



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.455 OF 2017**

**BENARD OMONDI KWAMBI ..... CLAIMANT**

**VERSUS**

**BEDI INVESTMENT LIMITED..... RESPONDENT**

**JUDGEMENT**

The claim is that the claimant was employed by the respondent as a machine operator, operating the textile/carding machine at the respondent company on 1<sup>st</sup> December, 2001 until December, 2015 when employment terminated.

The claim is that the claimant got injured while at work causing him amputation of his left hand and the doctor recommended a transfer to another department with lighter duties. The respondent did not accept the recommendations and instead opted to terminate employment.

Upon treatment, the claimant had resumed work but instead the respondent paid him under workman's compensation scheme and terminated employment. There was no payment of employment terminal dues of overtime, notice pay and service gratuity. There was underpayment during the term of employment.

The claimant had worked for the respondent from December, 2001 to December, 2015 a period of 8 years and was not paid service gratuity.

The claim is for the following dues;

- a) Underpayments;
- b) January, 2015 to April, 2015 ksh.16,266;
- c) May to December, 2015 Ksh.65,652;
- d) Notice pay Khs.19,674;
- e) Service gratuity for 8 years Ksh.78,696;
- f) Compensation for unfair termination of employment;
- g) General damages for unlawful, unfair, discriminative and unjust dismissal from employment; and
- h) Costs.

The claimant is also seeking for a declaration that his employment was terminated by dismissal which was unjust and discriminative and the respondent be compelled to pay damages.

The claimant testified that he was employed by the respondent on 1<sup>st</sup> December, 2001 to 27<sup>th</sup> December, 2015 when he was dismissed. He had been a general worker and in the year 2013 he became a machine operator. His wage was initially Ksh.200 per day and when he became machine operator he was paid ksh.450 per day. The wage was again increased in the year 2015.

On 27<sup>th</sup> December, 2015 the claimant had an accident while at work causing amputation of his left arm. From January and February, 2016 he was off duty. The human resource manager said he could not work. No letter was issued. It was verbal termination of employment. There was no absconding duty as alleged in defence.

The claimant also testified that Upon the accident the claimant was paid in a different claim without filing suit. He was never issued notice that he had been absent from work. No notice to show cause why employment would be terminated for being absent from work was issued. This led to unfair termination of employment.

The claimant also testified that upon his work injury he filed CMCC No.207 of 2016 and was compensated. The respondent paid his wages until February, 2016 and then stopped. He had been on sick off. He would go to the office weekly and be paid.

The claimant also testified that in the year 2013 he was under an employment contract. In the year 2008 to 2009 there was work stoppage and then resumed duty. From the year 2001 he would be called when there was work and then laid off. Payment of gratuity is due for the duration of employment.

The defence is that the claimant was a general worker and not machine operator as alleged. The claimant was injured while at work but this did not occasion termination of employment and he was dully compensated for the injury. While the claimant was on sick off he was paid his wages.

From 26<sup>th</sup> February, 2016 the claimant absconded duty without permission. He has never reported on duty since. He proceeded to file **Nakuru CMCC No.207 of 2016** for compensation for injuries sustained while at work.

The defence is that the claims made that there was unfair termination of employment has no basis, the claimant absented himself from work being gross misconduct. there was payment for work done and nothing is owing.

There was no underpayment as claimed. Remuneration was in accordance with the law. there is no notice pay due the claimant having failed to attend duty. The claim for gratuity is not justified as this was not a term of the employment contract. There was no overtime work and any such work was paid for. the claims made should be dismissed with costs.

Peter Opiyo testified that he is the payroll manager with the respondent and worked with the claimant who was on and off employment based on the nature of work orders the respondent received and which required the claimant to be at work. In the year 2013 the claimant was employed again and on 27<sup>th</sup> December, 2015 he was injured while on duty and he filed **Nakuru CMCC No.207 of 2016** and there was agreement to pay compensation.

After the accident the claimant was retained on the pay roll and paid weekly or would send another person to receive the wages. There are records of these payments to the claimant.

Mr Opiyo also testified that in March, 2016 the claimant did not report back to work. He could not be reached on phone. Under his contract, there was no address save for the phone number. There was no dismissal from employment as he could not be reached.

On the claims made gratuity pay was not a term of contract. Overtime was paid for in full when due. there was no underpayment as alleged. For public holidays, on 1<sup>st</sup> may, 2015 the claimant was paid as part of the weekly wages. There is nothing owing.

Jared Nyamboga the supervisor and who worked with the claimant testified that he started working with the claimant from the year 2013 when both got employed. The claimant had an accident while on duty as a general worker. His role was to supply materials to the machine operator but was not himself a machine operator. He got injured and was given 15 days off. He stopped attending work on 7<sup>th</sup> March, 2016. As the supervisor he tried to reach the claimant on phone but he was unreachable.

Mr Nyamboga also testified that access to the work place There is a punching system. The system must show when one is present. When absent there is no pay.

Peris Mbutia the human resource officer testified that the claimant was an employee of the respondent and he got injured while at work and he was given sick off and for such time he was paid. The claimant never returned after the sick off. Efforts to reach him were unsuccessful. There was no termination of employment. There was no communication until the claimant filed the current suit. The claimant had also filed Nakuru CMCC No.207 of 2016 and was compensated for work injury. Consent was filed.

At the close of the hearing, both parties agreed to file written submissions. There was no compliance.

The respondent filed work records.

Part of the work records filed by the respondent is the claimant's employment contract dated 10 December, 2013, leaf serial Number **S – 2221** for the period of 10<sup>th</sup> December, 2013 to 22<sup>nd</sup> February, 2014 a period of 2 ½ months at a wage of Ksh.467 per day. The claimant has also filed another contract dated 24<sup>th</sup> April, 2013 leaf serial number **S – 2051** for the period of 29<sup>th</sup> April, 2013 to 12<sup>th</sup> July, 2013 a period of 2 ½ months at a wage of ksh.379.30 per day.

In both contracts, the claimant is identified and employed as a general worker.

After the end of the last contract, there is no evidence of renewal. The claimant by letter dated 14<sup>th</sup> November, 2014 applied for the renewal of his contract. There is no response or any contract submitted by the respondent as the employer.

There is a payment statement for November, 2015 where the claimant is identified as a general worker. This evidence is not challenged.

The claimant was thus a general worker and not a machine operator as claimed. On the claims that there was underpayment for the period of January, 2015 to December, 2015 on the grounds that the claimant was a machine operator is without basis.

It is common cause that on 27<sup>th</sup> December, 2015 the claimant was injured while at work. For the injury sustained, he was allowed time off and for such time his wages were paid weekly. Wages are paid up and until 3<sup>rd</sup> March, 2016 at ksh.2,400 for the period of 22<sup>nd</sup> to 28<sup>th</sup> February, 2016.

The claimant has attached his hospital discharge summary issued on 30<sup>th</sup> December, 2015. I take it after his work injury on 27<sup>th</sup> December, 2015 he was treated in hospital hence the discharge summary on 30<sup>th</sup> December, 2015.

Where there was sick off days allocated, the claimant has not addressed such requirement.

Mr Opiyo for the respondent testified that upon the injury of the claimant he was allocated 15 days off. He was paid for such time off but failed to return to work.

Section 30 and 34 of the Employment Act, 2007 gives the employee a right for days off due to illness or sickness. Such time off work is allowed save with condition that upon return to work, the employee is required to submit a Certificate from a medical practitioner confirming sickness/illness as absence from work without due cause is subject to summary dismissal.

Despite the claimant being aware he suffered work injury and was allowed time off to attend hospital, the mandatory provisions of section 30(1) provides that;

*1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.*

Has the claimant met the above conditions of the law? upon payment of his full wages for the period of January and February, 2016 the claimant has not submitted the required certificate of incapacity to work signed by a qualified medical practitioner. Such then removes him from the employment of the respondent by operation of the law.

No compensation or notice pay is due. the claims that there was discrimination against the claimant following work injury has no foundation.

The claim for service/gratuity pay being the only other pending claim, in the payment statements filed by the respondent show a gross pay only. There are no statutory deductions and or remittances under the provisions of section 35(5) and (6) of the Employment Act, 2007.

Despite the contracts of employment between the parties not allowing for the payment of a gratuity, service pay is due to an employee where the employer fails to deduct and remit statutory dues. section 17 and 19 of the Employment Act, 2007 direct each employer to effect all lawful deductions from a wage and take such into account in the payment statement.

Where the employee is not registered with the NSSF or NHIF, before employment or upon employment, the employer has a duty to ensure there is full compliance as to retain such an employee and keep on paying the wages due without taking into account the statutory deductions even where the employee is paid weekly, service pay is due.

With the various contract issued to the claimant, the last covering the period of 10<sup>th</sup> December, 2013 to 22<sup>nd</sup> February, 2014 and the claim herein having been filed on 16th November, 2017 by operation of section 90 of the Employment Act, 2007 the claims for service pay due can only go back for a period of 3 years thus covering the period up and until the last contract filed for 2014.

For each full year of service, 2014 and 2015 the claimant is entitled to a minimum pay of 15 days based on the last gross wage due all at Ksh.450 x 15 x 2 all being Ksh.13,500 in service pay.

**Accordingly, the claims made are found without merit save for service pay assessed at Ksh.13,500. Each party shall pay own costs.**

**Delivered at Nakuru this 13<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....