



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.234 OF 2016

ROBINSTONE OTIENO OKEYO..... CLAIMANT

VERSUS

MEGA PACK (K) LIMITED.....RESPONDENT

JUDGEMENT

The claim is that on 15th May, 2010 the claimant was employed as a strapping operator (Machine Operator) and issued with letter of employment. He was earning Ksh.9, 050 basic wage and Ksh.1, 358 house allowances per month and the claimant is that this was underpayment for a machine operator.

The claim is that in September, 2015 the claimant fell sick on 18th and sought permission to seek treatment and was allowed but upon return he was verbally informed that his employment had been terminated for having asthma and therefor unfit to work. He was paid for days worked only and not for time on medical off.

That this led to unfair termination of employment and is seeking terminal dues;

- a) Notice pay Ksh.15,693.40;
- b) Underpayments Ksh.113,657.40;
- c) One year leave Ksh.9,552.50;
- d) Salary deduction ksh.4,005.40;
- e) Compensation; and
- f) Costs.

The claimant testified that he was employed as strapping operator working with a machine hence a machine operator. His wages were increased over time to ksh.13,000 and paid less statutory deduction and had a house allowance benefit working for 7 ½ hours for 6 days each week. The respondent was running shifts but on 18th September, 2015 he fell sick while at work and was given permission to attend hospital for treatment. He got serious and fainted and found himself admitted in hospital and the doctor gave him 5 days off. At the end he was still sick and on 21st September, 2015 he requested for more time for medical attention and went to St. Mary's hospital for treatment and got 3 days sick off. He returned to work on 28th September, 2015 but was dismissed on the grounds that he could not be allowed to work while sick.

The wage for September, 2015 was paid less the days not at work. He had called the shop steward and gave him the sick off sheet and claims his dues as pleaded.

The claimant also testified that he was employed on contract terms and upon lapse there would be a renewal. On 21st November, 2014 his employment was terminated for participating in an illegal strike and was paid his dues on 24th November, 2014 and signed a discharge voucher. He was later re-employed and issued with 3 months contract.

Access to the work place was by biometric system. He had to log in at the gate to gain access. He got sick off on 18th September, 2015 and

never reported back, Fred Nyaunchi took the sick off sheet to the respondent.

The defence is that the claimant was employed as a strapper in the production department under a fixed term contract from 31st August, 2015 to 31st December, 2015 but on 18th September, 2015 at 3pm the machine under which the claimant and other employees were working developed an electrical hitch and had to be switched off. The employees were deployed to other areas. At 3.30pm the printing operator Mr Michael Alala discovered the claimant was missing as he was not in the working station with other employees and a search was mounted.

The defence is that following an intense search the claimant was found sleeping on the floor behind stacked cartons and upon interrogation he refused to cooperate with the respondent and walked away.

The claimant did not report to work on 25th September, 2015, a notice to show cause why disciplinary action could not be taken against him issued and a meeting was scheduled for 28th September, 2015 but it could not be delivered as the claimant continued to be absent from work. The claimant remained absent from work until his fixed term contract lapsed.

The claims made are without basis and should be dismissed.

Eric Wagatwa Njenga testified that the claimant was employed by the respondent under fixed term contracts as a strapping machine attendant from January, 2011 to November, 2014 when he was dismissed for gross misconduct. He was paid his terminal dues.

The claimant was unionised and upon negotiations he was re-employed on fixed term contract until 18th September, 2015 when he was found sleeping behind machines and hidden with cartons. He claimed to be sick and the shop steward was called to take him to hospital but all along the claimant had feigned illness. The respondent waited for him to return but did not. A notice to show cause why disciplinary measures should not be taken against him issued but his phone was off and he could not be reached.

Mr Njenga also testified that he sent the shop steward to look for the claimant and to pay his wages. At the end of his contract in December, 2015 he had not returned.

All access to the respondent is captured at the gate. Where the claimant made effort to report to work as alleged, this should have been recorded at the gate which was not the case.

On the claims made, Mr Njenga testified that the claimant was not underpaid as he was not a machine operator as claimed. He had general duties strapping and assisting the machine operator. His contract lapsed on its terms upon his failure to return to work. The due leave days were prorated and he was paid for days worked.

Winsius Barasa testified that he is a machine operator with the respondent and the shop steward. The claimant was unionised and there was a CBA giving a schedule of payment and strapping was in general duties.

The claimant was found sleeping at work on 18th September, 2015. The manager saw him and he was called as the shop steward to witness and he woke him up when he feigned being sick and thus accompanied him to the hospital but there was no sickness. He never returned to work. He called him severally concerned with his work absence but he said he was unwell. No sick sheet was provided.

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

Both parties agree that access to the respondent's workplace is recorded by biometric system. One has to log in at the gate and hence such record can confirm work attendance.

As correctly submitted by the respondent, section 30 of the Employment Act, 2007 allow an employee to take sick leave or sick off but must inform the employer about the absence and reasons thereof within a reasonable time as held in **BIFU versus Barclays Bank of Kenya Limited [2014] eKLR**.

The claimant admitted that upon reporting to work with the respondent his biometrics would be picked/recorded at the gate. On 18th September, 2015 he said he was sick when he was found asleep at the shop floor. There is no record that he returned to work with the sick sheet, certificate of illness/sickness or to work after such date.

At the time the claimant was on a fixed term contract.

The defence that the claimant was found sleeping while at work and hiding behind carton which was witnessed by the shop steward, the human resource manager and the director was not challenged and in the circumstances of the claimant not submitting any records in terms of section 30 of the Employment Act, 2007 his absence from work is not justified.

On the fixed term contract, the claimant frustrated his own employment. He cannot claim notice pay or compensation.

On the claims for underpayment, the claimant was under a fixed term contract as a strapper. Such position is not equivalent to a machine operator to claim there was an underpayment. In any event the claimant was unionised and there was a CBA. Where the claimant was wrongly classified, the union has not filed a dispute with the Minister. The claimant Cannot claim for have worked in a position he was never appointed in the first instance as machine operator. His contract was for a specified position.

On the claim that there was a salary deduction for the time the claimant was on sick off or sick leave, as analysed above, the claimant failed to abide the provisions of section 30 of the Employment Act, 2007. Such absence not justified, the failure to attend work was not sanctioned or with the permission of the respondent. What was due was pay for work done and nothing more.

On the claim for one annual leave pay, the claimant was on affixed term contract covering September to December, 2015. He only worked for 18 days in September, 2015. Under the provisions of section 28 of the Employment Act, 2007 leave days can only be logically tabulated in this case at zero (0) rate.

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

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of: