



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 73 OF 2017

JAMES NYABOGA NYABONDA.....CLAIMANT

-VERSUS-

MENENGAI OIL REFINARIES LTD.....RESPONDENT

JUDGMENT

1. The Claimant through Messer Magatta and Associates Advocates filed this claim vide a Memorandum of Claim dated 20th February, 2017, alleging wrongful dismissal and unlawful termination from employment and non-payment of terminal dues against the Respondents and seeks the following orders of payment of :-

- a) Notice in lieu
- b) Annual leave
- c) Underpayment
- d) Compensation under section 49(1) of the employment Act no.11 of 2007.
- e) Certificate of service under section 51 of the employment Act
- f) Costs of the claim.

2. The summary of the claimant's case was that he was employed by the respondent in January, 2005 as a boiler operator earning a daily wage of Kshs.490/-. He states that he worked for the Respondent without leave and or payment in lieu of the same till April, 2014 when his services were terminated without any reason. He alleges that he reported the termination to the County Labour office in Nakuru on 25th April, 2014 and the labour officer wrote several letters to the respondent which did not elicit any response.

3. He states that on 13th June, 2014, he was issued with a cheque of Kshs 28,090 by the Respondent who did not indicate the purpose of the said money. Subsequently, he engaged the service of an advocate who wrote a demand letter asking for his terminal dues to no avail.

4. The 2nd Respondent filed a Memorandum of response dated 2nd July, 2018 through the firm of Muli and company advocates on 3rd July, 2018 and stated that the claimant utilized his leave days and the only ones not utilized was pro-rated and paid for.

5. It was alleged that the claimant was not terminated from employment as alleged but that the claimant deserted employment. That when the claimant deserted employment the respondent wrote a letter to him requiring him to report to work however when he failed to respond, the labour officer Nakuru, was informed of the said desertion who in turn traced the claimant and a meeting was set up between the parties at the labour office where the claimant confirmed that he no longer was interested with employment and the parties reached a settlement figure of Kshs 28,090/-.

6. It is the respondent's contention that the claimant was paid as agreed and the underpayment claimed is not merited. Further that the claimant NSSF and NHIF deduction were duly remitted.

7. It is the Respondent's case that the claimant suit is not merited as he deserted employment.

8. The matter herein proceeded for hearing on 2nd March, 2021 where the Claimant, **James Nyabonda CW-1**, testified that he was employed by the respondent from 2005 to the April, 2014 when his services were terminated without any reason. He testified that he did not desert

work as alleged and that when his services were terminated he reported the matter to Nakuru County labour office who summoned the respondent and was later called by the labour officer and issued with the cheque of Kshs, 28,090/- drawn by the respondent. He testified that he was the one who reported the matter to the labour office and not them. That he later wrote a demand letter before filing this suit. Also that he was not subjected to disciplinary hearing before the termination.

9. On cross examination by **Ms. Chepngetich**, the claimant stated that he worked for the respondent for 9 years, and during the 9 years he never went for leave. He testified that there was no negotiation between him and the respondent and that until his termination his pay was paid on a daily basis.

10. The Respondent's case proceeded for hearing on 20th April, 2021 with the respondent calling one witness, **Peter Kanenje Michibi-RW-1**, who testified that he is the current senior human resource manager of the Respondent and adopted his witness statement of 24th February, 2021 and stated that the claimant worked as a labourer being paid on a daily basis. He stated that the claimant worked till January, 2015 when he deserted worked as shown in the NSSF statement attached in the pleadings herein.

11. He testified that the claimant was not entitled to leave as he never worked continuously for a complete month. He testified further that the claimant was paid in accordance with the government wages direction and that he was never underpaid as alleged. Additional that the claimant deserted work therefore is not entitled to any dues as claimed.

12. On cross examination by **Mr. Magata**, he testified that the claimant was employed in January, 2005 then deserted work on 17th April, 2014 and later resumed in 20th May, 2014 and worked till 21st October, 2014. he testified that they wrote a letter to the claimant requiring him to report back to work after the desertion and another letter to the labour officer requesting him to trace the claimant having deserted but that both letters have not been produced in Court. He indicated that the annexure to the memorandum of response is a computer generated document which was not signed. Concluded that the claimant attended work depending on work availability.

Claimant's Submissions

13. The claimant's Counsel, submitted that the claimant did not desert work as alleged by the respondent and cited the case of **Ezra Nyamweya Motari –v- Kanini Haraka Enterprises ltd [2016] eKLR** where the court distinguished between absence without permission and desertion and submitted that the Respondent has not satisfied the ingredients required for desertion.

14. It is the claimant's submissions that the claimant has demonstrated to this Court that he was unfairly dismissed from employment which led to the payment of Kshs. 28,090/- by the respondent through a cheque at the labour office and cited the case of **Mary Chemweno Kiptui –v- Kenya pipeline Company Limited [2014] eKLR** where the court gave an in-depth analysis of lawful and unlawful termination. He argued that for the respondent assertion of desertion to hold any water, the respondent has to prove the said desertion and also prove the reasons for termination as envisaged under section 43 (1) of the Employment Act therefore it was contended that the claimant's termination was unfair within the meaning of section 45 of the Employment Act.

15. The claimant therefore prayed for the reliefs sought in his claim to be allowed as prayed.

Respondent's Submissions

16. The respondent maintains that the claimant is not entitled to the reliefs sought for the reason that the claimant deserted work and that he was a casual employee paid on a daily basis therefore notice in lieu was not necessary in this case.

17. It was submitted that the claimant was paid in accordance with the wage bill and on the leave pay it was submitted that the claimant never attended work for a complete month therefore was not entitled to leave. Further that the records indicate that his NSSF was paid till January, 2015 therefore was not terminated in April, 2014 as alleged.

18. I have examined all evidence and submissions of the parties herein. From the claimants evidence he was employed from January 2005 to the 17th April, 2014 when his services were terminated. The respondents on the other hand, allege that the claimant was a casual worker and he deserted work in April 2014.

19. Despite the respondent alleging desertion, they have not demonstrated that following the alleged desertion, they tried to face the claimant and also subjected him to a disciplinary action for desertion.

20. The claimant on the other hand communicated to the respondents through his counsel vide a demand notice dated 9/2/2017.

21. The respondents even paid the claimant kshs.28,090/= vide a cheque dated 13/6/14 and they didn't indicate it was for terminal dues following the desertion.

22. The claimant had worked for the respondents since 2005, there is no indication that he was issued with any appointment letter. Even as the respondents insist that he was a casual, they have not submitted any master roll to show how he worked. In any case Section 37 of the employment Act states as follows;

37. Conversion of casual employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and [section 35\(1\)\(c\)](#) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under [subsection \(1\)](#), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and [section 87](#) of this Act shall apply.

23. The claimant having worked for over 3 months for the respondent, ceased to be a casual employee and he could only be terminated following provision of Section 41 of the Employment Act 2007 which states as follows;

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make.

24. It is therefore my finding that the claimant was unlawfully and unfairly terminated there being no evidence that he deserted duty.

25. In terms of remedies, I find for the claimant and award him as follows;

1. 1 month salary in lieu of notice = 12,970/=

2. Unpaid leave for 3 years (the rest being time barred) = 3 x 12,970/=

= 38,910/=

3. Underpayment of wages from 2012 to 2014 = 17,971.20 + 2,761.20

= 20,731.4/=

4. The termination being unjustified or given that the claimant was treated unfairly by being treated as a casual over the years, I award him compensation equivalent to 8 months salary for the unfair and unjustified compensation.

= 8 x 12,970 = 103,760/=

Total awarded = 176,371.4/=

Less statutory deduction

5. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Magata for the claimant - present

Muli & Co. for respondent – absent

Court Assistant – Fred/Wanyoike