



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 45 OF 2013

SHAMAKAME ADAM MBUI

CLAIMANT

v

KYOGA HAULIERS (K) LTD

RESPONDENT

JUDGMENT

Background and pleadings

1. Shamakame Adam Mbui (Claimant) filed a Memorandum of Claim against Kyoga Hauliers (K) Ltd (Respondent) and the issues in dispute were stated as *occupational accident and wrongful dismissal*.
2. The Claim and Notice of Summons were served upon the Respondent and an affidavit of service sworn by one Nickson Nyange Rodgers Mabishi on 7 March 2013 filed in Court on 21 March 2013. It was deposed in the affidavit that a Ms. Pauline was served with the documents.
3. On 21 March 2013, the firm of Robson Harris & Co. Advocates filed a Notice of Appointment of Advocates to come on record for the Claimant. On the same day the file was placed before me and Mr. Ruwa for the Claimant applied to be allowed to amend the Memorandum of Claim. I granted the leave sought and set a mention for 11 April 2013.
4. On 11 April 2013, none of the parties appeared when the file was called and I directed the Deputy Registrar to notify the parties to appear for directions on 29 April 2013. The Deputy Registrar sent out a notice to both parties on the same date.
5. On 29 April 2013, again none of the parties appeared and I directed the Deputy Registrar to notify the parties to appear on 20 May 2013. On 20 May 2013 when the matter was initially called none of the parties was present. At 9.50 am, Ms. Adagi informed me she was on record for the Claimant. I directed that the Memorandum of Claim be amended within 14 days and set a mention for 10 June 2013. The Claimant was to serve the Respondent with a mention notice. Due to reasons which were not explained, the Amended Memorandum of Claim was not filed within the time I had directed.
6. On 10 June 2013 there was no appearance on behalf of the Respondent while Ms. Kimori appeared for the Claimant. Ms. Kimori informed me that an Amended Memorandum of Claim had been filed out of time and I admitted the same out of time and directed the Respondent to be served and set a mention for 24 June 2013.
7. On 19 June 2013 an affidavit of service sworn by George Chaka Kengo was filed. It deposed to the fact that the Respondent had been served with a Notice of Appointment of Advocate and Amended Memorandum of Claim which were acknowledged by signature of one Amadi and Respondent's stamp. Copies were exhibited.
8. On 24 June 2013, having satisfied myself that the Respondent had been served, I ordered that the Cause proceed to hearing on 10 July 2013. The Cause proceeded as an undefended Cause as the Respondent had not filed any Memorandum of Response.

9. In the Amended Memorandum of Claim, the issue in dispute was stated as wrongful dismissal and it was pleaded that the Claimant was employed by the Respondent as a mechanic in March 2008 at a monthly salary of Kshs 6,000/- which was increased to Kshs 8,900/- after three years and that he worked on Sundays and public holidays without extra compensation.
10. It was also pleaded that the Claimant was run over by a fuel tanker while on duty on 25 October 2010, rushed and admitted in hospital for 11 days and that in August 2012 the Claimant was dismissed without regard to the governing laws.
11. The Claimant sought general damages for wrongful termination, special damages and terminal dues.

The evidence

12. The Claimant gave sworn testimony and stated that he was employed by the Respondent sometime in 2008 as a mechanic at a salary of Kshs 6,000/- per month. The salary was later increased to Kshs 8,900/- per month.
13. On 25 October 2010 the Claimant reported to work as usual and was assigned duties to repair a vehicle which had a problem with a booster brake. While working on the booster brake, the Claimant was hit by the booster and was rushed to hospital where he stayed for nearly 11 days.
14. After the admission, the Claimant continued to go for medical check ups and only reported back to work after about one year, but he was informed that he was no longer employed by the Respondent.
15. The Claimant further testified that he was not issued with a letter of appointment and that he used to be paid through petty cash voucher and he produced vouchers dated 30 August 2008, 31 March 2009, 30 April 2009, 31 March 2010 and 31 January 2011.
16. The Claimant further testified that he was dismissed without notice or reasons and therefore he was seeking one month pay in lieu of notice, unpaid salary for August 2012, off days and holidays for 6 years and severance pay all totaling Kshs 66,020/-.

Issues for determination

17. The Respondent did not file a Response but that does not mean that the case for the Claimant stands proved. From the pleadings and testimony of the Claimant the main issue is whether the Claimant was wrongfully terminated and if the answer is in the positive what would be appropriate relief.

Evaluation

18. The primary statutory burden in a complaint of unfair termination or wrongful dismissal is in section 47(5) of the Employment Act. The section provide that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

19. I must examine whether the Claimant has discharged the burden placed upon him by the statute. The Claimant stated in evidence that he was not given a notice or reasons for his dismissal.
20. In his testimony the Claimant did not mention who in particular informed him that he was no longer an employee of the Respondent. There was no evidence under what circumstances the information about the dismissal reached the Claimant.
21. Further there was an unexplained incongruence between the pleadings and the testimony. The pleadings set out that the Claimant was run over by a fuel tanker. In testimony, the Claimant stated that he was injured by a brake booster. The Notice by an Employer of an Occupational Accident produced as an exhibit by the Claimant notified the Directorate of Occupational Safety and Health Services that the Claimant had been hit by a brake booster.
22. The Claimant also stated in evidence he was not reporting to work for nearly a year. There was no

mention on how he was being paid his salary during this period. He only claimed salary for August 2012.

23.The Claimant had the benefit of legal representation. His case was not properly pleaded nor sufficient evidence laid before the Court to enable it reach a conclusion that the dismissal was wrongful.

24.The cause was prosecuted in a most dilatory way. Causes are determined on the basis of pleadings and evidence placed before the Court. This applies even in undefended Causes and the parties should not assume that because a Cause is undefended the obligation to discharge the statutory obligation upon the party is lowered.

Conclusion

25.Considering what has been stated above it is my considered view that the Claimant did not meet the statutory threshold expected in a complaint of unfair termination or wrongful dismissal and I therefore dismiss the Cause with no order as to costs.

Delivered, dated and signed in Mombasa on this 30th day of August 2013.

Justice Radido Stephen

Judge

Appearances

Ms. Mbulika instructed by Robson Harris & Co. advocates for Claimant

Respondent did not file Response or appear at hearing.