



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
CAUSE NO. 99 OF 2012

OMARI KHAMISI KOMBO.....CLAIMANT

VERSUS

ABDULRAZAK KHALSFIN.....RESPONDENT

J U D G M E N T

The claimant has brought this suit against the respondent claiming terminal dues plus damages for wrongful termination. The respondent has denied liability and accused the claimant for absconding work without any notice. The suit was heard on 27/5/2013 and 31/5/2013 when the claimant and the respondent testified as CW1 and Rw1 respectively.

CW1 told the court that he was employed by the respondent on 4/9/2004 as a driver by an oral agreement. His salary was ksh.7000 but later it was increased to kshs.8000/. On 15/7/2009 the respondent gave him leave while he was going away to Canada until 13/8/2009. That on 12/8/2009 he was told by a fellow workmate that the caretaker of Rw1 home was looking for him because a motor vehicle had been stolen. That he went to see the caretaker and explained to him that he knew nothing about the car theft. That the following day 13/8/2009 he reported back to work accompanied by his wife but the Rw1 told him to come back on 17/8/2009 because he was busy. That on 17/8/2009 he never found Rw1 at his home but was referred to his office at Ganjoni. On reaching the office RW1 told him to wait for insurance people to record a statement.

At 3pm police officer came accompanied by the boss of the security guards for the RW1's home and arrested him. That he was later charged with criminal case number 2737 of 2009 and was released on bond. That after his release on bond he returned to work but was not allowed back by the security guards with RW1's instructions. That he continued with the trial until 7/12/2011 when he was acquitted as per the proceedings produced in court.

That subsequently he returned to work but again he was not allowed back to work. He was never given any termination letter nor was he paid his terminal dues. He prayed for 3 months salary in lieu of notice, salary accruing for the period when the case was being heard until its completion. He also prayed for certificate of service. He further prayed for ksh.86000 being advocates fees which he paid during the criminal trial of the criminal case. He contended that he was never given a hearing before dismissal.

RW1 admitted that the CW1 was his driver from September 2004 to 2009. that in July 2009 he went to Canada and gave the CW1 leave to resume work on 12/8/2009. That before he left he paid to the CW1 his leave dues and salary of ksh.8000/-. While abroad he was notified by his landlord that his car registration number KAX 923 Toyota platz was missing from his residence at Kizingo. He called his partner Mr. Jiwaji and requested him to report the matter to the police.

When he returned from abroad he called the incharge of the security company which was guarding his premises 24 hours. On the 13/8/2009 the claimant come to see him accompanied by his wife and told him that he learnt about the theft of the car through the caretaker and a workmate Mr. Khamisi. That he told him to return on 17/8/2009 because he was tied due to the journey from abroad. That when the claimant reported on 17/8/2009 he was arrested by police in the company of the security guards boss and was later charged in court. That he never talked to the claimant again or heard from him ever since. He denied that the claimant came to his premises 3 times because the guards never told him about it.

He denied reporting the criminal case to the police. He confirmed that when he left for Canada the car keys were in his custody. He denied ever dismissing the claimant from work and accused him of not returning to work after the arrest and which forced him to employ another driver. He also denied the claimants entitlement to any dues in respect of his employment or his criminal prosecution.

On cross examination he admitted that there was oral agreement that the employment was terminable by one month prior notice. He also admitted that the claimant came to see him because he learned that he was back to Kenya. He also admitted that the premises was guarded 24 hours and it had an electric fence around it. He further admitted that he never paid service pay to the claimant for the 5 years worked but maintained that he paid him salary for July and August 2009 in advance.

He did not however give him any payslips. He also admitted he never used to pay NSSF or pension for the claimant. After the close of the hearing both parties filed written submissions.

I have carefully read the pleadings and considered the evidence and the submissions and the issues that arise therefrom for determination are;

- a. **whether the court had jurisdiction to determine the suit.**
- b. **Whether the claimants employment was terminated by himself or the respondent.**
- c. **Whether the termination of claimant's employment was wrongful.**
- d. **Whether the claimant is entitled to the reliefs sought.**

The answer to the first issue lies in the preamble to the industrial Court Act and Section 12 of the said Act. The preamble states

“An Act of parliament to establish the Industrial Court ...

to confer jurisdiction on the court with respect to employment and labour relations and for connected purposes”

Section 12(i) provides

“the court shall have exclusive original and appellate jurisdiction to have and determine all disputes...relating to employment and labour relations”

The foregoing quotation clearly maps out the extended jurisdiction of the court to cover disputes which are related to employment and labour relations. In the present case the remedies sought include employment terminal dues and damages in the form of laws fees incurred in a criminal case where the respondent was the complainant. It however has to be clarified that the criminal case did not relate to the employment relationship between the claimant and the respondent. The typed proceedings and judgment produced during the hearing show that the alleged car theft occurred when the claimant was on leave and that his arrest. I also believe the testimony of the RW1 that the arrest and charges were done by other

people over whom he had no control namely the police and the security company which guarded the respondents premises.

Consequently the court has no jurisdiction to entertain the claim for damages for malicious prosecution in relations to criminal case number 2737 of 2009 and it is therefore struck out. The court however has jurisdiction to entertain the claim for terminal dues because that definitely is a claim based on the parties employment relationship.

The second issue to consider is who between the two parties herein did terminate the employment contract. The claimant alleges that he reported back to work after RW1 returned from Canada but he was not given any car to drive or shown any other work to do. Instead he was arrested from the RW1's office and charged with criminal case. That when he was released on bond he reported to work but he was denied entry to the respondents premises by guards on instructions from RW1. That after he was acquitted, the claimant alleged that he went back to work but was denied entry by the guards on instruction from RW1. The RW1 denied receiving any information from the guards that the claimant had come to see him. He also admitted that he never asked him to resume work when they met in court during the hearing of the criminal case.

The court was left to evaluate the evidence of the two parties only because they did not call any witnesses. The court will not agree with either party. Instead the court finds that the employment contract was terminated through frustration. The court finds that the arrest of the claimant by police and security company for an alleged offence committed during leave time prevented both parties to this suit from performing their part of the contract without any other evidence to the contrary, the court reaches the reasonable conclusion that the claimant never returned work due to the charges he was facing and the respondent could not provide work and pay to an absentee worker. In addition, the court noted from the proceedings adduced that the respondent's car of which the claimant was employed is the one which was stolen and therefore the subject matter of the contract had been lost in circumstances which none of the parties herein is to blame.

Consequently the answer to the second issue for determination is that non of the two parties herein was to blame for the termination of the employment contract. In view of the foregoing finding, the court holds that the termination of the claimants cannot be deemed to have been wrongful. The court takes judicial notice that for termination to be wrongful, one of the parties to the employment contract must be guilty of breach of a term of the said contract. That is not the case in this case as already found above.

As regards the fourth issue of the reliefs sought, the court has already struck out the claim for damages for malicious prosecution. The prayer for notice pay is also dismissed in view of the findings on the 2nd and 3rd issues above. The claimant is also not entitled to the prayer for loss of earnings for period after august 2009 for lack of proof. The court has also considered the prayer for gratuity for 8 years of service. No evidence had been adduced to prove that the claimant was entitled to any gratuity by virtue of his service within the meaning of Section 35(b) of the Employment Act. If at all he intended to claim service pay under Section 35(5) then there was opportunity to make such a prayer from the beginning or by amendment before judgment.

The final order of the court therefore is that the suit is dismissed without costs.

Signed dated and delivered this 4th October 2013.

ONESMUS MAKAU

JUDGE

