



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 425 OF 2016

ZACHARIA AKHABOCHI SOWAYI.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 14th October, 2016, on the 18st October, 2016 through the firm of Wachira Waiganjo and company advocates claiming unfair termination and to be compensated for the alleged unfair termination.
2. The summary of the claimant's case is that he was employed by the Respondent on August, 2008 as a general employee in the refinery department working either on the night shift from 6pm to 8am or the day shift that ran from 8am to 6pm every day for 7 days a week without any rest day. He stated that he was paid Kshs.435 per day when on day shift and Kshs. 918 when on night shift
3. It is alleged that the claimant worked on all holidays and never took any leave while at the respondent employment which he was never compensated for save for Kshs. 2,627.49 paid in January, 2013 for his leave.
4. The claimant stated that sometimes in December, 2013 he reported to work as usual only to be denied entry by the guards at the gate. On inquiry he was informed that Okusimba, Job and Peter Kegode who were members of works committee at the Respondent's employ had instructed the guards not to allow him in.
5. He stated that the Respondent terminated his service without any notice or payment in lieu of Notice. Also that he was not subjected to disciplinary hearing neither was he paid his terminal dues.
6. It is alleged also that the Respondent did not pay any NSSF for the claimant therefore the claimant prays to be paid gratuity for the years worked.
7. The claimant avers that he reported the termination to the labour office and later on the Labour officer paid him Kshs,2,008/- being his terminal dues.
8. Dissatisfied with the said payment the claimant preferred this Suit and prayed for judgment against the Respondent for;-
 - a) Notice
 - b) Overtime
 - c) Off duties
 - d) Public holidays
 - e) Leave
 - f) Gratuity
 - g) Compensation
 - h) Costs of this Suit to be borne by the Respondent.

9. The Respondent through the firm of Wamaasa and Masese company Advocates filed a response to the claim on the 30th January, 2018 claiming that the suit is prematurely instituted as it ought to have been referred to the Labour office before it was brought to Court.

10. The Respondent then denied the entire claim in its response and put the Claimant to strict proof thereof and prayed for the claim to be dismissed with costs to the Respondent.

Hearing

11. This cause came up for hearing on the 22nd June, 2021 with the Claimant, **Zacharia Akhabochi Sowayi** who testified that he was employed by the Respondent in August, 2008 as a laborer in the refinery department whose duty was to fill up the containers with oil. That he was paid Kshs.435 per day when on day shift and Kshs. 918 when on night shift. He testified that he reported the matter to the labour office but was not assisted satisfactorily. With regard to the documents produced by the Respondent indicating his pay as 335, he denied the signature therein and stated that he has never worked in the workshop.

12. On cross examination, he testified that he worked as a general labourer everyday either night or day shift and were paid per week by the cashier and would sign in acknowledgment of receipt.

13. The Respondent called one witness **Evans Ondimu Omweri**, the Human Resource manager who sought to adopt his witness statement dated 12th May, 2021 and filed on 21st May, 2012 which stated that the claimant was employed on 4th January, 2012 and not 2008 as alleged as a casual labourer who was given work depending on availability of work at the Respondent.

14. He alleged that the claimant was paid Kshs.335 per day. He stated that the claimant stopped availing himself at the Respondent for selection as from 17th November, 2012 only to resurface in January, 2013 claiming leave pay for the year 2012 which was calculated and given to the labour officer for onward transmission to him, a fact which the claimant acknowledged receipt in his claim. He stated that the claimant was paid all overtime whenever he worked.

15. On cross examination he maintained that the claimant was employed in the year 2012 and not 2008 and was paid Kshs.335 per days. Finally that he was not dismissed from employment.

Submissions

16. The claimant submitted that in the circumstances of this case he was unfairly terminated by the Respondent and the argument by the Respondent that his claim is premature is without any basis since the claimant's attempt to have the issue herein resolved by the labour officer did not receive satisfactory results therefore prompting the claimant to engage this Court as the final arbiter after all other avenues failed. In this he cited the case of Kenya **Plantation and Agricultural Workers Union- v Mununga Leaf Base [2013] eKLR**.

17. The Respondent on the other hand submitted that the claimant was engaged to it as a casual labour who was given work depending on availability and never worked on continuous basis to allow him enjoy the provisions of section 37 of the Employment Act. He argued that the Claimant was paid on daily basis a fact that the claimant has alluded to in his pleadings since the calculations made are based on a daily wage.

18. It was submitted that casual employment where the employee is paid daily wage can be terminated at the close of the day without need of notice as provided for under section 35(1) of the Employment Act.

19. Nevertheless the respondent submitted that the claimant failed to go to work from 17th November, 2012 without any explanation as such his services were never terminated rather that the claimant deserted work.

20. They therefore prayed for the claim to be dismissed with costs to the Respondent.

21. I have examined the evidence and submissions of the parties herein. From the evidence that the claimant produced, he indeed worked for the respondent which fact is acknowledged by the respondent.

22. The contention however is how much he earned and when he was employed.

23. The claimant avers he was employed as a general labourer from 2008 August and terminated in December 2013. He stated that he was being paid 435/= on day duty and kshs.918/= on night shift.

24. The respondents contend that the claimant was employed in 2012 and not 2008 and that he deserted duty as from 17th November, 2012 – 6 months later and only resurfaced at work in January 2013 demanding his leave pay.

25. Despite these varied positions, no party produced any documents to show the correct position of this fact.

26. No appointment letter was issued to the claimant despite working for the respondent as indicated by the respondent which is in breach of Section 9(1) of the Employment Act 2007 which states as follows;-

General provision of contract of service

(1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not 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, shall be in writing.

27. The respondent produced a schedule of payments of daily wages showing payments of certain workers but which the claimant denied he signed.

28. The respondent also produced schedule of payments for holiday worked in 2014 which I find is not relevant as by then, the claimant was not working for the claimant.

29. The schedule produced for payment of each day for the week from 4th June to 10th June 2012 also bears no signatures against the name of the claimant.

30. There is therefore no evidence produced by the respondents and claimants as to the exact period the claimant worked.

31. In absence of evidence as to the time the claimant worked and no evidence as to how he was paid, I will adopt the claimant's position as the true one due to the provision of Section 10(7) of the Employment Act 2007 which states as follows;

10.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

32. I will take it that the claimant worked from 2008 to 2013 – a period of 11 years. I will take his wage to be 435/= per day (day shift) & 918 (night shift).

33. The respondent averred that the claimant absconded duty but the claimant indicated that he was terminated verbally.

34. The claimant was not given any opportunity to explain himself – his absence and neither was he subjected to any disciplinary process.

35. I find he was unfairly dismissed as per 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”.

36. As for the remedies, I find for claimant and award him as follows;

1. 1 month salary in lieu of notice at kshs.435/= per day for 6 days = 435 x 6 x 4 = 10,440/=.

2. Overtime at 1 hour per day from 8am to 6pm.

= 1/12 x 435 = 52.2 x 6 days

= 313.2 per week

Over 5 years = 52 weeks x 5 x 313

= 48,828/=

3. Public holidays

For every year = 2008 = 5 days

For 2009 = 11 holidays

For 2010 = 11 holidays

For 2011 = 11 holidays

For 2012 = 11 holidays

Total 49 days holiday

= 49 x -52.2 (x2)

5115.6 x 9 hours

= 46,040.4

4. Gratuity for 5 years at ½ salary for each year worked

= ½ x 10,440 x 5 + 25,175/=

5. Compensation equivalent to 8 months salary for unfair termination

= 8 x 10440 = 80,560/=

TOTAL = 211,038/=

Less statutory deductions

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

DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Owino for claimant – present

Cheloti for respondent – absent

Court Assistant - Fred