



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.447 OF 2017

BERARD MOGAKA OMWANDO.....CLAIMANT

VERSUS

COMPLY INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

The claimant's case is on the facts that he was verbally employed by the respondent on oral terms as a machine attendant in July, 2008 earning ksh.1,600 per week from July, 2008 up to September, 2010 and from October, 2010 the salary increased to ksh.2,100 per week until employment terminated on October, 2016.

The claim is that there was underpayment of wage, the claimant was at work for 7 days each week with a day of rest or break. On public holidays there was no rest, annual leave and the respondent paid statutory dues to the NSSF.

The claim is also that the claimant fell sick and sought treatment and the doctor advised that the illness was caused by the work environment and was advised to change to lighter duties.

When the claimant reported to work he was directed by the respondent to go home and wait for a communication which was not done. He was later called and paid Ksh.29,417 on 20th September, 2017 and without an explanation.

The termination of employment was contrary to section 35, 41 and 45 of the Employment Act as there was no notice, hearing or reasons given. The claimant is seeking the following;

- a) Notice pay Ksh.13,287
- b) Underpayments Ksh.164986
- c) Off duties Ksh.64,464
- d) Public holidays ksh.63,428.45
- e) Leave for 9 years and 3 months Ksh.75,722
- f) Compensation.

The claimant testified in support of his claims that he was employed by the respondent as an assistant machine attendant on a verbal contract. He would help the machine attendant to sandpaper timber and for 9 years and 3 months he worked without a break, rest, annual leave and without compensation for his time. The claimant fell ill and the respondent stated that they could not keep a sick employee and his employment was terminated upon payment of Ksh.29,417 without a breakdown as what such amounts comprised of.

The claimant also testified that the allegations by the respondent that he resigned from his employment is not true. The letter filed is not done in his hand.

Upon cross-examination the claimant testified that he was employed as a causal employee but assigned duties to assist the machine operator. He would sign the causals register and paid weekly.

The claimant was also taken through the muster roll over various weeks and dates and admitted to being off or laid off by the respondent;

On 1st to 6th June, 2014 he was not at work;

1st to 6th July, 2014 not at work;

On 1st May, 2014 a public holiday and not at work;

On 2nd May, 2015 it was a Sunday and not at work;

The week of 21st to 27th March, 2016 he was not at work on Friday; it was on Good Friday.

On 12th September, 2016 it was IDD holiday and he was not at work.

The claimant also testified that the respondent was running on 3 shifts each of 8 hours and where there was overtime work this was paid for.

Defence

The defence is that the claimant was employed as a machine assistant in sawmill department from 14th October, 2010, was not at work from January to March, 2011 and upon returned he worked and left on 29th September, 2016. The claimant was employed on causal basis and based at Njoro paid a daily rate of Ksh.296 paid weekly but from 29th September, 2016 he absconded duty.

There was no underpayment as alleged. There is no amount due or owing. The claimant worked for 8 hours shift and on availability of work. Any extra work was paid for in full. the respond remained closed on public holidays and there was no work.

The claimant was paid for accrued leave days despite being a causal employee. For the duration of employment 14th October, 2010 to 29th September, 2016 the claimant had accrued 94 days which was assessed at ksh.33,558 and which was paid to the claimant. Less PAYE all was Ksh.29,417.

The respondent paid all statutory dues.

There was no unfair termination of employment. The claimant alleges that he was advised by a doctor to take light duties but such information was never brought to the attention of the respondent. the claims made should be dismissed with costs.

Nicodemus Musyoka testified that he is the personnel manager of the respondent and the claimant was employed as a general worker on 14th October, 2010. He would help with machine work from time to time until 29th September, 2016 when he deserted duty. He alleged to have been advised by the Doctor that he needed to be allocated light duties and the witness advised him to put it into writing but he requested to resign. Before the medical documents could be investigated, the claimant resigned from his employment and demanded to be paid his terminal dues.

Mr Musyoka also testified that he set off to find out if the medical report was genuine as the claimant had not reported any illness. He sent a supervisor to look for the claimant but there was no cooperation. The respondent opted to pay terminal dues and the claimant signed the discharge voucher. There was no underpayment as alleged or failure on the part of the respondent to apply the correct wage regulations. The claimant signed the discharge voucher, put his thumb print and accepted the final dues.

At the close of the hearing both parties filed written submissions.

The claimant has attached his medical records and a medical certificate from the Nakuru provincial general hospital he was diagnosed with chest problems and a recommendation to be deployed and to seek further treatment. Mr Musyoka for the respondent testified that he received these records and set off to investigate them as the claimant had not reported any illness to them. but before this could be done the claimant resigned from his employment.

The claimant has denied authoring the letter of resignation.

There is letter dated 29th June, 2017 said to be signed by the claimant and resigning from his employment.

From the alleged letter of resignation, a look with a naked eye can clearly show the signature thereof alleged to be by the claimant is planted on the record. The hand that has done the body of the letter is not the same as the one that has done the signature.

Even where a look of the same with the naked eye were not correct, the claimant is said to have absconded duty on 29th September, 2017. The letter of resignation is dated 29th June, 2017 wherein the claimant is said to have resigned as of 2nd October, 2017.

There is also letter of the claimant dated 4th May, 2017, a letter of *Resignation Apology* and seeking *I decided to break working with the factory though under medial ground.*

This letter dated 4th May, 2017 is signed by the claimant and one can tell it is done in his hand and there is no manipulation. The signature placed under the *discharge Voucher* is strikingly similar.

On the medical record submitted by the claimant, the recommendation was not stoppage of employment. It was for deployment and further treatment.

Why then did the claimant accept the payment of his final dues? sign for them and cash the issued cheque?

This can only be explained in that after submitting his medical records with the respondent dated 30th March, 2017 he then authored letter dated 4th May, 2017 he applied seeking to resign from his employment with the respondent. he cannot thus claim that as of 20th September, 2017 when he signed the discharge voucher and place a thumb print thereon he was not aware of the possible consequences and the end of his employment with the respondent through voluntary resignation.

Where the recognition was not voluntary, upon the respondent filing the defence and serving the claimant there is no response thereof denouncing the records as filed.

The court finds no case of unfair termination of employment.

On the claims made, there is no compensation due as employment terminated voluntarily and no notice pay is due in this instance.

On the alleged underpayments, the claim is that the claimant was an assistant machine attendant. He was undertaking general duties assisting in the sawmill. An assistant machine attendant is not regulated under the wages payable to a machine attendant as such person remains *in assisting duties* for the principal employee the *machine attendant*.

Under section 10(6) of the Employment Act, 2007 the employer is the custodian of all work records. In this regard the respondent as the employer filed the work records for the claimant and where his work attendance is registered and recorded daily.

With the amendment of the defence at paragraph 2 noting the claimant was paid a rate of ksh.357 per day for a general worker in Njoro and outside Nakuru town, this assessed against the wage orders is above the minimum wage and thus factored his dues appropriately.

On the alleged work for 7 days each week without rest, annual leave and public holidays save for what the claimant has admitted as having been laid off and not at work on several weeks, the court assessment of the work attendance sheet is that;

In September, 2016 the claimant was at work for a total of 22 days;

In May, 2016 he was at work for 27 days;

In May, 2015 he was at work for 21 days;

May, 2014 for 24 days;

April, 2013 for 14 days;

April, 2012 for 18 days,

March, 2011 for 20 days; and

In March, 2010 had no work attendance.

Cumulatively, the claimant had the most attendance in the year 2014 in January, April, June, September, and October at 29 days. There is no attendance for days beyond 29 days in any given month.

On his basis the claims for work without a rest day is unfounded.

The claimant has also claimed for leave for the duration of employment. He has since been paid ksh.33,558 for 94 days applied as due for leave. The claimant applied the daily wage and paid less the due statutory deduction. As such that settled, nothing arises.

Accordingly, the claims made found without merit and are hereby dismissed.

Each party to pay own costs.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of: