



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.165 OF 2017

DANCUN ODERA SANDE.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGEMENT

In the year 2008 the claimant was employed by the respondent as a machine attendant on what was referred to a *regular casual* and earning a daily wage of Ksh.217.

The claimant worked for the respondent until 15th August, 2015 when he was suspended for alleged issuing threats to other employee and failure to take proper command from the employer that he failed to await selection prior to proceeding to the working area. From the year 2008 to 2015 the claimant's work area was that of a machine attendant and being so the allegations made against him were false.

From the year 2008 to 2011 The claimant reported on due daily doing 2 weeks of night shift and 2 weeks of day shift per month and without taking off days, holidays, leave of payment of NSSF and NHIF and in the year 2011 the claimant was registered with NSSF and NHIF.

The claim is that from the year 2011 to 2014 the claimant continued to work for the respondent and earning ksh.297 per day, ksh.334 in the year 2012, ksh.378 in the year 2013 and ksh.44 in the year 2014.

By letter dated 31st July, 2015 the claimant was invited for disciplinary hearing which he attended on 4th August, 2015 and present were the managing director and human resource manager and 5 other employees who were alleged to be his accusers but he was not allowed to attend with a person of his choice. The claimant wrote letter dated 25th July, 2015 responding to allegations made against him but was not allowed a fair hearing as the managing director kept on interjecting during his defences..

Following the disciplinary hearing, the claimant was sent to the cashier and made a sing a document without reading and which was for his final dues, a letter terminating his employment and certificate of service. he was then paid ksh.14,777 and removed from the premises. He was not allowed an appeal.

The claimant is seeking the following dues;

- a) Annual leave from July, 2008 to August, 2015 ksh.57,957;
- b) Paternity leave in the year 2011 Ksh.4,676;
- c) Off duty Ksh.177,768;
- d) Underpayments Ksh.100,530; and
- e) Compensation for unfair termination of employment.

The claimant testified in support of his claims. that upon employment he would be placed on 2 weeks night or day shift working from 8am to 6pm or 6pm to 8am each day for 6 days each week and no rest day. As a machine attendant he was underpaid and seek severance pay as he was abruptly and without notice terminated in his employment.

The claimant also testified that he was issued with a notice to show cause why his employment should not be terminated, he respondent and

was invited to attend a hearing but he was not given a chance to urge his defence.

The claimant also testified that on his claim for paternity leave he took his application to Mr Arasa and identity card but was not allowed to take it. He was not paid in lieu thereof.

Upon reporting to work each employee was required to clock in for control at the gate. He was alleged to have proceeded to his work station without instructions which was not true. The respondent's management had a personal vendetta on him after he offloaded palm oil from a truck and in the year 2014 he was summoned to Kisumu and it was alleged that the truck had water instead of oil. He was required to denounce his statement and this led to termination of employment.

The claimant also testified that when his machine was faulty he would be allocated other duties.

The defence is that the claimant was employed as a casual labourer and executed his duties as such. He was found behaving with veneration in a manner that was sabotaging the general execution of his duties which amounted to gross misconduct subject to summary dismissal which does not require issuance of a notice. The claimant was however invited to a hearing and allowed to urge his defence and his employment terminated and paid his dues.

The defence is also that the claims made are without merit and should be dismissed with costs.

Evans Omweri testified that he is the human resource manager with the respondent and from the work records the claimant was issued with a notice to show cause why his employment should not be terminated following gross misconduct. He was given an opportunity to give his defence following which a decision was taken to dismiss him from his employment. The decision to terminate employment was made at the head office in Kisumu. There was no appeal.

Mr Omweri also testified that from the record the claimant took all his annual leave or was paid.

In the year 2011 to 2014 there was payment for not taking annual leave. There are vouchers to confirm the payment.

The claimant was also paid his terminal dues for untaken leave days, days worked and pay for ½ pay not paid during the period of suspension.

The witness also testified that the claimant was dismissed from his employment for failing to take instruction. Employees are required to clock in at the gate before proceeding to their work stations. The claimant clocked in and before work allocation proceeded to the changing area. Other workers had complained about his conduct and that he was not adhering to the workplace policy. In his defence and response to the show cause, the claimant confirmed that he did not follow the laid down procedures which amounted to gross misconduct.

The witness also testified that the claimant then failed to follow lawful directions of the respondent, he gave malicious reports of the respondents and he failed to cooperate with other employees and upon investigations the respondent had to call in the police as the claimant had threatened the managing director.

In paying the claimant his terminal dues, the total number of days worked is 201 days and not the days due for leave and out of 201 his due leave days were paid. He signed in acknowledgement of what was due.

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

From the pleadings, the evidence and written submissions, the issues which emerge for the court determination can be summarised as follows;

Whether the claimant was employed as a machine attendant or casual labourer;

Upon the determination of the above, whether there was underpayment of the wage(s) due to the claimant;

Whether there was unfair termination of employment;

Whether the remedies sought are due.

During the hearing, evidence-in-chief had to stop on several occasions as the claimant kept giving different versions of evidence. On the one hand he alleged his termination of employment was due to a personal vendetta by management. That he had been sent to Kisumu and where a truck was alleged to have oil but there was fuel and from his statement he was targeted for termination of employment that he was a machine operator but would be allocated other duties. That his disciplinary hearing was a sham only meant to dismiss him from his employment.

The pleadings and the evidence being at variance and the claimant without consistency, the defence by the respondent became crucial.

Following adjournment to allow him go through his evidence and pleadings, he secured an advocate to represent him and his entire evidence shall be taken into account in addressing the claims made.

On the issues set out above, with regard to the designation of the claimant, On 19th August, 2015 the claimant was issued with a certificate of

Service and which is not contested and which define his period of employment with the respondent from July, 2008 to 19th August, 2015 in the position of general labourer. Such certificate is issued under the provisions of section 51 of the Employment Act, 2007 (the Act).

Further to the above, the claimant attached several documents to his statement of claimant one being annexure "DOS3" his response to the show cause notice and dated 25th July, 2015 and where he defines himself as *all along all serving causals assemble at the car park for a roll call and then proceed to their work stations.*

Section 10 (6) and (7) of the Act requires the employer to keep work records and upon a dispute being registered with the court to file and produce them. on the filed Certificate of Service with regard to the claimant, his position is thus confirmed as that of a casual labourer and not machine attendant. Even where he was allocated general duties at a particular machine, such did not change the designation. The claimant remained a casual labourer for the duration of his employment with the respondent.

With regard to the question of whether there was unfair termination of employment, Section 47 of the Employment Act, 2007 requires the employer to justify the grounds of termination, Section 43 of the Act requires the employer to prove the reasons for termination, Section 45(2)(a) & (b) of the Act requires an employer to prove that the reasons for termination were valid and fair reasons, and Section 41(2) of the Act obligates the employer to hear and consider any representations an employee may wish to make where summary dismissal is envisaged for fundamental breach of contractual obligation or gross misconduct; the respondent submitted that the claimant did not discharge its obligations under the Act. see **Muthaiga Country Club versus Kudheih Workers [2017] eKLR** and in the case of **Kenfreight (E.A) Limited versus Benson K. Nguti [2019] eKLR** the court held that;

... under Sections 43(1) and 47(5), the burden of proving unfair termination rests on the employee while the burden of justifying the grounds of termination rests on the employer. Additionally, that a party who relies on a contractual term to terminate a contract of employment in accordance with Sections 35 and 36 of the Employment Act, such a party cannot be said to not have a valid reason or not to have justification for termination.

By notice dated 23rd July, 2015 the claimant was suspended from duty by the respondent on the grounds that he had refused to follow lawful commands given by the general manager or management representative in respect to loading and that he had proceeded to refinery section before he was selected for such work by management as per procedure. The claimant was also invited to show cause why his employment should not be terminated for what was termed as gross misconduct and pending further investigations.

In reply, on 25th July, 2015 the claimant asserted that;

... I do participate in loading as well as follow the command given to me by the management representative despite the fact that I do have a medical certificate that prohibits me from heavy duty a fact that the general manager is well aware of. his preposterous to claim or even suggest that I don't or accuse me of a matter ...

This is the response attached to the defence.

In the Memorandum of claim, the claimant has attached a different response of equal date and noting that;

... in this particular day the management representatives had incited fellow workers against me. So I didn't [did not] see the need to participate in their pettiness. So I proceeded to the refinery where the changing room is, changed my clothes and proceeded to the loading bay. Upon getting there the g.m. called me and ordered me to change my clothes, ii dully complied ...

The attached response is incomplete.

What is apparent to the court and from the response filed by the claimant, there was a set procedure to be followed upon reporting to work. Clocking at the gate, then proceed to the car park for allocation of duty, and the management or a representative thereof would allocate the work station.

In this instance, for the reason(s) of what the claimant considered to be *management representative had invited fellow workers*, he did not see the need to *participate in their pettiness* and therefore opted to proceed to his usual work station.

Work direction and instruction is the prerogative of the employer. The employer's representative being a supervisor, manager or any other title allocated and allowed to give work and shop floor directions is a management prerogative. The employee cannot chose to take work instructions of their liking as such would lead to chaos and anarchy. Lawful instruction should be taken as required.

Where the claimant felt there was incited of the employee against him, recourse was not to ignore lawful instructions such conduct is addressed under section 44(4) of the Act as gross misconduct and subject to summary dismissal with short notice or payment in lieu of such notice.

In this regard the claimant was suspended to allow for him to show cause and for investigations. He was invited to the disciplinary hearing and he attended. A letter of termination was issued upon recommendation that there was gross misconduct.

The court finds there was a justified reasons leading to termination of employment and due process was gone into and there is no case of unfair termination of employment. The claim for compensation does not arise.

On the claims made, the claimant has claimed for underpayment on the basis that he was a machine attendant but was paid as a casual labourer. Such is addressed above, being a casual labourer, there was no underpayment.

The claimant is seeking payment for off duty from July, 2008 to August, 2015.

In this regard, the claimant testified as follows;

.. I did not take off duty. Work hours were 8am to 6pm and night shift 6pm to 8am. For 6 days in a week I was at work. I had no rest day. I was underpaid.

...

This evidence put into account and on the basis that the claimant worked in a day or night shift for two week and then had a change, on his evidence that he worked for 6 days in a week, each week comprising 7 days, the single day not at work is covered under the provisions of section 27 of the Act. such is defined as his rest day.

The claimant is claiming annual leave on the basis that the respondent tabulated the same at 201 days and these days should all be paid for. however, Mr Omweri testified and explained how such days arose being this related to the total number of days the claimant was at work for the year 2015 and this was applied to assess his accrued annual leave days and encashed in his terminal dues. this explanation is found reasonable and is logical.

On the analysis above, the claims made are found without merit and are hereby dismissed. Each party shall bear own costs.

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

M. MBAR?

JUDGE

In the presence of: