



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 438 OF 2014

PETER ODINGA NGOLO.....CLAIMANT

VERSUS

CHANDARIA INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 20th March, 2014 the claimant averred that he was employed by the respondent in May 2007 initially as a general worker and later as a machine attendant drawing daily wage of Kshs 492/= per day.
2. On 27th May, 2013 he claimed that the head of converting department, a Mr Shetty summoned and told him that his services were no longer required. He was advised to go home until the day the personnel manager would call him back to work.
3. He further pleaded that he visited the respondents premises several time to enquire about his reinstatement but without success. The claimant therefore deemed the respondent's action as constructive dismissal which was wrongful and unlawful. He therefore sought an order of compensation as detailed in his memorandum of claim.
4. The respondent admitted the claimant was its employee engaged from time to time as a casual employee to be paid wages at the end of the day. The respondent further averred that being a casual employee, provisions of section 35(1) (a) of the Employment Act applied and therefore averred that the claimant's services were terminable at the options of either party without notice. Further, the claimant's engagement being casual in nature, his engagement was subject to availability of casual assignment.
5. In his oral testimony in court, the claimant additionally stated that he was a casual employee for five months and later became an attendant at a daily wage of Kshs 609 paid weekly. They were issued with payslips. On 27th May, 2013 his head of department told him there was no work and he should go home. He further stated that he learnt of a plan to reduce work force though he was never issued with a formal letter to that effect.
6. In cross-examination he denied ever taking tissue paper without authority and that he never shouted at anyone. He was simply ordered out. The respondent's witness Mr Joash Chahanza stated that he was the HR- Manager and that he knew the claimant. He further stated that packing and converting department where the claimant worked hired workers on need basis.

7. According to him on 27th May, 2013 the claimant was stopped from working because some company products were found out of the company's remises and the claimant was the suspect. The claimant subsequently disappeared and never came back to work for fear of arrest. Regarding leave, it was his evidence that leave was not given to workers of claimant's cadre because the work was seasonal. He further stated that the claimant's terminal benefits had not been paid because the claimant has never gone for them.

8. Concerning payslips, he stated that the respondent maintained a check off system to establish days and hours worked. The payslips were for six days and were clustered. They never meant one had worked for the entire six days. It is common ground that the claimant was a casual worker. It is further common ground that on 27th May, 2013 the claimant left employment. What is contested is the reason the claimant left employment.

9. According to the claimant, his head of department told him to go home as there was no more work. According to the respondent, the claimant stopped coming to work after some company products were found outside the company's premises without authority and the claimant and another were suspected to be responsible.

10. From the pleadings and evidence, the claimant was in continuous engagement with the respondent for an aggregate period exceeding one month. The deeming provisions of section 37 of the Employment Act therefore applied to him. That is to say in terminating his services, the procedure and process governing the termination of regular employees applied to him as well.

11. The respondent alleges the claimant deserted duties after being suspected of involvement in attempted theft of company property but no evidence has been produced to show an attempt was made to call him back to work or face dismissal. In termination of employment cases, the burden of proof of the reason or justification for dismissal or termination of employment rests with the employer. In this particular case the court is not satisfied that the burden has been discharged to the required standards.

12. The court therefore finds that the termination of claimant's services was unfair and awards him as follows;

| | |
|--|-----------------------|
| a) One month's salary in lieu of notice | Kshs. |
| (492 x 30 days) | 14,760 |
| b) Leave untaken | 88,560 |
| c) Six month's salary for unfair termination of services | <u>88560</u> |
| | <u>191,880</u> |

13. Costs of the suit

14. The respondent shall further issue the claimant with a certificate of service.

15. It is so ordered.

Dated at Nairobi this 10th day of February 2017

Abuodha J. N.

Judge

Delivered this 10th day of February 2017

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge