



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2272 OF 2012

(Before D.K.N. Marete)

BERNARD SHISIALI MUHATIACLAIMANT

Versus

SPEEDEX LOGISTICS LTD..... RESPONDENT

JUDGEMENT

This matter came to court vide a memorandum of claim dated 12th November, 2012. The issues in dispute are therein expressed as,

1. **Unfair termination**
2. **Failure to pay claimant’s dues**

The respondent in an Amended Statement of Response denied the claim and prays that the same be dismissed with costs.

The claimant’s case is that he was employed by the respondent on 1st January, 2009 as a rider. This was on permanent terms and he was issued with a letter of appointment dated 25th October, 2010. On 30th October, 2012 his services were terminated. At the time of such termination, he earned Ksh.19,788.00 per month.

The claimant states that on termination of employment he was paid a consolidated salary of Ksh.39,010.00 and during the term of his employment he had not been issued with a letter of warning or complaint concerning his work. The letter of termination only stated that the reason for termination was due to an accident he was involved in while on duty. The accident, he submits, did not in any way incapacitate him from performance of his duties and was therefore no sufficient ground for termination of services. Despite the unfair termination, he was not paid all his dues and the quest for the same has been futile.

He prays as follows;

Salary for October 2012

Ksh.19,788.00

Prorata Leave for 2012 =

Total Months worked x 1.75 x Basic Pay

30

10 x 1.75 x 19,788 = = **Ksh.11,543.00**

30

Service pay = (Basic salary x Years worked x 15)

30

19,788 x 4 x 15 = = **Ksh.39,576.00**

30

Compensation for unfair

Termination (12 x 19,788) = = **Ksh.23,7456.00**

TOTAL

=

Ksh.277,032.00

Less

Ksh.39,010.00

=

Ksh.238,022.00

The claimant in his memorandum of claim further submits that he was a hard worker for a period of three years and ten months and that his termination of employment was contrary to the Employment Act, 2007 and the process also subjected him to unfair working conditions including declining to cater for his treatment well knowing that he had been injured while on duty.

The respondent admits employment of the claimant as a rider on the terms of the letter of appointment dated 25th October, 2010 which employment had commenced on 1st January, 2009. He was a rider and his starting salary was Ksh.12,659.00

The respondent denies that the claimant was a superb worker as claimed. Instead he had been given several warnings prior to termination. In one instance, he had signed an LPO for fuel without authority from the respondent's management and the company had issued him with a final warning. He had engaged in misconduct like reporting to work late and misusing fuel and the respondent complained and warned him severally. He also had an official motorbike missing without proper explanation on his part and was severally found in places that were not assigned for his duty. He was issued with reasons for termination as follows;

'The Respondent denies the contents of paragraph 9 of the Memorandum of Claim and avers that, it is not the Claimant's accident which formed the basis of termination and that it duly briefed the Claimant the reasons of his termination being; his habitual behavior of reporting to work late contrary to the time provided for under the Employment contract and signing LPO for fuel without authority from the management of the company.'

The accident was therefore not the ground of termination. He was paid his full entitlement in law and was

fairly terminated and is therefore not entitled to this claim. He was a con worker who used the accident to blackmail and take undue advantage of the respondent by demanding undue sick offs. The respondent submits that the claimant, contrary to his submission was well taken care of in his malady and accident and denies allegations of neglect.

The matter variously came for hearing in court until the 6th May, 2013 when it was finally heard. CW 1, Bernard Shisiali Muhatia, the claimant testified and reiterated his case as expressed in the claim. He submitted that his claim is compensation for ten (10) months working period, the balance of three (3) years having been met. This was reiterated on cross-examination. At cross-examination, he denies being late for work and with difficulty attempts to explain the matter for the sick-offs. His truthfulness is tested in this cross-examination and comes out wanting. He also denies having been issued with any warning letters.

When the matter came for hearing on 27th August, 2013, DW 1, Adrian Muriithi Munyagia testified on behalf of the respondent. He testified that he was the respondent's Administration Manager and knew the claimant. He also reiterated and reinforced the defence case as expressed in the statement of response and submitted that the claimant was due for summary dismissal but this was humanely substituted for termination. He was paid for;

- Leave due and unutilized
- Payment in lieu of notice
- Service pay for 3 years

He had become erratic and unreliable after the accident. He was no longer useful as an employee and hence the termination. There was no record of attendance for the claimant in the two months after the accident.

The issues for determination therefore are;

1. Was the termination of the claimant's employment wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The face of the claim and defense offer a contradiction of terms and facts. It is a case of your word against mine. The claimant was issued with a letter of termination dated 30th October, 2012 which reads as follows;

'TERMINATION OF EMPLOYMENT

The Management regrets to inform that your employment with the company is hereby terminated w.e.f. 1st November, 2012. Your services as rider with the company is no longer tenable considering a recent accident. Consequently, the company will pay you one month in lieu of notice and full service accordingly. Kindly acknowledge receipt on the duplicate of this letter.'

The letter was brief and to the point. The claimant in evidence acknowledges receipt of Ksh.39,010.00 being final dues and signed in acknowledgement of the same but later and in evidence submits that he signed this out of desperation for cash, particularly for his treatment - See Appendix 5 of response. He now claims compensation for ten(10) months worked in 2012.

The record of court does not at all have a statement of response but an amended one. In this, the respondent introduces other issues other than the one stated in the letter of termination. Here, as earlier expressed in our analysis of the response, issues of gross misconduct, warning letters, missing motorbike and untruthfulness of the claimant are submitted. No copies of warning letters are however attached to the defence, or at all.

This court has the power to fill gaps left out in evidence by the parties. This is where the application of balance of probabilities and preponderance of evidence as principles of application and practice in civil law arise. There may not be clear cut or any evidence of warnings on the part of the defense. This is only pleaded and buttressed in the respondent's evidence and submissions. The claimant either does not deny or rebut this evidence by the respondent. The test of balance of probabilities would rightly be applicable to concretise the situation in view of the scanty evidence of the issues raised by the defense.

This matter has to be decided on the principle of balance of probabilities. That is, who of the two parties is most likely telling the truth in the circumstances? Which of the two cases is more probable? I find this in favour of the respondent. The respondent's testimony, pleadings and submission come out clearer and cleaner than the claimant's. It would appear that in the course of employment and particularly after the accident, the claimant became a malignant malingerer who was no longer useful to the respondent's establishment.

The prayers of the claim as are here below listed are not truthful or realistic in the least;

- a. Service for 3 years 10 months
- b. One month salary in lieu of notice
- c. Prorata Leave for the year 2012
- d. Interest on (b) and (c)

Any other relief this court may deem fit and just to grant

Costs of this suit

He wishes to be compensated for matters that had earlier been covered by the respondent's calculation of final dues at Appendix 5 of the response. This is not fair, or at all.

The entire claim is to me mischievous and appears an afterthought. How does one leave employment and take his terminal dues without raising a finger only to come back later and claim the same? This is not evidence of sincerity on the part of the claimant.

Section 45 of the Employment Act, 2007 sets out the law of unfair termination of employment. This would arise in situations where the employer inter alia fails to prove that the termination was for a fair reason, procedural or that he did not act in accordance with justice and equity. This was not the case here and therefore the conclusion that the termination was fair. The entirety of the S. 45 as cited hereunder does not seem frustrated in the circumstances of this case and therefore this court's conclusion on the subject.

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(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*
- c. *that the employment was terminated in accordance with fair procedure.*

- (3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*
- (4) *A termination of employment shall be unfair for the purposes of this Part where-*
- a. the termination is for one of the reasons specified in section 46; or*
 - b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*
- (5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-*
- a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*
 - b. the conduct and capability of the employee up to the date of termination;*
 - c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*
 - d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
 - e. the existence of any previous warning letters issued to the employee.*

I therefore make a finding that the termination of the claimant's employment was fair and dismiss the claim with costs to the respondent.

I also dismiss the respondent's claim (or is it counter-claim), for payment in lieu of notice. This was not clearly set out as a counter-claim and only came out in evidence at examination in chief. It is in the circumstances not sustainable.

This claim is therefore dismissed with costs to the respondent. And this answers all the issues for determination.

Dated, delivered and signed this 11th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Masaviru instructed by Masaviru K. Nelson Advocates for the claimant.
2. Mr. Kabiru instructed by Kabiru & Company Advocates for the respondent.