



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

CAUSE NO. 349 OF 2017

SOSPITA ABDALLA KISANYA.....CLAIMANT

VERSUS

INTEX CONSTRUCTION CO LTD.....RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 29th November, 2017. The respondent filed response on 27th March, 2018.
2. The matter came up for hearing directions on 23rd April, 2018 when the respondent was absent. A hearing date was allocated and directions issued for service upon the respondent for the 7th May, 2018. On the due date and despite being served and Affidavit of Service filed confirming service upon the respondent on 26th April, 2018 they opted not to attend the hearing.
3. The claimant was heard on his case.

Claim

4. The claimant's case is that he was employed as a Tipper Driver by the respondent company in October, 2007 until February, 2017 when his employment was unfairly terminated. He was not given any valid reasons; there was no fair procedure; terminal dues not paid particularly the leave days, overtime, notice due not paid and the house allowances payable not paid in accordance with the law. The claimant was also not paid his February, 2017 salary.
5. The claim is also that during employment the claimant worked overtime and public holidays and was not paid or given a rest day. He claims for;

Notice pay at Kshs.42, 854.00;

Unpaid February, 2017 salary kshs.42, 854.00;

Unpaid house allowance for February, 2017 Kshs.8, 571.00;

Severance pays Kshs.192, 843.00;

Leave dues Kshs.385, 68600;

Compensation Kshs.514, 248.00;

Unpaid rest days Kshs.647, 095.40; and

Costs of the suit.

6. The claimant testified in support of his claim.
7. In 2007 the claimant was employed by the respondent as a Driver where he worked diligently until 2009 when his contract was terminated. He was recalled back in 2012 to 2013 when he was laid off on the grounds that the respondent had no money.

8. The claimant was reemployed in 2014 to 2017 on the same job and terms at a salary of Kshs.42, 854.00 and house allowance of Kshs.8, 571.00 per month. Overtime was paid based on the work schedule. The promise to be paid a hardship allowance was never done.
9. In 2013 the vehicle the claimant was driving, Registration Number KBM 061P was defective and he reported this to the workshop manager who directed the claimant to continue at work and any other problem reported on the vehicle defects were brushed off. In January, 2017 the vehicle failed on the pressure system and this was reported to the manager, Isaac but he refused to repair it and decided to allocate the vehicle to another driver, James. After one day, James refused to drive the vehicle after noting the defects. The vehicle remains parked at the workshop.
10. The claimant also testified that on 25th February, 2017 he was served with a suspension letter dated 11th February, 2017. The claimant had a good work record but the manager, Isaac had always been against him. The work environment was no longer conducive.
11. The claimant was sent to the head office where he met the Human Resources Manager and where Mr Evans informed the claimant that a decision had been taken to terminate his employment without pay. There was no hearing or payment of terminal dues. The termination of employment was wrongful.
12. The claimant also testified that the respondent has attached a letter of termination alleged signed by him in acceptance but the signature is not his. He was never issued with such letter and what is filed is a fabrication.

Defence

13. In response the respondent's case is that the claimant was employed in November, 2014 and all his dues paid. All procedures and laws were followed in terminating his employment and on the grounds of poor work performance. The claimant was given a chance to appeal using the respondent internal procedures but failed to do so. The claims made are without justification and should be dismissed.
14. The respondent also filed a witness statement of Mr Evans Rutto Kaptum and who avers that as the acting human resource manager of the respondent he is aware that on 10th November, 2014 he claimant was employed by the respondent as a Tipper Driver and in October, 2016 he was issued with a warning letter due to poor work performance but failed to heed the same. On 18th February, 2017 a notice of termination was given to the claimant and also asked to hand over a satisfactory report as his exit requirement. The notice indicated how much the claimant was entitled to in terminal dues. The claimant did not dispute the same. The claimant was given a chance to appeal where he felt aggrieved by the respondent's decision to terminate his employment but failed to do so.
15. As the respondent was absent, the case closed.
16. The claimant has since filed his written submissions.

In the determination of the suit herein, all pleadings filed by the parties have been put into account, the statements and the written submissions filed by the claimant and the applicable law.

The issues which emerge for determination are;

Whether there is a case for unfair termination of employment;

Whether the remedies sought are due.

17. Part of the documents filed by the respondent is the letter terminating the claimant's employment dated 18th February, 2017. The claimant asserts that he was not issued with this letter and the signature thereon does not belong to him. The claimant however testified that he was called to the head office and Mr Evans informed him that a decision had been taken to terminate his employment without pay.
18. I take it whether oral or in writing, the claimant lost his employment after the meeting in the head office on 18th February, 2017. He claims that this was unfair termination as there was no valid reason and the respondent asserts termination of employment was as a result of poor work performance by the claimant. Warning had been issued but the claimant failed to take heed.
19. Termination of employment on the grounds of poor work performance is a matter treated very cautiously under the law. The rationale is that the employee is employed to undertake specific duties and where there is poor work performance; the employer must establish the cause and make effort to address the same. Such must be within an environment supportive of the employee so as to ensure the employee is able to go back to good performance and resume regular duties as initially employed to do.
20. Section 41(1) of the Employment Act 2007 therefore provides that;

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

21. Where there is poor performance, the employer is required to ensure procedural justice and before terminating employment. issue notice to the employee to explain why employment should not be terminated on the grounds of poor performance. The notice should therefore set out the reasons for which the employer is considering termination of employment and allow the employee a chance to give his defence. Such should be on the shop floor and in the presence of another employee chosen by the employee.

22. In the case of **Agnes Yahuma Digo versus PJ Petroleum Equipment Limited Industrial Cause Number 2049 of 2011 (21 February 2013)** Court held that:-

a. The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time.

b. An employer, who fails to manage the performance of their staff, lacks moral authority to tell the staff that they have underperformed.

23. He further sought to rely on the authority of **Jane Samba Mukala versus Ol Tukai Lodge Limited Industrial cause number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)** where the honourable court held that:-

a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

24. To address internal processes including work performance and disciplinary matters, an employer should have internal policies issued and addressed with employees at the time of employment. Such is to ensure the employees are aware and conversant with internal mechanism of addressing any arising matters with regard to their employment. By sharing such a policy in advance the employer is able to apply and objective process when work performance and disciplinary matters arise.

25. Section 5(8) (c) of the Employment Act, 2007 provides that;

*(c) an “**employment policy or practice**” includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures*

26. Also section 12 of the Act provides that;

(12) Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) Specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) Specify the person to whom the employee may apply—

(i) If dissatisfied with any disciplinary decision relating to the employee; and

(ii) For the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) Where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.

27. In this case, where the claimant is alleged to have been of poor performance, a warning was issued, the respondent as the employer has not demonstrated what measures were taken to address such poor performance. Even where there may have been any poor performance, the provisions of section 41 as set out above are mandatory. The claimant should have been issued with a show cause notice setting out the areas

of his poor performance and be allowed to argue his defence as to why he was unable to undertake his duties as required if at all. Such a hearing is regulated to be at the shop floor and in the presence of another representative of the claimant's choice. Such procedural safeguards were not adhered to in this case.

28. It was the claimant's evidence that he was driving motor vehicle Registration No.KBM 061P which had mechanical problems and were reported to his supervisor at the workshop. Such reports and defects were not addressed. The vehicle was given to another employee who made similar complaints as the claimant had done. The vehicle was then parked at the workshop.

29. The respondent has not addressed the reports made by the claimant with regard to complaints made to his vehicle and which in this case made him unable to undertake his duties. As a key tool for his trade as a driver, the failure to repair the vehicle the claimant was driving became a good cause for the respondent to address before issuing him with a letter terminating employment. Failure to address reported mechanical problems by the employer rendered the claimant unable to undertake his duties effectively. This cannot be visited upon him with termination of employment.

30. In this regard I agree with findings in the case of **Agnes Yahuma Digo versus PJ Petroleum Equipment Limited Industrial Cause Number 2049 of 2011** where the court held that;

a. The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time.

b. An employer, who fails to manage the performance of their staff, lacks moral authority to tell the staff that they have underperformed.

31. In this case, I find the termination of employment was wrongful, unfair and unlawful. This is because from the onset and at the hearing of the matter two things come out very clearly. The first one is that at all times the claimant was never afforded the requisite facilities and personnel to facilitate an acquisition of his performance targets as employed to work as a driver. Secondly, he was not afforded appropriate disciplinary process as is required by the law in the termination of his employment. I agree with his submissions that the respondent failed to comply with mandatory provisions of the law.

Remedies

32. On the finding that the claimant was unfairly terminated from his employment, compensation is due pursuant to the provisions of section 49 of the Employment Act, 2007. The claimant had worked under three (3) different terms, 2007 to 2009; 2012 to 2013; and 2014 to 2017. Termination of employment occurred within the last phase. At the time the claimant had worked for less than 3 years. Compensation of ten (10) months gross salary is hereby found appropriate and fair.

33. The latest pay statement filed by the claimant is the one for November, 2016 with a gross pay of Kshs.42,854.00 and house allowance at Kshs.8,571.00 all being Kshs.51,425.00 and awarded Kshs.514,250.00.

34. Notice pay is due in a case of procedural unfairness by failure to adhere to the provisions of section 41 of the Employment Act, 2007. Section 35 of the Act provides for one (1) months' notice pay. The claimant is awarded Kshs.51,425.00.

35. Salary due as at 18th February, 2017 is due. For the 18 days of work, the claimant is hereby awarded Kshs...30,855.00.

36. The claim for house allowance unpaid is put into account on the award for notice pay at the gross amount.

37. Leave due as claimed is on the basis that the claimant worked from 2007 to 2017 for a period of 9 years. The record and evidence is clear to the extent that the claimant worked for the respondent for 3 different phases. Each ended and the last was for less than 3 years. Leave due can only arise for the last phase. Section 28 of the Employment Act, 2007 provides for leave days at 21 days or payment in lieu thereof. Without the any work records to show leave was taken, and the letter of termination indicating that there was leave days owing, these dues shall be computed by the respondent and submitted for the confirmation by the court.

38. The gratuity payable shall also be computed by the respondent and confirmed in court.

39. On the claim for rest days, the claimant failed to clarify how this arose and the periods covered. This is crucial noting the different work contracts the claimant enjoyed with the respondent. Without clarity, this claim is declined.

40. Claim for severance pay is made but this case did not stand out as a matter falling under the provisions of section 40 of the Employment Act, 2007. Severance pay does not apply to the claimant.

Accordingly, judgement is entered for the claimant against the respondent with a declaration that termination of employment was unfair and the following awards follow;

(a) Compensation at Kshs.514,250.00;

(b) Notice pay Kshs.51,425.00;

(c) 18 days worked in February, 2017 Kshs.30,855.00;

(d) The respondent shall compute the leave and gratuity payable to the claimant within 14 days and file the same with the court for confirmation;

(e) The claimant shall be issued with a Certificate of Service;

(f) Costs to the claimant.

Delivered in open court at Eldoret this 31st day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Robert & Martin

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