REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.198 OF 2018

VINCENT TAABULEY OUNDO...CLAIMANT

VERSUS

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

JUDGEMENT

The claim is based on the facts that the claimant was employed by the respondent as a casual labourer/machine operator from October, 2014 to 7th March, 2018 when his employment was terminated on 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 issued with any warning, notice or the hearing to urge his defence contrary to section 41 of the Employment Act. The termination of employment was fundamentally flawed, lacked fairness and contrary to the provisions of sections 43 and 45 of the Employment act.

His terminal dues were not paid in full.

The claim is that compensation is due at 12 months at ksh.150, 000;

Notice pay for 3 months ksh.37, 500;

Overtime work at Ksh.383, 775;

Accrued leave for 3 years ksh.37, 500;

Certificate of service; and

Costs with interests.

The claimant testified that on 14th February, 2018 before he left work his supervisor called him that he should not report to work the following day which was on a Sunday when he was supposed to have clocked 24 hours to change his shift. He had worked overtime and had pleaded to come in at 6pm evening shift instead of the morning shift to which the supervisor agreed to but when he returned he was sent away.

The claimant also testified he was in the company of other employee who also did not report in the morning shift.

On Monday morning when he reported to work with others they were sent to see the human resource officer.

Every month he enjoyed 4 off days. These would be accumulated and taken once. Upon return others would take their 4 days off but in this case they all converged on 14th February, 2018 and alleged to have refused to report for work and were therefore dismissed. After a week he was paid his terminal dues among others. He signed an agreement dated 7th March, 2018 at ksh.18, 096. There was no explanation as to what this constituted and this resulted in unfair termination of employment. There was no hearing and following his taking 4 off days his employment was terminated.

The claimant also testified that the employment records field by the respondent are a sham. His work hours were from 8am to 6pm on day shift or had to stay at work until what was allocated to finish. Night shift was from 6pm to 8am to allow for shift change and handover. Over

the weekend he had to do 24 hours to allow for shift change. Some sections of the respondent had 3 shifts but in his case there were only 2 shifts. No overtime work was paid.

The claimant also testified that he was under a written contract off employment which he signed. It was for the role of assistant operator.

Contract dated 4th January, 2016 and paid ksh.11, 623; Contract dated 3rd January, 2017 paid ksh.12, 800.

That every week he took a day off and in a given month he had 4 days off. He filled staff leave forms on several occasions. On 5 th October, 2016 he applied to attend a funeral in Kakamega;

In 2015 he went on annual leave to allow him pay school fees for his children. This was done again in the year, 2017 to 2018.

He signed for his terminal dues including notice pay at ksh.13, 715;

Overtime pay at ksh.7, 337;

Total Ksh.18, 936.

He signed agreement of settlement.

The defence is that the claims made are without merit as the claimant was allowed a fair hearing in line with section 41 of the Employment act but he acquiesced and abated his right thereby exhausting his right to challenge the termination of his employment. The claimant was prone to misconduct, sabotage and persistent acts of indiscipline while at work.

Notice pay is not due as claimed at 3 months. Upon termination of employment the claimant was paid for such time.

There were no accrued leave days.

Compensation is not due as the respondent followed the due process of the law and there were reasons leading to termination of employment. All overtime work was paid for in full. There is nothing owing and the claims should be dismissed.

The respondent filed work records.

No witness was called.

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

By letter dated 7th March, 2018 the respondent terminated the claimant's employment with immediate effect for the reasons that;

> ....Your termination is a result of your numerous misconducts, ill behaviour, work sabotage, your refusal to attend to your work as per your shift arrangement even *after being instructed to do so by the operator in charge and lapse of your contract. …*

At the time of termination of employment the claimant had served under a contract of employment running from4th January, 2017 to 3 rd January, 2018. No other contract is filed. I take it the last contract was not renewed but the claimant continued at work up and until 7 th March, 2018 a period of over 30 days and thus became converted and protected under section 37 of the Employment Act, 2007 as held in the case of **Krystalline Salt Limited versus Kwekwe Mwakele & 67 others [2017] eKLR.** See also **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR;**

> Our reading of **Section 37** of the **Employment Act** reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month.

Under the last contract, the claimant is defined as an *Operators Assistant.* The claimant pleaded that he was a general labourer/machine operator. This cannot be far from the truth. His contract gave him a defined role of operations assistant on a defined wage.

The defence is that the claimant was of numerous misconduct, ill behaviour, work sabotage and eventually refused to attend to his allocated work as per the shift arrangement. Such indeed in gross misconduct.

The respondent has relied and submitted that under section 107 and 109 of the Evidence Act the claimant bears the burden of proof on what he pleaded. However in employment and labour relations, the employee is only required to abide the provisions of section 47(5) of the Employment Act, 2007 and the burden of discharging the burden of proof that there were genuine and justified grounds of termination or dismissal of employment is placed upon the employer. The Evidence Act principles do not thus apply.

In this regard the claimant testify that he on 14th February, 2018 he had worked overtime and was due to change shift and wanted to take his rest but due to the changes in shifts, together with other employees he did not attend on the next day, a Sunday until Monday morning but his

employment was thus terminated.

The claimant gave a very detailed chronology of events. Due to the nature of work shifts, he would work for a week and take a day off. 4 days would be accumulated each months and be taken together. For a change of shifts, the outgoing shift employees would work for 24 hours to allow for a change and handover.

I take it, the work attendances were thus synchronised to allow for smooth work operations. The claimant was compensated for such changes with an off day each week and 4 days off each month.

The failure, refusal and neglect to attend work on 14th February, 2018 disrupted the smooth running and operations of work. The respondent had prepared a shift schedule supervised by the shift operator. To thus fail, refuse or neglect to abide, such is gross misconduct.

Even where the claimant was of gross misconduct, section 41(2) of the Employment Act, 2007 requires that the employee who is of gross misconduct be accorded the due process of the law. The subject employee must be accorded a hearing in the presence of another employee of his choice.

The respondent has filed a letter and notice of invitation to the claimant dated 26th February, 2018 to be held on 6th March, 2018. The evidence was that after 14th February, 2018 the claimant did not attend work. The subject notice dated 26th February, 2018 does not have a forwarding address. Where then was the claimant served at?

This is a serious lapse.

The evidence by the claimant that the proceedings filed by the respondent and alleged to be for his disciplinary hearing were a sham stands out true. Without the claimant receiving the invitation for the disciplinary hearing, to proceed with the disciplinary hearing as alleged was a sham. Whatever the nature of misconduct the claimant had committed the due process of the law required notice.

Section 41(2) of the Employment Act, 2007provides that;

> 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

For the procedural lapse(s) this implicates on the decision to terminate employment. There was procedural unfairness contrary to the provisions of section 45(2) of the Employment Act, 2007 and the claimant is entitled to compensation by virtue of section 49 of the Act. however, section 45(5) of the Act the court is required to take into account the work indiscipline. It is not contested that the claimant had warnings. Such put into account, compensation due is hereby assessed at one (1) month gross wage last earned at ksh.12, 800.

On the claims made, the claimant being protected under the provisions of section 37 of the Employment Act, 2007 as set out above has already been paid notice pay due at one month. The claim for pay at 3 months is not justified.

The claimant was also paid for the overtime work.

On the claim for accrued annual leave, on the work records filed included taking annual leave in the years 2016, 2015 coupled with his evidence that every week he had a day off and in every month he had 4 days off. The records filed and on the evidence, there is compliance with section 27 and 28 of the Employment Act, 2007.

A certificate of service is due under the provisions of section 51 of the Employment Act, 2007.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of compensation at Ksh.12, 800; a certificate of service shall be issued; costs at 50%.

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

M. MBARU

JUDGE

In the presence of: ....