



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 855 OF 2011

GEOFFREY KARIUKI MWANIKICLAIMANT

-VERSUS-

MANAGING DIRECTOR NANAK TRUCKING CO. LTD.RESPONDENT

Nyabena for Claimant

M/s. Gitonga for Respondent

JUDGMENT

The Claimant *Geoffrey Kariuki Mwaniki* brought this suit by way of a Memorandum of claim on 2nd June, 2011 seeking orders for payment of terminal benefits and maxim compensation for unlawful dismissal.

The Respondent filed their Statement of Defence on 29th June, 2011 which statement was last amended on 28th November, 2012 denying the claim in its totality contending that the Claimant was not dismissed but absconded from duty.

Both parties adduced sworn evidence in support of their respective positions.

The issue for determination is whether the Claimant's employment was terminated by the Respondent, and if so, whether the termination was for a justifiable reason. Flowing from that is also the remedies if any, available to the Claimant.

It is common cause that the Claimant was employed by the Respondent on 5th January, 2008 in the position of a truck driver at a monthly salary of Kshs.15,000/= which was later increased to Kshs.18,000/= per month.

The letter of appointment and salary slips are attached as appendices GMK 1(a) and GMK 1(b) to the Claimant's Memorandum of claim.

The Claimant told the court in his evidence-in-chief that he served the Respondent faithfully and diligently until 14th February, 2011, when the Respondent wrongfully terminated the Claimant's employment by neither giving him notice nor reasons for the dismissal. The Claimant has also not been paid any terminal benefits.

The Claimant denies the allegations by the Respondent that he absconded from work. He has explained that, he was driving from Kampala, Uganda when the motor vehicle he was driving broke down at Burnt Forest hence causing the delay to arrive in Nairobi as scheduled and that he had communicated this predicament to the Respondent's manager. That when he eventually arrived at his work place, the Respondent dismissed him summarily.

The Claimant added that the allegations of absconding were but an afterthought manufactured for the purpose of the court case. That these allegations were not conveyed to the Claimant prior to the termination of his employment.

The Claimant therefore seeks payment of;

- a. One month's salary in lieu of notice in the sum of Kshs.18,000/=;
- b. Kshs.52,200/= in lieu of leave days not taken;
- c. Refund of monies used to fuel the truck to and from Kampala in the sum of Kshs.60,000/=;
- d. Refund of parking fees in the sum of Kshs.2,100/;
- e. Statutory dues deducted and not remitted to NSSF and NHIF; and
- f. Respondent to issue certificate of service to the Claimant and meet the costs of the suit.

With regard to the specific claims, the Claimant testified as follows;

Notice pay.

That he was summarily dismissed without notice and was not paid in lieu thereof and is therefore entitled to one month's salary in lieu of notice. The Respondent instead states that the Claimant ought to pay to the Respondent Kshs.15,000/= in lieu of notice for absconding duty.

Leave.

That for the four (4) years he served the Respondent he was never granted leave nor was he paid in lieu thereof. He was entitled to 21 days leave for each year of service and claims payment in respect thereof.

NSSF and NHIF.

That the Respondent deducted statutory dues from his salary and he did not remit as required by the law. The court should direct him to remit accordingly for the four (4) years of service and file evidence with the court of such remittance.

Parking Fees.

Claimant told the court that he spent his own money for parking of the Respondent's motor vehicle. That he was usually given Kshs.500/= parking fees for the entire journey from Mombasa through Nairobi to Kampala and this amount was not sufficient.

In this last journey, the Claimant left Nairobi on 26th January and returned back to Nairobi on 14th February, 2011. This totals about 20 days and the Kshs.500/= allowance could not cover the parking fees for the entire journey. The Claimant has attached some of the parking receipts marked GMK4 to the Memorandum of claim. The Claimant seeks refund of Kshs.2,100/= in respect of parking fees.

Fueling Refund.

The Claimant told the court that he had spent Kshs.60,000/= from his own money for fuel charges while under the Respondent's employment when he was transporting goods to Kampala. He told the court that he had informed the Respondent that the truck KAW 815J had developed mechanical problems and was consuming excessive fuel but the Respondent had ignored this information. As a result, the Claimant on several trips spent his own money to fuel the truck. The Claimant has attached fuel receipts and marked them as appendix GMK 3 and GMK 4(i) and (ii) as proof of the payments made. The receipts cover various journeys but only sought payment in respect of those that remained unpaid.

Certificate of Service.

The Claimant was summarily dismissed and was not issued with a Certificate of service making it difficult for him to obtain alternative employment. He seeks the court to direct the Respondent to issue him with a Certificate of service in terms of **Section 51** of the Employment Act.

Compensation for unlawful dismissal.

The Claimant states that the summary dismissal was uncalled for and totally unjustified. He denies that he absconded from work and seeks maxim compensation in respect thereof.

In the Amended statement of Defence dated 28th September, 2012, the Respondent denies the claims by the Claimant entirely stating in the main that the Claimant absconded from work while on a trip from Kampala and as a result he is not entitled to payment in lieu of notice, and compensation for unlawful dismissal because he left the employment on his own volition on 11th February, 2011.

With respect to NHIF and NSSF contributions, the Respondent states that it had paid all the statutory deductions as illustrated by Appendix 5 to the Statement of Defence except with respect to NHIF, payments for February, March, April and May 2010 in the sum of Kshs.960/=-, which it was ready and willing to remit.

With respect to NSSF, the Respondent stated that it had remitted all dues except in respect of January, 2011 in the sum of Kshs.400/=-. The Respondent was also ready to remit the same forthwith.

Severance pay.

With regard to the claim for severance pay the Respondent submits that the Claimant is not entitled to it firstly because he is registered with NSSF and all contributions except in respect of one month have been remitted. Secondly the Claimant served the Respondent from 5th May, 2008 up to 5th September, 2009 when he absconded and was reinstated on 25th February, 2010 after pleading with management that he was sick. He has therefore not served the Respondent for four (4) years continuously as he alleges.

The Respondent reiterates that, this time round, the Claimant had absconded again and his employment was not terminated.

Compensation.

The Respondent urges the court to find that, Claimant absconded from work and is not entitled to any compensation at all. That the entire suit be dismissed with costs.

Conclusions of law and fact.

Upon a thorough analysis of the pleadings, the oral and documentary evidence presented and the final submissions by the parties, the court has arrived at the following conclusions of law and facts;

Severance pay & claims for NSSF and NHIF.

It is common cause that the Claimant was registered with NSSF and NHIF. From the records produced, the Respondent had remitted all contributions except for the months admitted herein in the sum of Kshs.1,360/=. The court directs the Respondent to remit the said arrears forthwith and provide evidence of such remittance within 30 days from the date of this judgment.

With regard to the claim for severance, **Section 35 (6) (d)** exempts payment of severance pay under **Section 35 (5) (5)** for employees registered with NSSF. Accordingly, the Claimant is not entitled to the claim for severance pay and the same is dismissed.

Leave pay.

Regarding the claim for payment in lieu of leave in the sum of Kshs.52,200/= the Claimant told the court that he worked continuously and was denied leave whenever he asked for it. **Section 28** of the Employment Act, 2007 provides:

“(1) An employee shall be entitled –

- a. **after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;”**

Subsection 28 (3) makes it mandatory for that leave to

“consist of at least two uninterrupted working weeks.”

Furthermore, **Section 74 (1) (f)** compels the employer to keep a written record

“of an employee’s annual leave entitlement

days taken and days due specified in section 28.”

It follows therefore, where an employee alleges that he/she was not granted leave, the burden of rebuttal shifts to the employer to show that the employee took leave. To discharge the evidentially burden of rebuttal, the employer must produce the records in terms of **Section 74 (1) (f)** of the Act, failing which the court is entitled to make an adverse assumption that leave was not granted.

The Respondent in this case did not produce written records of leave entitlement and leave taken by the Claimant. The Respondent only produced a letter by the Claimant which is undated asking for two months leave for unspecified period and it has several writings on it which include an approval on 20th January, 2011. The Claimant left work on 14th February, 2011 and could not have taken the purported leave. Accordingly the Respondent has failed to discharge its burden of rebuttal.

The court finds that the Claimant has on a balance of probabilities proven that he was not granted leave for the four (4) years he served the Respondent. The total leave entitlement for the period is 72 days. The court finds that he is owed Kshs.52,200/= in lieu of leave not taken.

Fuel and parking costs.

The evidence by the Claimant regarding Kshs.60,000/= he spent fueling the truck is not very clear. The receipts he produced did not bring much clarity into the matter. The Respondent gave evidence to the effect that its trucks are fueled in specific petrol stations and mostly using a card system. The court

failed to appreciate why the Claimant who earned a monthly salary of Kshs.18,000/= would spend Kshs.60,000/= to fuel the Respondent's truck.

The court found the evidence of the Claimant in this respect not candid and doubts its veracity. Accordingly the claim for Kshs.60,000/= in respect of fuel refund is refused. However, the court appreciates that in the long journey the Claimant undertook, a parking allowance of Kshs.500/= per truck was not sufficient.

From the evidence adduced by both parties, the court is satisfied that the Claimant had spent Kshs.2,100/= to pay for the various parking of the truck he drove and awards him a refund accordingly.

Certificate of service.

In terms of **Section 51 (1)** of the Employment Act, it is mandatory for an employer to issue an employee a Certificate of Service upon termination of his employment unless the employment was for less than four (4) consecutive weeks.

Indeed in terms of **subsection 51 (3)** an employee who wilfully or by neglect fails to issue an employee with a Certificate of Service or who in a Certificate of Service includes a statement which he knows to be false commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

It is worrying that many employers are ignorant of the provisions of **Section 51** of the Employment Act and its serious consequences because in many cases that come before us, the employees have not been issued with Certificate of Service.

The consequence of this omission, is that many employees whose employment has been terminated for whatever reason, find it extremely difficult to get new employment since prospective employers almost always demand a record of previous employment. The Labour officers are exalted to crack the whip in this regard.

The court directs the Respondent to issue the Claimant with an appropriate Certificate of Service forthwith.

Wrongful termination, notice pay and compensation.

With regard to the claim for compensation for unlawful dismissal, there is competing evidence from the Claimant on the one hand and the Respondent on the other.

The Claimant tells the court that on 14th February, 2011, his truck developed problems at Eldoret while on his way to Nairobi from Kampala. That he informed the Human Resource Manager Mr. Joshua about it via an sms and he was recalled to Nairobi and a replacement driver sent to collect the truck. Upon arrival at Nairobi office, he was sent home and told he would be called back. That was the last day he worked for the Respondent because he was not called back and his efforts to get back were thwarted by the Respondent.

That he never got any letter of termination nor any reasons for the dismissal. This happened on 14th February, 2011. That he was not charged with any misconduct, nor was any disciplinary hearing held to warrant such a dismissal. That he was not paid any terminal benefits and he has suffered loss and damage as a result of the unlawful conduct of the Respondent.

On the other hand the Respondent through its witness **George Omondi Owiti** the Administrative Assistant of the Respondent told the court that on 14th February, 2011 the Claimant abandoned his truck at Eldoret and absconded from work. No letter was produced in this respect.

After a careful analysis of the competing evidence the court finds that the Claimant has established on a

balance of probabilities that he was summoned to Nairobi on 14th February, 2011 when his truck got stuck in Eldoret and was sent home.

That the Respondent never recalled him back. That no disciplinary action was taken against him nor was he provided with any reasons for the termination.

Accordingly, it is the court's considered view that the summary dismissal of the Claimant was unlawful and unfair, the claimant having discharged his onus in terms of **Section 47 (5)** of the Employment Act 2012 and the Respondent has failed to provide any justification for the dismissal.

The court finds further that the summary dismissal of the Claimant by the Respondent was contrary to **Section 45 (1)** of the Employment Act, as it was done unfairly in that no valid reason was provided in terms of **Section 45 (2) (a)** and the termination was in terms of unfair procedure in terms of **subsection 2 (c)** thereof. The Claimant is therefore entitled to payment in lieu of notice in the sum of Kshs.18,000/= in terms of the provisions of the Employment Act.

The Claimant has suffered loss of livelihood consequent to an unlawful decision by the Respondent. He was not paid any terminal benefits and was disempowered by the failure by the Respondent to provide him with a Certificate of Service.

The court taking all the circumstances of the case into account awards him ten (10) months salary as compensation for unlawful dismissal in terms of **Section 49 (1) (c)** of the Employment Act 2007.

In the final analysis the Respondent is directed to pay the Claimant;

1. Kshs.18,000/= in lieu of notice.
2. Kshs.52,200/= in lieu of leave.
3. Kshs.2,100/= being refund for parking.
4. Kshs.180,000 being 10 months salary compensation for unlawful and unfair dismissal;
5. and cost of the suit; further the Respondent is to
6. issue a Certificate of Service to the Claimant forthwith.

It is so ordered.

Dated and delivered at Nairobi this 18th day of October, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE