserved the right to counterclaim for loss of business.

15. The 2nd Respondent however did not counterclaim nor did they adduce evidence on the alleged misconduct as expressly stated in the memorandum of Response.

16. The 2nd Respondent deny all the particulars of claim by the Claimant as follows;

With regard to a claim for salary arrears, 2nd Respondent state that it paid all salary for the days worked and even paid one (1) month's salary in lieu of notice.

That the Claimant did not work any overtime at all and is put to strict proof that he worked for sixteen (16) hours daily. The 2nd Respondent in this regard states that the drivers worked on scheduled shifts and it was not possible for anyone driver to work two (2) shifts in a day.

17. The claim for leave days is also denied, the 2nd Respondent stating that it was settled. The 2nd Respondent further denies that the Claimant was entitled to any severance pay since he is the one who caused loss of business to the 2nd Respondent due to misconduct.

18. With respect to the claim for housing allowance, the 2nd Respondent avers that the Claimant was paid a consolidated salary which he had gladly accepted and is not entitled to housing allowance at 15% of the wage paid.

Testimony

19. The Claimant testified in support of the particulars of claim. He stated as follows;

Uniform

He bought the uniform which comprised of a black suit, white shirt and black shoes twice a year and the purchase price was not refunded as verbally promised by the 2nd Respondent. He had therefore bought two pairs of uniform at Kshs.2,000/= during the period he worked for the 2nd Respondent and claims a refund of the amount.

Leave days

He told the Court that for the period of over two (2) years he worked for the 2nd Respondent, he sought leave but the same was denied. He was threatened with a sack if he persisted. He claims payment in lieu of leave days for thirty (30) months worked, in the sum of Kshs.25,380/=.

Termination

The Claimant has sued the 1st Respondent together with the 2nd Respondent because the letter of termination was written and signed by the 1st Respondent.

The Court however finds that it was not necessary to sue the 1st Respondent who was merely an Agent of the 2nd Respondent. The 1st Respondent is struck off the suit.

20. In terms of the said letter, the reason given in the letter of termination for the discontinuation of employment is the termination of the service contract between the 2nd Respondent and Sarova Hotels. The Claimant was given one month's notice of termination in the said letter.

The 2nd Respondent did not blame the claimant for the termination of the contract between itself and Sarova Hotels in the said letter.

Determination

21. The 2nd Respondent did not call any witness in support of its averments in the memorandum of response. It did not also produce any documentary evidence to refute the claims set out in the memorandum of claim and the annexures thereto.

22. Upon a careful analysis of the pleadings and the sworn testimony by the Claimant the Court has

reached the following conclusions of fact:

The employment of the Claimant was terminated purely because the contract of transport he was employed to service had expired. The Claimant was therefore retrenched within the meaning of **Section 40** of the **Employment Act**. He was therefore entitled in the minimum to serve one month notice or be paid one month's salary in lieu of notice.

23. The Court finds that the Claimant served one month notice and is therefore not entitled to payment in lieu thereof.

Secondly, the Claimant is entitled to severance pay equivalent to fifteen (15) days salary for each completed year of service. He had served the 2nd Respondent from 17th June 2008 to 31st January 2011. He had therefore served a period of two (2) years and six months. Severance pay payable to the Claimant is therefore the equivalent of one and a half months salary in the sum of Kshs.15,500/= which the Court awards accordingly.

24. The Claimant is not entitled to compensation for unlawful termination as he was lawfully retrenched from service.

The Claimant has however proved on a balance of probabilities that he is owed Kshs.7,000/= refund for uniforms bought, sixty (60) days salary in lieu of leave days not taken in the sum of Kshs.22,000/= and salary arrears for January 2011 in the sum of Kshs.11,000/=.

25. The Court is also satisfied that the Claimant was entitled to 15% of his monthly salary as his housing allowance in terms of the General Wage Order applicable at the time and in the absence of any evidence to the contrary in the sum of Kshs.49,500/=.

The claim for overtime was found to be an afterthought, and unmerited as the claim was not in the original claim by the union as per Appendix II to the memorandum of claim.

26. Consequently the total award by the Court to the Claimant as against the 2nd Respondent is as follows;

1. arrear salary for January 2011 in the sum of Kshs.11,000/=
2. payment in lieu of leave in the sum of Kshs.22,000/=;
3. severance pay in the sum of Kshs.15,500/=;
4. housing allowance in the sum of Kshs.49,500/=;
5. refund for uniforms, Kshs.7,000/=.

The 2nd Respondent is to pay the award with interest at Court rates from the date of judgment until payment in full.

Costs to follow the outcome.

Dated and Delivered at Nairobi this 13th day of November, 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE

