



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1045 OF 2011

BENEDICT MUSYOKA MUTIE.....CLAIMANT

VS

PAYLESS CAR HIRE & TOURS LIMITED.....RESPONDENT

AWARD

Introduction

1. On 4th July 2011, the Claimant filed a Memorandum of claim vide which he sued the Respondent for wrongful and unfair termination of employment. The Respondent filed a Reply on 5th September 2011 and the matter was heard on 8th July 2013. The Claimant appeared in person while the Respondent was represented by Kelvin Mogeni, Advocates. The Claimant testified on his own behalf and the Respondent called its Managing Director, Jai Radia.

The Claimant’s Case

2. The Claimant was employed by the Respondent on 18th August 2009 in the position of Driver at a monthly salary of Kshs. 15,000. He worked as such until 18th September 2009 when the Respondent terminated his employment on allegations that he had incurred revenue loss.

3. The Claimant testified that on 17th September 2009, he was arrested for the traffic offence of obstruction. He was subsequently charged in Court on 18th September 2009 and having pleaded guilty was fined Kshs. 5,000. When he went to work on 19th September 2009, he was issued with a dismissal letter.

4. According to the dismissal letter, the Claimant had incurred a revenue shortage of Kshs. 2,540. It was the Claimant’s case that he had no access to the cash box in the bus whose key was kept in the Head Office. He was only responsible for the smart cards. Prior to his dismissal, the Claimant was not given an opportunity to be heard.

5. The Claimant therefore claimed the following:

- a. Notice pay.....Kshs. 15,000
- b. Salary for the month worked.....15,000

- c. 12 months' salary in compensation for unfair termination....180,000
- d. Costs and interest
- e. Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Reply, the Respondent admitted employing the Claimant as a driver at a monthly salary of Kshs. 15,000. The Respondent further admitted terminating the Claimant's employment on 18th September 2009, for breach of employment contract.

7. The Respondent's Managing Director, Jai Radia testified that the cash shortage of Kshs. 2,540 which led to the Claimant's summary dismissal was confirmed from the smart card stock. Radia explained to the Court that the smart bus had a driver's machine that could only be operated by the driver. Information from the machine would be relayed to the Respondent's office through an automated system which would generate a daily cashiering report. Sometimes the driver would handle cash in cases where a customer needed change.

8. Radia told the Court that he was not aware that the Claimant had been charged and convicted of a traffic offence although the matter might have been reported to the Respondent's Human Resource Department. Radia added that the Respondent was willing to pay the Claimant for the days worked less the cash shortage of Kshs. 2,540 subject to the Claimant returning Company property in his possession.

Findings and Determination

9. In the written submissions filed on behalf of the Respondent on 17th July 2013, Counsel submitted that the Claimant had worked for less than one month and was still on probation at the time of his termination and was therefore not entitled to any benefits under the Employment Act, 2007.

10. However, according to the pleadings filed in Court by the parties, the Claimant's employment commenced on 18th August 2009 and terminated on 18th September 2009, which translated to a service period of one month. Further, the Claimant's employment contract did not make any reference to a probation period and a probationary contract as envisaged in Sections 2 and 42 of the Employment Act, 2007 cannot therefore be inferred.

11. The Court is also aware of the 13 months' continuous service threshold set in Section 45(3) of the Employment Act, 2007 with respect to complaints for unfair termination. I am however persuaded by the decision of Lenaola J in the case of **Samuel G. Momanyi Vs. the Hon. Attorney General & SDV Transami Kenya Ltd [2012 eKLR]** in which he declared the said Section 45(3) unconstitutional in as far as it seeks to deny employees who have served for less than thirteen months the right to sue for unfair termination of employment.

12. I will now examine the Claimant's claim within the legal beacons set out above. The Claimant claimed that the termination of his employment by way of summary dismissal was unfair and sought compensation.

13. Section 45 (2) provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

14. The reason advanced by the Respondent for summarily dismissing the Claimant was an alleged loss of cash amounting to Kshs. 2,540 and the Respondent’s witness, Jai Radia told the Court that the Respondent operated a system which generated daily cashiering reports through which the Respondent detected the cash shortage. There was however no evidence to show the shortage and the Court was therefore unable to verify the Respondent’s allegations against the Claimant.

15. Moreover, there was no evidence that the Claimant was given an opportunity to be heard as required under Section 41(1) and (2) of the Employment Act, 2007. I therefore find the termination of the Claimant’s employment by way of summary dismissal unfair within the meaning of Section 45 of the Act and award him one month’s salary in compensation. I also award him one month’s salary in lieu of notice as well as salary for the month worked.

16. The final effect of this Award is as follows:

- a. One month’s salary in compensation for unfair termination Kshs. 15,000
- b. One month’s salary in lieu of notice.....15,000
- c. Salary for the month worked.....15,000

Total.....45,000

17. In view of my finding that the allegation of cash shortage was not proved, the Respondent is not entitled to make any recoveries from the Award amount, save for statutory tax. Payment of the Award amount is subject to the Claimant handing over all assets belonging to the Respondent that are in his possession.

Each party will bear their own costs.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF OCTOBER 2013

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*

