



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.1336 OF 2011

MWENDWA MUTISYA.....CLAIMANT

VS

AL- MICDAD PARCEL SERVICES.....RESPONDENT

Ms. Betty Rashid for Claimant

Mr. Otieno for Respondent

JUDGMENT

The Claimant seeks terminal benefits to wit;

- (a) 3 months' salary in lieu of notice in the sum of Kshs.48,300/=;
- (b) Payment in lieu of leave for the year 2009 in the sum of Kshs.16,110/=;
- (c) Severance pay for 2 years in the sum of Kshs.32,200/=;
- (d) Underpayments for 2½ years @ 2,100 per month in the sum of Kshs.63,000/=;
- (e) Salary for April 2010 to July 2011, in the sum of Kshs.257,600/=; and
- (f) Compensation for unlawful dismissal.

The claim is premised on the following alleged facts;

That the Claimant was in January 2009 employed by the Respondent as a long-distance driver. That he earned Kshs.16,100 per month. The letter of employment dated 1st January, 2009 is attached to the Memorandum of claim and provides that the same was effective from 1st January, 2009. That the Claimant's basic salary was Kshs.16,100/= plus a house allowance of 15% totaling Kshs.16.100/=. He was entitled to 21 working days as annual leave. Termination notice by either party was 1 month or payment in lieu thereof. Service pay was payable if the Company terminated the services of the Claimant. The letter is signed by both parties.

The payslips of the Claimant attached shows that the Claimant was registered with NSSF and NHIF and the monthly contributions were duly deducted.

By a letter dated 8th July 2011, the services of the Claimant were terminated with effect from 1st April,

2010. In terms of the letter, he was to be paid; service pay for the year 2009 in the sum of Kshs.16,100/=; 21 days' leave for the year 2010 in the sum of kshs.3,003.00 and Notice pay of Kshs.16,100/= totaling Kshs.37,150/=. However, he was deducted 32,200 being salary paid in two (2) months whilst the Claimant was not at work.

According to the Claimant, on 4th January, 2010, whilst driving to Nairobi from Mombasa in the cause of his employment using motor vehicle registration number KAZ 752G belonging to the Respondent, he was involved in a road accident. He sustained a fractured leg and head injuries. He was rushed to Kenyatta National Hospital where he was admitted and treated for the injuries sustained. It took him about 1 year and four months to fully recover.

Whilst he was at home recovering, he was paid salaries for the months of January, February and March 2010 and the salary was stopped.

On 9th July 2011, the Claimant resumed work as a driver but was given a termination letter dated 8th July 2011. The Claimant states that the termination was unfair and is entitled to compensation in respect thereof. He also claims terminal benefits listed hereinabove.

The Respondent filed a Memorandum of Response on 8th September, 2011. The Respondent admits the particulars of employment of the Claimant and that on 4th January 2010, he was involved in a road traffic accident in the course of his employment. That they spent Kshs.218,960/= in respect of hospital bills for the Claimant

The Respondent states that the Claimant did not report back to work nor did he inform the Respondent of his inability to return to work due to the injuries. No documentation was presented to the Respondent by the Claimant in this respect during the time of his absence from work. The Respondent was unable to establish contact with the Claimant during the time to enquire about his status. The Respondent terminated his employment after paying 3 months' salary while he was away effective 1st April, 2010. This explains why no reasons were provided for his termination because this happened while he was away.

According to the Respondent therefore, the Claimant absconded from duty and is not entitled to any compensation. The Respondent offers to pay to the Claimant terminal benefits as follows;

- a. Notice pay - Kshs.16,100
- b. Leave pay for 21 days - Kshs.13,603
- c. Gratuity for 2009 and 2010
@ the rate of 15 days for each
completed year of service at - Kshs. 8,050

Total offer made = Kshs.35,420

Admitted Claim:

In view of the offer made by the Respondent above, the court enters judgment in favour of the Claimant for Kshs.35,420/=.

Analysis:

No evidence has been tendered by the Claimant with regard to the claims for;

a. **3 months' salary in lieu of notice.**

The letter of appointment submitted by the Claimant provided for provision of 1 month notice by either party who wishes to terminate or payment in lieu thereof. Clearly this claim is misguided and same is dismissed and substituted by the offer made by the Respondent above.

b. **Underpayments** for 2½ years @ 2,100 per month in the sum of Kshs.63,000/=. This claim is also dismissed for want of evidence. The same has not been substantiated at all in the pleadings. In any event, the Respondent has denied the same.

c. **Salary for April 2010 to July 2011**

This claim is with respect to payment of salary for the period when the Claimant was hospitalized and/or recovering from his injuries whilst at home.

It is not in dispute that the Respondent met all medical expenses with regard to treatment and hospitalization of the claimant. Furthermore, the Claimant also received compensation in the sum of Kshs.224,825/= under the Work Injury Benefits Act, following the accident.

It is clear that the Claimant was not entitled to payment of a salary during the time he was absent from work beyond the statutory period he was eligible for sick leave.

In this respect Section 30(1) provides that an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay in each period of twelve consecutive months. The statute provides for the minimum requirement but the employer may provide longer periods of leave with full pay or half pay.

It is not in doubt that the Respondent was well aware of the injuries sustained by the Claimant and his subsequent hospitalization. The employer cannot be heard to say that it was not aware that the Claimant was unable to come to work due to the injuries incurred in the course of his employment.

The admissions by the employer that it met all the medical bills and processed the claim with respect of the Work Injury Benefits Act, is sufficient testimony that it had possession of all the relevant medical documents regarding the medical condition of the Claimant including knowledge of his ability and/or inability to resume work.

It is inconceivable that the Respondent would lack particulars including the telephone numbers, postal and physical address of a driver who was entrusted with Company Motor Vehicles and large cargo in the course of his employment. The court does not believe that, the Respondent was not able to contact him before terminating his services.

It is undeniable that the injuries sustained by the Claimant were serious and required a lengthy period to recover. His absence cannot therefore be construed as absconding from work within the meaning of Section 44(4) (a) of the Employment Act, 2007 which provides;

“without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work” as a justifiable reason to terminate the employment of an employee.

For the avoidance of doubt, the court finds that the Claimant was only able to resume work on 9th July 2011, which he did, only to be given a letter of termination dated 8th July, 2011, the day before.

As a matter of fact, the letter of termination dated 8th July, 2011 does not provide the reason why the employment of the Claimant was terminated. In the circumstances, the court finds that the claimant has proven on a balance of probabilities that his employment was wrongfully and unfairly terminated, the employer having failed to prove the reason of termination to satisfy the requirements of Section 43(1) of the Employment Act as read with Section 47(5) which requires the employer to justify such reason given

for the termination of employment.

The court therefore finds the reason for the termination was invalid and the termination was not in accordance with a fair procedure contrary to Section 45(2)(a) and (c) of the Employment Act.

Section 49 provides for the remedies available to an employee whose employment has been unlawfully and unfairly terminated which include;

“(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wages or salary of the employee at the time of dismissal.....”

49(3)(a) *“reinstates the employee and treats the employee in all respects as if the employee’s employment had not been terminated; or*

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”

In the present case, the Claimant has only sought compensation for the unlawful and unfair termination. The court finds that the loss of employment was intimately connected to the severe injuries sustained in the course of his employment. That at the time of termination, he had fully recovered from the injuries and presented himself for work.

The conduct by the Respondent was to say the least callous and should have been more sympathetic to the plight of the Claimant who had sustained injuries whilst serving them. I find that though the Claimant received compensation for the injuries he sustained, he had lost prospects of future employment and indeed lost earnings for the entire period he was hospitalized save for the 3 months he was paid his salary.

Taking all these circumstances into account, the court awards the Claimant maximum compensation equivalent to 12 months’ gross salary at the time of termination in the sum of Kshs.193,200/=.

The court also finds that the claimant was entitled in terms of his letter of appointment to payment of severance pay calculated at 15 days’ salary for each completed year of service from 1st January, 2009 to 8th July, 2011 in the sum of Kshs.32,200/= already offered.

Accordingly, the Respondent is to pay to the Claimant as follows;

- a. Kshs.35,420/= as tendered;
- b. Kshs.24,150 (32,200 – 8,050) being severance pay for 2 years;
- c. Kshs.193,200 being compensation for unlawful dismissal;

Total payable - Kshs.252,770/=

- d. Costs of the suit.

It is so ordered.

Dated and Delivered at Nairobi this 12th day of July, 2013.

Mathews N. Nduma

Principal Judge – Industrial Court