



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 176 OF 2018

GEOFREY ORINA OBEGI.....CLAIMANT

-VERSUS-

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Statement of Claim dated 22nd May, 2018 on the 29th May, 2018 claiming to have been unfairly terminated and seeking compensation for the unfair termination.
2. The Claimant avers that he was employed by the Respondent in the Month of April, 2008 to serve as a machine attendant (Boiler attendant) at a monthly salary of Kshs 32,000.
3. The Claimant then worked for the Respondent till 31st August, 2016 when he was suspended from employment on allegation that he was absent from work on the 29th August, 2016 and lied to the Respondent that he had sought permission to be away when no permission was granted.
4. In the suspension letter dated 31.8.2016, the Claimant was required to give a written response and show cause why disciplinary action should not be taken against him. He responded to the show cause letter on the 1.9.2016.
5. Vide a letter dated 9th September, 2016 the Claimant was invited to a disciplinary hearing schedule on the 14th September, 2016 culminating to his termination on 29th September, 2016.
6. The Claimant avers that he gave his explanation for being away on the 29.8.2016 as he was ill and needed to seek medical attention. He further stated that he never signed the attendance sheet as alleged by the Respondent which formed the basis of his termination.
7. The Claimant took issue with the disciplinary hearing and submitted that the same was a sham and not properly conducted.
8. The Claimant avers that he worked from 6am to 6pm clocking in 12 hours a day and at times he could work for 14 hours. That he worked 7 days of the week with no rest day even during public holidays and that the Respondent never paid him compensation. He also alleged that he never took his leave throughout his employment with the Respondent and prayed for compensation of the same.
9. The Claimant therefore prays for the following reliefs as against the Respondent;-
 - 1) **A sum of Kshs. 3,434, 758.60 being overtime pay, public holidays pay, gratuity, salary in lieu of Notice and 12 month salary compensation for the unfair termination.**
 - 2) **Costs of this suit.**
 - 3) **Interest on the above**
 - 4) **Any other relief as this Court may deem just.**
10. The Respondent entered appearance on the 9th October, 2018 and filed a response to the claim on the 29th November, 2018 denying the

claim in its entirety.

Hearing

11. During hearing the Claimant testified at CW-1 and adopted his witness statement dated 29.5.2018 together with list of document dated 28.8.2018. The Claimant testified that he was never served with the suspension letter dated 31.8.2016, neither did he sign the attendance sheet as alleged by the Respondent. He admitted that he was subjected to disciplinary hearing where he explained himself that he was unwell and on the next day he reported early to give further explanation only to be turned away. That he later reported the matter to the labour office and the Respondent paid him Kshs. 21,000 being his salary for that month only. He therefore urged this Court to compel the Respondent to pay his terminal dues.

12. On cross examination by Cheloti Advocate, CW-1 testified that he was employed by the Respondent as a boiler attendant to feed the boiler to generate steam and the salary was Kshs. 31,000 which salary fluctuated depending on the days of the month. He testified that he received Kshs 48,000 as gross salary in January, 2016 as per the hours worked that month. He testified that he was suspended for being absent from work on 29.8.2016 and that he explained his absence to his supervisor the next day and vide the letter dated 1.9.2016 and that his absence was a result of illness. He admitted that he was subjected to disciplinary hearing however that the issue was not ironed out.

13. On further cross examination, he testified that he reported the matter to the labor office and was paid Kshs 21,902 by the Respondent. On the claim for leave the Claimant testified that he sought for leave in his claim but that he took leave for 2015 and 2016.

14. On re-examination, the Claimant testified that he sought permission from his supervisor, Mr. Stephen Tatu (deceased) to be away for being unwell who granted him permission. On whether he clocked in on the 29.8.2016, the Claimant testified that he was away on that day and never clocked in the electronic device neither did he sign the attendance sheet as alleged.

15. The Respondent on the other hand called one witness, Evans Omweri, the Respondent Human Resource manager as RW-1. RW-1 adopted his witness statement dated 17.4.2019 and produced the list of documents filed on 21.4.2019. The additional list filed on 3.11.2021 was expunged from record having been filed without leave of Court.

16. The Respondent witness testified that the Claimant was paid on a daily rate of Kshs 559 adding up to Kshs. 16,570 per month and any additional monies paid to him was for overtime pay. The Witness then testified that the Claimant was subjected through the disciplinary process and all his dues were paid to him at the labour office.

17. Upon Cross examination by Daye Advocate, RW-1 testified that the Claimant was their employee who worked at times overtime and during weekend and public holidays when the Respondent had a lot of work. The witness further testified that the pay slip did not indicate the overtime pay.

18. Upon further cross examination, RW-1 testified that the signature in the suspension letter signed by the Claimant is not similar to the signature in the attendance list.

Claimant's submissions.

19. The Claimant submitted from the onset that he never absented himself from duty on the 29.8.2016 as alleged by the Respondent rather that he reported to work and fell ill, then sought for permission from his supervisor. That the Respondent latter on alleged that the Claimant absconded duty on the said date without permission. It was argued that the signature which the Respondent alleged that the Claimant signed on the 29.8.2016 was not his and the biometric could attest to that. The Claimant took issue with the reason for termination as the Respondent alleged during the disciplinary hearing that the Claimant was absent on various occasion but no evidence was tabled before the disciplinary hearing or this Court to back up the said allegation.

20. Accordingly, the Claimant submitted that the termination failed the substantive and procedural fairness test as was held in **Walter Ogal Anuro V Teacher service Commission [2013] eklr.**

21. The Claimant therefore urged this Court to allow the claim as prayed.

Respondent's Submissions.

22. The Respondent on the other hand submitted that the Claimant disobeyed a lawful command and absented himself from duty on the 29.8.2016 which act warranted his summarily dismissal as per section 44(4)(e) of the Employment Act, nevertheless that the Respondent issued the Claimant with a suspension letter requiring him to give explanation of his absence which he duly responded to and a disciplinary hearing was conducted on 14th September, 2016 with the termination issued on 29th September, 2016. Accordingly, it was argued that the Respondent followed the procedure as per section 41 of the Employment Act before the termination of the Claimant's services.

23. The Respondent then submitted that the termination was not unfair in the circumstances and supported their argument by citing the case of **Kenya Plantation and Agricultural Workers Union V Sotik Highlands Tea Estate Limited [2016] eklr.**

24. Accordingly, it was submitted that the Claimant was tasked with proving that there was no notice or reason given for the termination which is not true in this case. Invariably, it was submitted that the Respondent has discharged its burden and demonstrated the reason for the termination and therefore the claim ought to be dismissed with costs.

25. I have examined all the evidence and submissions of the parties herein. In this claim what the Claimant seeks is basically payment of his

terminal dues. The Claimant also avers that his termination was unfair and unjustified.

26. The issues for this court's determination are as follows;-

1. Whether the Claimant's termination was unfair and unjustified.

2. Whether the Claimant is entitled to the remedies sought.

27. On the 1st issue herein, the Claimant was terminated for absenteeism. The Claimant admits he was absent due to illness but had sought permission from his supervisor a fact which was not proved.

28. The Claimant was subjected to a disciplinary hearing and admitted absenteeism.

29. It is therefore my finding that the claim for wrongful termination cannot stand and is therefore dismissed.

30. As for the remedies sought, the Claimant is indeed entitled to his terminal dues.

31. He sought to be paid for overtime work as submitted.

32. From the payslips submitted the Claimant's payslip shows fluctuating basic pay which is an indication that the Claimant was paid extra moneys that can be an indication to overtime pay as submitted by the Respondents. From the documents presented to court by the Respondents in particular there is an indication that the Respondent was paid for the overtime and even rest days worked.

33. As for the claim for gratuity, I find this is also not tenable because the Claimant was a member of NSSF and thus as per Section 35(6) of the Employment Act 2007 is not entitled to payment of gratuity.

34. I find that the Claimant's case fails in its totality and is therefore dismissed accordingly with costs to the Respondents.

Dated and delivered in open Court this **10TH** day of **MARCH, 2022**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Murunga holding brief Cheloti for Respondent – present

No appearance for Claimant

Court Assistant - Fred