



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.367 OF 2015

ANTHONY NYABERI MOTURICLAIMANT

VERSUS

GILANI'S SUPERMARKET LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in February, 1998 as a general worker.

The claimant's case is that he was underpaid in his position in violation of the wage orders. He was made to work on public holidays without the necessary payment. No annual leave was taken or paid for in lieu thereof.

On 6th December, 2011 the claimant was hit by a trolley while on duty and where he sustained injuries. As a result of these injuries the claimant could not perform his duties diligently and as a casual employee he should have been given lighter duties but instead the respondent dismissed him from employment on grounds of poor performance which was unfair considering the facts that he incurred the injuries while on duty.

By letter dated 8th November, 2012 the respondent admitted owing the claimant in terminal dues. however when accepting the payment the respondent required him to accept that he would not lodge any other claim including that for injuries incurred while at work.

The claimant is seeking the following dues;

- (a) Work during public holidays from February, 1998 to January, 2013 at ksh.62,974.60;
- (b) Leave due 2012-2013 Ksh.5,541.10;
- (c) Compensation;
- (d) Work for 13 days in January, 2013 Ksh.5,621.20;
- (e) Compensation and
- (f) Costs.

The claimant testified that upon employment by the respondent he worked diligently as a casual employee loading and offloading goods but on 13th January, 2013 he was dismissed on the grounds that his work was not good. He was issued with notice dated 8th December, 2012 but there was no hearing and his union was not invited.

The claimant also testified that his work went low following an injury at work. He got a medical report noting that he ought to take lighter duties. However the respondent continued to allocate him similar duties as before he was not injured.

In response, the respondent has denied all the allegations made by the claimant and on without prejudice avers that the claimant was an employee until 8th January, 2013 and not on 13th January, 2013. There was no underpayment as alleged and dully compensated him when at work during public holidays or by being given alternative rest days or added to his annual leave days.

The claimant has refused to collect his terminal dues despite being invited to.

The defence is also that the claimant never reported to work on the day he alleges he was injured. The medical report indicates that the claimant had a road traffic accident contrary to what is alleged in the memorandum of claim that he was hit by a trolley while at work. The claims therefore made are without basis and should be dismissed with costs.

In evidence, Zedrick Nduati Waweru the human resource manager testified that the claimant was employed vide letter dated 10th May, 2012 in which letter the date when employment commenced was stated. The contract has a termination clause upon notice of one month or instantly upon gross misconduct.

In this case the respondent issued the claimant with notice dated 8th December, 2012 giving the reason under the contract terms. The claimant served his notice period. He failed to clear and or accept the terminal dues.

Mr Waweru also testified that before December, 2011 the claimant had a history of misconduct where he had been issued with warning letter. The alleged work injury did not take place as alleged and following poor work performance the claimant was issued with warning on 31st March, 2011. The medical letter submitted stated that injury was on 6th December, 2011 and the issue of poor work performance had nothing to do with such alleged injury.

On 14th December, 2010 the claimant had been issued with warning for laxity at work. Similar warning were issued on 1st January, 2008; 24th June, 24th October, 27th December in the year 2008.

It is an admitted fact that the claimant was of poor performance. He had no work allocated during public holidays and the work sheet shows that on public holidays the claimant was not at work. He took leave due in the period 2012/2013. In reply to the demand notice, the respondent in reply offered to pay for leave days due, off days and overtime less what had been advanced to the claimant. The claimant refused to collect his dues.

The claimant filed suit following alleged work injury in CMCC No.581 of 2013 which concluded and he was paid Ksh.573, 371.0. and allegations that he was directed to withdraw the claim so as to be paid his work benefits is not correct. Upon clearance, the claimant shall be paid his due.

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

By letter dated 8th December, 2012 the respondent issued the claimant with notice terminating employment on the grounds that his work performance was poor and he was to be observed on a daily basis. The claimant was advised to collect his terminal dues on 8th January, 2013.

Termination on the grounds of poor performance is strictly regulated under the provisions of section 41(1) of the Employment Act, 2007 and requires the employer to give the employee a hearing and support such a poor performing employee.

In this case, the claimant on his own accord admitted that he was of poor performance following an accident at work on 6th December, 2011. That he was attended to by Dr Obed who noted that he should be given lighter duties. The respondent has challenged such submissions on the basis that there was no work injury and the alleged medical report related to injury outside the work place.

The claimant filed the Medical report by Dr Obed which is dated 11th June, 2013 following an examination on the claimant on equal date. The history given is that the claimant was injured while at work on 6th December, 2011 and suffered 20% disability.

Following such accident the claimant filed work injury claim and as confirmed by the respondent he has since been paid Ksh.57, 371.00. It is therefore correct that the claimant was injured while at work and following such injury he suffered a disability.

Such a person with a disability is entitled to reasonable accommodation at the work place pursuant to the provisions of Article 54 of the Constitution, 2010 read together with Persons with Disabilities Act, 2003. However the duty is mutual. The claimant as the employee must bring to the attention of the employer the circumstances within which reasonable accommodation is required.

Where the claimant was injured at work on 6th December, 2011 the letter by the medical doctor was only sourced many months later and on 11th June, 2013. I take it the medical report was more required in support of the work injury claims and not in seeking reasonable accommodation.

The duty being dual, by the claimant poorly undertaking his duties and admitting to such fact, the respondent as the employer cannot be held solely liable save for the non-compliance with the mandatory provisions of section 41(1) of the Employment Act, 2007 which required the respondent to give the claimant a hearing in the presence of his union which he was a member. Had such hearing been conducted in accordance with the law, matters now being urged in court should have become apparent at the shop floor.

The failure to adhere to the mandatory provisions of the law led to unfair termination of employment.

In addressing the compensation due to the claimant for unfair termination of employment, the court is required to put into account the provisions of section 45(5) of the Employment Act, 2007 as follows;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*
- (b) the conduct and capability of the employee up to the date of termination;*
- (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*
- (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
- (e) the existence of any previous warning letters issued to the employee.*

In this case the claimant was issued with notice stipulated under his employment contract and in accordance with section 35 of the Act, the claimant had a litany of work misconduct even before his injury he was a lax worker, upon termination of employment the respondent offered to pay the terminal dues which the claimant has refused to accept. Putting such matters into account, the court discretion not to award any compensation is hereby invoked.

On the claims made for payment for work over public holidays, the work records submitted by the respondent confirm that the claimant was noted as not at work during public holidays. The claimant has signed to the work schedule and which was used to pay his wages. There is no doubt that the work records filed are true and in accordance with section 10(6) of the Employment Act, 2007.

On leave days due as at 8th January, 201, salary for days worked, such have been offered to the claimant vide several letters sent to him and through his appointed advocates. such are dues which can well be settled at the shop floor. Clearance with the employer is a good practice to ensure that the claimant has taken into account any salary advanced to him and any other liability which may have arisen within his employment. Such is an accepted good practice for every employee to undertake at the end of employment.

Accordingly, the claims made are found without merit. What is due to the claimant in leave days and unpaid wages shall be computed at the shop floor and paid upon the clearance. Each party to bear own costs.

Delivered at Nakuru and dated this 21st day of January, 2019.

M. MBARU JUDGE.

In the presence of

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