



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 929 OF 2017

HUDSON MWAMBOGHO RUGHENDO.....CLAIMANT

- VERSUS -

BROLLO KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 01st April, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 19.12.2017 through Tindika & Company Advocates. His case is that the respondent employed him as a general fitter from 14.02.2007 and the contract was verbal. His further case is that he was verbally, unfairly and wrongfully terminated on 15.05.2017 by the respondent's managing director also the respondent's witness herein (RW) one Dosh Ketan Chandra. His further case is that he worked for continuous 10 years 3months and was not given a certificate of service. As at termination he earned Kshs. 711.00 but as at employment he attached on his application letter for the employment dated 13.02.2007 the Trade Test Certificate Grade III but his pay was for ungraded artisan throughout the employment. He had passed the interview and started working on 14.02.2007. That under the Regulation of Wages (Wages) (General) (Amendment) Order 2015 the daily wage of Kshs. 711.00 was for an ungraded artisan while that of an Artisan Grade III was Kshs.894.00.

The claimant pleads that he raised the grievance of underpayment. In 2009 he says that the respondent suffered a mass exit of skilled artisans at the respondent's workshop. Only two artisans remained, the claimant and one Stanley Gitonga. Further, the pay for Stanley Gitonga was regularised but not that of the claimant and RW failed to honour the promise to pay the salary or wage for Artisan Grade III. For the underpayment from 14.02.2007 to 15.05.2017, the claimant has computed the underpayment at Kshs.444, 926.60 now claimed herein.

The claimant further pleads that on 01.04.2017 Rm convened a meeting with the workers to discuss grievances including underpayment. The claimant was selected to represent his department in subsequent meetings. The RW convened on 29.04.2017 a meeting of the 10 sectional or departmental heads. The grievances discussed included treatment of workers as casuals, underpayment and overtime. RW declined to give a firm resolution of the dispute to await a report by the Labour Officer and RW promised to reconvene in two weeks. In early May 2017, the claimant and the other worker's sectional or departmental heads received the Labour Officer's report dated 21.04.2017. On 13.05.2017 the claimant was informed to meet RW on 15.05.2017. The claimant attended and RW informed the claimant that the Labour Officer's report showed that he had incited the other workers against the respondent and RW told the claimant that he was no longer the respondent's employee. The claimant's case was that RW asked him to report at his office on 17.05.2017 at 1.00pm for final dues. The claimant attended as scheduled and he pleads that RW paid his weekly pay for days worked Kshs.4, 266.00 and offered terminal dues of Kshs.40, 000.00. The claimant pleads that he rejected the offer as too low and he demanded terminal dues per the letter of 17.05.2017 by his Advocates IRB Mbuya & Company Advocates. The claimant's case is that he was not given an opportunity to defend himself against the allegations of incitement, he was not accorded a termination notice, he was not given chance to be heard in presence of a representative, and he claimed 12 months' wages using the daily wage of a Grade III Artisan enumerated under the Regulation of Wages (General) (Amendment) Order Legal Notice No. 117 of 2015 thus $894 \times 26 \times 12$ months thus Kshs.278, 928.00.

The claimant further claimed that throughout the service he was not granted annual leave and he computed due yearly pay for each year served and in lieu of annual leave in the sum of Kshs.148, 554.00.

The claimant's further case was that from February 2007 to July 2010 when NSSF deductions commenced, he had not benefited from any NSSF contribution and he claimed service pay for that period curiously so as service pay for 10 years served Kshs. 134, 235.00 (at 15 days 'pay per year) less NSSF paid Kshs. 38, 053.37 making Kshs.96, 181.63.

The claimant also prayed for one-month payment in lieu of termination notice Kshs.23, 244.00. The claimant also prayed for underpayment for 12 days worked in May 2017 at Kshs. 4, 140.00.

The claimant prayed for judgment against the respondent for:

- 1) Certificate of service.
- 2) Declaration that the claimant ought to have been paid wages based on the wage levels of an Artisan Grade III.
- 3) Declaration that the termination of the claimant's employment was unfair.
- 4) Payment of terminal dues as claimed Kshs.995, 344.23.

The respondent filed the memorandum of response on 26.02.2018 through Tolo & Company Advocates. The respondent admitted employing the claimant as a general fitter and the engagement was on piecework employment and a written contract was superfluous. Similarly, in view of piecework engagement the claimant was not entitled to a certificate of service or he left without collecting it.

The respondent further pleaded as follows. The claimant was employed as a fitter general but was not on the basis of his previous skills and the claimant did not avail to the respondent any documents to show that he was a skilled artisan Grade III. The respondent admitted that the claimant's wage was Kshs. 711.00 paid on weekly basis. The respondent denied terminating the employment but that the claimant left employment on his own. The respondent also admitted that the claimant applied for the job on 13.02.2007 but denied being aware of the claimant's National Trade Test Certificate Grade III. The respondent admitted that the terms of service for Gitonga were regularised but based on his exemplary performance and he was a permanent and not piece-rate worker like the claimant. The respondent admitted that the grievances were considered by the Labour Officer and report dated 21.04.2017 issued – and the report found that the claimant was ungraded artisan and as such the remuneration given was fair, reasonable and in accordance with minimum statutory wages. The Labour Officer's report never dealt with a grievance by the claimant about underpayment as claimed in the present case. Further the claimant had not made a written complaint about underpayment.

The respondent pleaded that it did not terminate the claimant's employment as alleged for him but that the claimant failed to give RW satisfactory answer about why he was inciting staff. Further a disciplinary process was to issue but the claimant brought his advocates' demand letter and the respondent thereby learned about the claimant's own choice to leave employment. Thus the claimant left work voluntarily on 17.05.2017. The claimant was paid days worked in May 2017. The respondent admitted that the claimant worked for the respondent for 10 years but he remained a piece-rate worker and was not entitled to service pay as claimed, and is, as well not entitled to notice pay.

The respondent prayed that the claimant's suit be dismissed with costs.

The claimant filed the reply to the memorandum of response on 29.03.2018. He urged that the unit of measure for the alleged piece-rate work was not pleaded but the respondent had admitted that the claimant earned a daily wage of Kshs. 711.00. Further the Labour Officer's report found that the respondent had permanent and casual staff and no mention of piece-rate workers. Further, the respondent hired the claimant as a fitter general because the claimant held the National Grade Test III Certificate. The claimant denied leaving employment by his own volition. The claimant reiterated that his claims and prayers be allowed.

The claimant testified to support his case. RW testified to support the respondent's case. The final submissions were filed for the parties. The Court makes findings as follows.

To answer the **1st issue**, the claimant and the respondent were in a contract of service. The respondent has pleaded that the claimant worked for the respondent for 10 years. The evidence was that the claimant was paid at a daily wage rate paid on weekly basis. The respondent deducted and remitted NSSF deductions effective July 2010. RW testified in cross-examination thus, **“He worked since February 2007 to 2017. That is correct. He worked for us for 10 years. I knew him. In my statement I do not state he was a casual employee. If one is employed for more than 3 months I know the law says the employment turns to permanent”** The Court returns that from February 2007 to separation on 15.05.2017, the claimant was in unbroken employment of the respondent designated as a casual fitter general on daily wage paid cumulatively on weekly basis. In such circumstances, the Court returns that the casual employment converted to one subject to minimum statutory terms and conditions of service as provided for in section 37 of the Employment Act, 2007. The submissions made for the claimant in that regard are upheld. While making that finding, as pleaded and urged for the claimant, the respondent has not pleaded and provided evidence of the unit and agreed pay per unit (piece work and attached rate of pay) and the alleged piece-work and piece-rate arrangement is found not to have existed at all.

To answer the **2nd issue** for determination, the Court finds that the respondent has admitted that the claimant applied for employment and the Court returns that on a balance of probability, the claimant attached on his handwritten letter of application for employment his Trade Test Grade III as a fitter so that the respondent appointed him as fitter general. The respondent has admitted that Gitonga's terms were regularised as pleaded for the claimant on account of exemplary performance. However, the Court finds that the parties had been in a dispute about the designation of the claimant in relation to his established skills. In the meeting convened by RW on 29.04.2017, RW testified that the claimant attended as the in-charge maintenance or assistant of one of the departments. By that evidence, and Gitonga being an employee performing similar work as the claimant and the claimant being the in-charge of the department, it defeats all logic that Gitonga qualified as a Grade III Artisan but not the claimant. Looking at the work assigned, the evidence, and the claimant's exhibited qualifications of Trade Test Grade III as a fitter, the Court returns that the claimant worked as a Grade III Artisan, Fitter and he was therefore entitled to the minimum statutory wage attached to that designation.

To answer the **3rd issue** for determination, the Court finds that the termination was unfair in substance and procedure. First, there is no dispute that the claimant and other workers had raised grievances about underpayment, overtime, casual terms of service and other matters. The report by the labour officer found that some employees (like the claimant) had worked for over 10 years without being placed on permanent terms. The report also shows that other employees worked beyond stipulated hours without payment of overtime dues. The

evidence is that in view of those findings RW took the view that the claimant had incited staff and he summoned the claimant on 15.05.2017 and confronted him with the assertion of incitement findings against the claimant.

RW testified thus, **“On 15.05.2017 at 11.30am I met the claimant at the office. It was about complaints against the claimant as main person instrumenting against management; he was inciting workers. I did not give him a notice. I summoned him by word of mouth. It was myself and claimant alone at the meeting. Agenda was not there. It was a general discussion. I asked him about alleged incitement. On 15.05.2017 after meeting I did not tell him he was no longer employee. I did not tell him to come back on 17.05.2017 1pm to collect final dues. It is partly true. I told him if he did not sort it out he could not continue working at company. If he did not provide answer on incitement allegations he would not continue working for the respondent. He was to bring an answer on 17.05.2017. On 15.05.2017 evidence was against him. He said allegations were untrue but I had evidence. There was no disciplinary process other than our meeting. I told him to come on 17.05.2017 to think about complaints against him. There was no harm in giving him time to think about the issues. On 17.05.2017 he was to come and have meeting with me if he had change of position by him. He maintained he was innocent and allegations not true.”**

That extensive evidence shows that on 15.05.2017 RW did not give a notice and a hearing to the claimant about the alleged incitement as envisaged in section 41 of the Employment Act, 2007. RW at that meeting and in his evidence in Court did not disclose the particulars of the alleged incitement. The evidence is that RW on 15.05.2017 dismissed the claimant upon some mysterious evidence of incitement which was embedded only in RW’s mind and empty allegations. The Court finds that at that meeting RW by his own evidence confirms that he terminated the contract of employment and gave the claimant an opportunity to think about that decision and to reconvene on 17.05.2015. The Court finds that the meeting of 17.05.2017 was about terminal dues but which parties disagreed about. Thus RW testified, **“On 17.05.2017 he was not paid any money. He came, he discussed and he delivered demand notice from a lawyer. I did offer to pay him Kshs.40, 000.00 on 17.05.0.17. It was a token. He was leaving. He delivered the lawyer’s notice and I had no choice. I stopped discussions and offered Kshs.40, 000.00. On 15.05.2017 I told him he could not continue working for respondent if allegations of incitement were not true. I never terminated him. We were discussing the incitement allegations. I told him to think about it and if he did not change position then he could not continue working for respondent.... He was to admit he had incited other workers. We had not fired him. We had not fired him. We gave a chance to own up. He refused. I offered a separation.”**

The Court finds that as at termination on 15.05.2017, RW invoked empty allegations of incitement against the claimant and required the claimant to do the impossible, that is, exculpate himself of the empty allegations or stand terminated. The Court returns that the reason for termination did not exist as at termination as per section 43 of the Act. The Court further finds that in absence of particulars of the alleged incitement, the respondent in fact dismissed the claimant on account of the grievances he had raised about underpayment due to failure to be designated as Artisan Grade III, overtime and casual terms of service that had been imposed throughout the very long period of service of over 10 years. The reason for termination is found to have been unlawful per section 46 (h) of the Act which states that it does not constitute a fair reason to impose dismissal or other punishment on account that an employee has initiated or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation. In the instant case the Court finds that the claimant had raised a genuine complaint and which had been escalated to the Labour Officer and such claimant’s initiation of a valid complaint could not constitute a lawful, fair or genuine reason for termination.

The Court finds that the termination was unfair in procedure and substance as pleaded and submitted for the claimant.

To answer the **4th issue** for determination, the Court returns that the claimant has established a case for award of the maximum 12 months’ compensation under section 49 of the Employment Act, 2007. The Court has considered the factors in section 49 of the Act. The claimant had a long clean record of service of over 10 years. The aggravating factor against the respondent is that he emplaced the claimant on casual service upon a wrong designation with underpayments throughout the service. Further, the reason for termination has been found to have been unfair under section 46 (h) and therefore section 45 of the Act – as it did not relate to the claimant’s conduct, compatibility, and the respondent’s operational requirements. The claimant is awarded **Kshs.278, 982.00** as prayed for. He is also awarded the **Kshs.23, 244.00** in lieu of the termination notice. He is also entitled to a certificate of service per section 51 of the Act. He is also awarded **Kshs.4, 140.00** being underpayment for days worked in May 2017.

The Court has considered the claims and prayers for service pay from February 2007 to July 2010; underpayment of wages throughout service; and payment in lieu of annual leave throughout service. The Court finds that the claimant has established the claims and prayers as valid and they are hereby awarded as prayed for. The claimant has succeeded and he will be paid costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to deliver the certificate of service by 01.05.2022.
- 2) The declaration that the claimant ought to have been paid wages based on the wage levels of an Artisan Grade III.
- 3) The declaration that the termination of the claimant’s employment was unfair.
- 4) The respondent to pay the claimant terminal dues as claimed **Kshs.995, 344.23** by 02.06.2022 failing interest to run thereon at Court rates from the date of this judgment till full payment.
- 5) The respondent to pay the claimant’s costs o the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 01st April, 2022.

BYRAM ONGAYA

JUDGE