



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.383 OF 2017

DAVID SIRENGE KIGANANE.....CLAIMANT

VERSUS

MEGA PACK (KENYA) LIMITED.....RESPONDENT

JUDGEMENT

The claim herein is based the facts that the claimant as employed by the respondent as a loader and then promoted as Corrugator and then quality controller. Employment was from 4th January, 2012 to 21st November, 2014 when the employment was wrongfully and unfairly terminated.

The claim is that the claimant was alleged to have taken part in leading as strike and being a supervisor was held culpable. The alleged industrial action was for agitation for the safer working conditions impressing upon the respondent to put in safety measures to prevent or at least minimise excessive heat emitted by the boilers in the corrugators and which heat was hazardous to the human resource working in the department and which the respondent had ignored and neglected to give negotiations a chance.

The claim is also that the industrial action by the claimant and other workers was done in good faith but the claimant was dismissed with his colleagues despite the right to assemble being a fundamental constitutional right.

The claimant was not paid his terminal dues. He is claiming for leave days not taken, overtime pay, service gratuity and compensation for unfair termination of employment.

- a) Leave from January 2012 to November, 2014 Ksh.28,175.00
- b) Overtime claim for 3 hours each day at ksh.213,444.00;
- c) Notice pay Ksh.11,011.00;
- d) Service gratuity Ksh.16,516.50;
- e) Compensation;
- f) And
- g) Costs.

The claimant testified that he worked diligently for the respondent and on 20th November, 2014 all employees went on strike during his shift. The strike resulted from long shifts and there was a boiler emitting fuses. A notice to strike had been issued and copied to the labour officer. Following the strike the claimant was called and without a hearing issued with letter terminating his employment on 21st November, 2014.

The terminal dues owing at the time were not paid

The defence is that the claimant was employed as trainee Quality Checker from 1st April, 2014 and had worked on distinct contracts. The claims made are without basis and should be dismissed with costs.

The defence is also that on 20th November, 2014 the claimant together with other employee stopped work and engaged in a strike without issuing the respondent notice of 7 days as required in law. Despite verbal appeals to resume work the claimant and other employee refused to heed and the summary dismissal was justified.

The defence is also that all employees including the claimant were entitled to 21 days of leave after 12 months of work and at the time of his summary dismissal the claimant he was paid Ksh.5,514.00. There is no notice or pay in lieu thereof due as the claimant was summarily dismissed.

The claimant was paid his terminal dues through a deposit to his bank account at Unitas Sacco Society Limited Account No.015009527 and the particulars of which are within his knowledge.

In evidence to support the defence the respondent called Eric Njenga Wagatwa the human resource manager and who testified that the claimant was on a 6 months contract for the duration of his employment with the respondent the last covering 1st April, 2014 but on 20th November, 2014 all employees including the claimant went on strike without notice or involving the labour officer and without the support of the trade union. He tried to summon the employees together with other managers to resume work but they refused and failed to take heed.

Mr Njenga also testified that the strike started during the claimant's shift and this affected the next shift. Despite efforts to negotiate, the employees including the claims refused. He posted a notice at the gate inviting the employees back to work at 10am until the next day and on 21st November, 2014 there was no work resumption by 12 noon. He posted another notice requiring work resumption by 3pm and a decision was taken to close the factory as 3pm. The claimant and other remained outside the gate singing, chanting and demanding to be paid their terminal dues.

Mr Njenga also testified that to avoid further damage and stoppage of production, the respondent decided to pay the striking employees. The each was called in the presence of the trade union representative and paid his dues. The claimant signed a discharge voucher with his terminal dues paid to his bank account.

Mr Njenga also testified that the respondent was running 3 shifts each day and there was no overtime work allowed and where such did happen, there was payment at month end.

At the close of the hearing both parties filed written submissions.

Section 47 of the Employment Act, 2007 (the Act) requires the employer to justify the grounds of termination, **Section 43** of the Act obliges the employer to prove the reasons for termination, **Section 45(2)(a) & (b)** of the Act requires an employer to prove that the reasons for termination were valid and fair reasons, and **Section 41(2)** of the Act that obligates the employer to hear and consider any representations an employee may wish to make where summary dismissal is envisaged for fundamental breach of contractual obligation or gross misconduct. See **Muthaiga Country Club versus Kudheih Workers [2017] eKLR** and in **Caliph O Ogega versus National Social Security Fund Cause 280 of 2013** where the court held:

Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... Due process must be followed.

At paragraph 6 and 7 of the Memorandum of Claim the claimant pleads that he participated in a strike to agitate for his rights at work together with other employees. In his evidence, the claimant admitted to these facts as pleaded and justified the same under his right to assembly and urge his constitutional rights.

Even where the right to assemble is a constitutional right, work stoppage in asserting such right is regulated in law and under section 76 of the Labour Relations Act, 2007. Stoppage of work can only be sanctioned by the court through a protected strike.

In the case of **Joash Alubale Jacob versus Mega Pack Limited [2019] eKLR** the court in addressing the provisions of section 76 of the Labour Relations Act, 2007 held that;

Section 46 of the Employment Act, 2007 has unique provisions which give protection to an employee who is engaged in the lawful activities of a trade union. ...

The provisions of section 46 of the Employment Act, 2007 must be read together with sections Part X (10) of the Labour Relations Act, 2007 to get the meaning and rationale for what constitutes lawful trade union activities and protected strikes. Under section 76 of the Labour Relations Act, 2007 allow for protected strikes and lock-outs as follows;

76. Protected strikes and lock-outs a person may participate in a strike or lock-out if—

(a) The trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

(b) The trade dispute is unresolved after conciliation—

(i) Under this Act; or

(ii) As specified in a registered collective agreement that provides for the private conciliation of disputes; and

(c) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of—

(i) The trade union, in the case of a strike;

(ii) The employer, group of employers of employers' organisation, in the case of a lock-out.

An employee cannot assert the right to strike outside the law. Where the industrial action is not protected, an employee who absents himself from work commits work place misconduct classified as gross misconduct under section 44 of the Act and cannot justify such conduct under the constitution on the right to assemble.

In this case, on the claimant's evidence that he failed to attend work and engaged in a strike, the respondent issued notices to resume work and he failed to take heed and proceeded to accept his terminal dues, the court finds the summary dismissal vide letter dated 21st November, 2014 was justified. No compensation or notice pay is due.

Mr Njenga also testified for the respondent that all efforts were made to have the employees and including the claimant resume work but they declined and proceeded to stage demonstrations outside the premises. He issued them with notice on 20th November, 2014 at 10am seeking them to attend work to no avail. The industrial action was not sanctioned by the trade union and when the employees were invited to take their dues, each attended and in the presence of the trade union representative.

The respondent thus discharged its duty under section 47 of the Act read together with sections 44 and 41(2) of the Act. The claimant invited the summary dismissal upon himself.

On the claims made, upon cross-examination, the claimant testified that there were 3 work shifts each day. To thus claim for overtime pay while the claimant worked in an 8 hours shift would be to seek unjust enrichment.

The claimant attached payment statement to his memorandum of claim and part of the dues paid with his wages are overtime and which varies each month. This put into account; the claims made for overtime pay are not justified.

On the claim for service gratuity, on the payment statements submitted by the claimant there is a deduction for NSSF and NHIF. On his contract there is no provision for service gratuity. There is no other private treaty or agreement giving the claimant the benefit of service gratuity outside what is provided in law with the payment of the statutory dues.

The claimant has signed the discharge voucher on 25th November, 2014 acknowledging payment of ksh.13,004.00 and being payment for wage due, house allowance due, leave balance pay and less absence from duty for 59.50 hours and statutory deductions all being Ksh.13,004.00. These dues have since been paid to the claimants account and which is not controverted.

The court finds no outstanding and unpaid dues.

Accordingly, the claims made are found without merit in their entirety and are hereby dismissed with costs to the respondent.

Delivered at Nakuru this 7th day of November, 2019.

M. MBAR?

JUDGE

In the presence of:.....