



**REPUBLIC OF KENYA**

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

**CAUSE NO.196 OF 2018**

**GEOFFREY MACHUNGO MAGETO ..... CLAIMANT**

**VERSUS**

**ROYAL GROUP INDUSTRIES (K) LIMITED ..... RESPONDENT**

**JUDGEMENT**

The claim is that the claimant was employed by the respondent as an assistant machine operator from 6<sup>th</sup> May, 2016 to 13<sup>th</sup> March, 2018 when his employment was terminated wrongfully over alleged misconduct, ill behaviour and sabotage. At the time the claimant was earning ksh.12,500 per month.

The claim is that the claimant was not given a hearing or notice before his employment was terminated. He is claiming for the payment of his terminal dues;

- a) Accrued leave for 2 years ksh.25,000;
- b) Certificate of service;
- c) Compensation ksh.150,000;
- d) 3 months' notice pay ksh.37,500;
- e) Overtime of 695 days x 7 hours Ksh.209,195; and
- f) Costs.

The claimant testified that upon employment by the respondent he worked diligently but on 14<sup>th</sup> February, 2018 he was to attend work but due to problems he did not. In the evening he was sent home. The next day the human resource gave him 6 days of leave.

On 13<sup>th</sup> March, 2018 the claimant was terminate din his employment. There was no hearing or notice issued. The letter dated 5<sup>th</sup> March, 2018 filed by the respondent he did not receive it. The respondent also referred the matter to the minister for disciplinary hearing but he did not attend.

The letters of warning filed with the defence were never issued to the claimant. The alleged apology he did not sign it.

The claimant also testified that he had a funeral to attend at home, he came back very exhausted and called his supervisor and was not able to attend work. He was directed to write an apology.

Upon termination of employment he was paid ksh.17,000 and he accepted it because he needed money to pay rent.

It is true that on 14<sup>th</sup> February, 2018 he had a problem and was not able to attend work.

Every weekend he would be at work for 24 hours and would not be paid overtime.

There would be a shift change every week.

The claimant also testified that he would be allowed leave and off days. There are several leave application forms attached to the defence;

On 1<sup>st</sup> December, 2016 the claimant was allowed annual leave to attend burial at home;

On 8<sup>th</sup> September, 2016 to 10<sup>th</sup> was allowed time off to attend a funeral;

For failure to attend work he wrote an apology to the respondent.

## **Defence**

The defence is that before the respondent terminated the claimant's employment he was given a hearing and allowed to appeal. The claimant engaged in misconduct, sabotage and persistent acts of indiscipline. Termination of employment followed the due process under the provisions of section 41, 43 and 45 of the Employment Act.

The defence is also that the claims made with regard to notice pay at 3 months has no legal basis; the claims made for not taking annual leave are not justified as he took annual leave and the termination of employment having been justified there is no case for compensation.

The claims made with regard to overtime are erroneous and devoid of any legal basis. The claims should be dismissed with costs.

The respondent filed a list of documents.

There was no witness called.

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

The claimant filed his claim on 12<sup>th</sup> June, 2018. The defence was filed on 18<sup>th</sup> July, 2018.

The claimant contested most of the work records filed by the respondent but upon the defence being filed and served there was no reply to challenge the same or that the work records filed were not proper.

It is trite that the employer is the custodian of employment records. Upon filing of a claim with the court, the duty is upon the employer to file the work records.

As the records filed herein were not challenged until the claimant was put on cross-examination, the record is taken as true and correct in accordance with section 10(7) of the Employment Act, 2007.

By letter dated 13<sup>th</sup> March, 2018 the respondent terminated claimant's employment as a result of;

*.....your numerous misconducts, ill behaviour, work sabotage and your refusal to attend to your work per your shift arrangement even after being instructed to do so by the operator in charge. ...*

Failure to attend work or take lawful directions of the employer is in breach of the provisions of section 44(3) and (4) of the Employment Act, 2007 and the employer is allowed to effect summary dismissal subject to adherence to the provisions of section 41(2) of the Act.

From the filed records, on 12<sup>th</sup> March, 2018 the claimant was invited and attended a disciplinary hearing. Matters facing with regard to workplace misconduct were addressed and he was allowed his defence. At the end of the hearing a recommendation was taken to terminate employment.

The claimant admitted he was paid ksh.17,000.

On the grounds set out in the letter terminating employment, these being gross misconduct, the claimant having been taken through the due process of the law as under section 41 read together with section 43 of the Employment Act, 2007 the court finds no evidence of unfair termination of employment to justify the claims for notice pay or compensation.

On the claim for overtime pay though claimed the particulars of how the claim for 695 x 7 days arose to warrant the claim of ksh.209,195 is not gone into. The claimant testified that he worked in a shift which would be changed every week, he was allowed time off for rest and took his annual leave. The claims thus made for overtime time work without being rationalised are not justified.

On the claims for accrued annual leave for two years, the claimant in his evidence admitted to taking several days for leave, the records filed by the respondent confirm his applications for annual leave.

In the contract of employment the claimant was entitled to 21 leave days which is commensurate with section 28 of the Employment Act, 2007.

On 15<sup>th</sup> to 16<sup>th</sup> December, 2016 he took a day of leave;

14<sup>th</sup> to 15<sup>th</sup> December, 2016 he took a day of leave;

1<sup>st</sup> to 3<sup>rd</sup> December, 2016 he took 3 leave days;

30<sup>th</sup> September, to 1<sup>st</sup> October, 2016 he took a day of leave;

8<sup>th</sup> to 10<sup>th</sup> October, 2016 he took 2 leave days;

23<sup>rd</sup> to 26<sup>th</sup> May, 2016 he took 3 days of leave;

Cumulatively, he claimant had 11 leave days.

In total there are 31 leave days not accounted for.

On the due wage of ksh.11,623 per month, to encash these days all is at ksh.12,010.40.

In the letter terminating employment the respondent made an undertaking to tabulate the owing leave days for payment. The claimant has since received ksh.17,000.

**Accordingly, on the claims made the court finds no merit save the claimant shall attend at the shop floor for tabulation of his owing leave days and which shall be paid less what has been received at ksh.17,000. The claimant shall also be issued with a Certificate of Service pursuant to the provisions of section 51 of the Employment Act, 2007. Each party shall bear own costs.**

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

**M. MBARU**

**JUDGE**

In the presence of: .....