



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 386 OF 2015

ISAAC FREDRICK OTONYO.....CLAIMANT

VS

KENFREIGHT (EA) LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a driver from 18.7.2001 earning kshs 29616 per month. He worked continuously until 6.11.2014 when he his employment was abruptly terminated by the respondent. That after the dismissal he was paid all his terminal dues save for his service pay as provided for under the Collective Bargaining Agreement (CBA). He now brings this suit claiming severance pay of ksh.162,888.

2. The respondent has denied liability for the alleged termination of the claimants employment and avers that it is the claimant who terminated his services through the resignation letter dated 6.6.2012. She further avers that the claimant is not entitled to any service pay both under the CBA and the Employment Act because he is the one who voluntarily resigned from his employment and also because he was a member of the NSSF and a beneficiary of the respondent's Pension scheme.

3. The suit was heard on 5.10.2015 when the claimant testified as Cw1 and the respondent called Mr. Elijah Ndeto as Rw1. Thereafter the parties filed written submissions.

Analysis and Determination

4. There is no dispute from the pleadings, evidence and submissions that the claimant was employed by the respondent on permanent basis upon the terms stipulated under a CBA. There is also no dispute that the claimant worked continuously for more than eleven years. The issues for determination are:-

- a. Whether the claimant resigned from employment or he was wrongfully terminated by the respondent.
- b. Whether the reliefs sought should be granted.

Resignation vs wrongful termination

5. Claimant stated in his testimony that his employment was terminated by the respondent but he gave no further details. He admitted that he wrote the letter dated 6.6. 2012 but denied that it was a resignation letter. Rw1 however denied the alleged termination and contended that it is the claimant who resigned by the letter dated 6.6.2012 citing torture by the Transport Manager and demanded to be paid his terminal dues. Rw1 however, admitted that he never investigated the alleged torture.

6. After careful consideration of the evidence adduced, the court finds on a balance of probability that the claimant resigned from employment by the letter dated 6.6.2012. The said resignation was not voluntary because he attributed the resignation to the unbearable conditions of work caused by the Transport Manager on behalf of the respondent. He cited corruption in the company and late night trips as unbearable to him and as the reason he had to differ with the said manager. Secondly, he accused the said manager of unprocedurally dispossessing him of the truck keys and giving them to another driver. Without the truck keys, the claimant was prevented from performing his part of the employment contract. For the foregoing reasons the claimant's involuntary resignation amounts to constructive termination by the respondent.

Reliefs

7. The only relief sought is for severance pay amounting to kshs.162,888 calculated at the rate of 15 days pay per completed year of service for 11 years. The said relief is based on clause 25 of the CBA which provides that:

“An employee, whose services are terminated under clause 25.0, above, will be eligible to the following:-

- a. One month notice salary and appropriate allowance up to the last day worked.***
- b. Prorate leave upto the date of termination.***
- c. Service of 15 days per each completed year worked.”***

8. The respondent has denied that the claimant is entitled to the relief for the reasons that he did not pray for the same and secondly that he is disqualified from claiming the same by the CBA and section 35(6) of the EA. According to Respondent the claimant prayed for severance which is only available for employees terminated on redundancy. She further contends that under clause 25 of the CBA an employee who resigns is disqualified from claiming service pay. That under section 35(6) of the EA, an employee who is a contributor to the NSSF and Pension Scheme is also disqualified from claiming service pay.

9. In view of the finding above that the claimant did not resign voluntarily but was constructively terminated by the respondent, the court finds he is entitled to service pay under clause 25 of the CBA if the relief is sought. Under section 26(2) of the EA an employee is entitled to any other right granted under CBA in addition to the minimum rights provided under the said Act. Consequently, the disqualification from service pay provided for under section 35(6) of the EA must be read subject to section 26(2)of the EA aforesaid.

10. The court has considered the rival submissions made by the parties on whether or not the clamant should be awarded service pay although he prayed for severance pay and finds no merits in the claimant's view. It is trite law that parties are bound by their pleadings and it is not the business of the court to aid the parties in perfecting their pleadings. Instead it is the duty of the parties through their counsel to ensure that they present accurate pleadings and then substantiate the same in evidence. Indeed the law has provided for amendment of pleadings to cure any defects and to fill any lacuna. Such

right to amend pleadings can be exercised at any stage of the proceedings before judgment.

11. In this case however the claimant deliberately failed and or neglected to amend the pleadings even after the defence raised the issued on 5.10.2015 when the suit came up hearing. Consequently, the court declines to grant service pay because it was not prayed for as a relief. The only prayer sought was for severance pay and the court agrees with the defence that such relief is only available to employees who are declared redundant. The claimant herein was not declared redundant and for that reason the prayer for severance pay is dismissed.

Disposition

12 For the reasons stated above suit is dismissed with no order as to costs.

Dated, signed and delivered this 11th day of December, 2015

ONESMUS MAKAU

JUDGE



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