



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.141 OF 2014**

**FRANCIS GATHONDU KIHUKO .....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

On 12<sup>th</sup> September, 1997 the claimant was employed by the respondent as a Drawer in the textile department. On 30<sup>th</sup> September, 2009 the claimant was employed on permanent basis and issued with letter of appointment at a wage of Ksh.5, 715.20 per month.

The claimant was involved in an accident on 10<sup>th</sup> July, 2013 and when he resumed duty on 3<sup>rd</sup> September, 2014 he was directed to get a letter from his union for a possible settlement instead of being reinstated.

In January, 2014 the claimant was dismissed without any letter.

There was no notice issued before employment terminated which was unfair and discriminative on the grounds that no salary was paid, the CBA with Tailors and Textiles Workers Union was not followed, the claimant had been underpaid and his due terminal dues were not paid.

The claimant was entitled to a wage of ksh.5, 811.00 and 6,312.00 due in the year 2009 and there was an underpayment of Ksh.1, 811.00 and Ksh.2, 312.00 respectively. In the year 2010/2013 the wages were reviewed and increased to ksh.8, 096.00 but the claimant was underpaid.

The claimant is seeking underpaid wages from 1<sup>st</sup> May, 2009 to 1<sup>st</sup> May, 2007 all at ksh.424, 692.60;

Leave travelling allowance Ksh.5, 700.00; Severance pay for years worked Ksh.132, 000.00; Leave days for 16 years Ksh.703, 512.60; Compensation for unfair termination of employment; General damages; and Costs.

The claimant testified that he was employed as a casual on 12<sup>th</sup> September, 1997 and got a letter of appointment on 30<sup>th</sup> September, 2009 as a Machine Attendant. Following an accident on 10<sup>th</sup> July, 2013 he was admitted in hospital and discharged with mental disorientation vide medical reports dated 13<sup>th</sup> August, 2013. After two weeks he reported to work but informed that he could not work due to mental condition. He reported the matter to the union and the respondent insisted that he had to recover first.

The claimant also testified that the matter was reported to the labour officer but there was no resolution.

From 1997 to 2009 the claimant was underpaid and earning ksh.3, 000.00 per month. Such was below the Wage Orders applicable. In subsequent years, there was an underpayment.

The claimant worked continuously for the respondent as machine attendant from 1997 to 2009 with his NSSF contributions sent by the respondent. there was no notice issued terminating employment. The letter dated 15<sup>th</sup> August, 2013 was contrary to the law as it indicates the medical report did not show he had been given sick off but at the time of dismissal the respondent knew he had an accident.

**Defence**

The defence is that the claimant was employed on casual terms and was on and off until he was issued with letter of appointment. The job card from Gironi Comm. Community Studio is by a third party.

On 7<sup>th</sup> August, 2000 the claimant made application seeking employment and when he was employed on casual basis and issued with contract to this effect. All due wages were paid.

On 30<sup>th</sup> September, 2009 the claimant was employed on permanent basis as a Machine Attendant which was done after a meeting with the Tailors and Textiles Workers Union to employ casual employees on permanent terms.

The respondent had no knowledge of the alleged accident on 10<sup>th</sup> July, 2013 until 13<sup>th</sup> August, 2013 when it received documents from the provincial general hospital, Nakuru. The claimant had been admitted for a day and the attending doctor noted the claimant was able to walk and talk. The claimant did not contact the respondent or report the accident and attempts to reach him were fruitless. He was issued with letter of summary dismissal with a copy to the union and to the county labour officer.

The letter dated 13<sup>th</sup> August, 2013 and 30<sup>th</sup> August, 2013 from the medical superintendent, Nakuru general hospital did not have any purpose as it came after the fact of summary dismissal of the claimant for absconding work. The claimant did not resume duty as alleged or coerced to get a letter from his union. When he reported on 3<sup>rd</sup> September, 2013 he was informed of the summary dismissal.

Terminal dues were tabulated at ksh.2, 923.00 and deposited with the labour officer for the collection by the claimant.

The employment of the claimant on permanent basis did not confer any benefits other than the due wages as held in **Nairobi Cause No.932 of 2010 – Tailors and Textiles Workers Union versus Bedi Investment Ltd.** In dismissing the claimant the respondent complied with clause 14 of the CBA. The claims made are without basis and should be dismissed with costs.

The due salary arrears tabulated at ksh.2, 090.00 for the year 2013 and leave traveling allowance at Ksh.3, 922.00 were deposited with the labour officer when the claimant failed to attend and collect. The claimant was further paid Ksh.575.00 for leave and travelling allowance for the year 2013.

Juma Godfrey testified for the respondent that he supervised the claimant in his duties when he was a casual employee and in the year 2009 he was employed on permanent terms as a machine attendant.

On 9<sup>th</sup> July, 2013 the claimant deserted duty. He attended the day shift and then disappeared. The respondent relied on the attendance sheets and biometrics to confirm the claimant was absent from duty. The last logging was 7.46am to 18.01pm on 9<sup>th</sup> July, 2013.

On 13<sup>th</sup> August, 2013 the claimant reappeared and said he had been discharged from hospital. He submitted documents without an explanation. There was no sick off or indication of a medical condition. The discharge summary indicated there was an accident and admission on 10<sup>th</sup> July, 2013 for a day.

Before 13<sup>th</sup> August, 2013 there was no communication by the claimant as to his whereabouts. Apart from the discharge summary, there was no other medical certificate. There was no genuine reason as to why the claimant was absent from work.

The claimant was unionised and there was a CBA which allowed for summary dismissal where an employee was absent from duty for over a week without authority. The claims made should be dismissed as the claimant has been paid his dues.

Peter Opiyo the Accountant and Personnel in the human resource department testified that he joined the respondent's employment in the year 1992 and worked with the claimant who was employed on casual terms from the year 2000 to 2009. The union had a CBA and the claimant was employed permanently from the year 2009. Before the claimant was paid a daily wage and upon becoming permanent he had an addition of house allowance.

Mr Opiyo also testified that the claimant absconded duty from July to August, 2013. He brought a discharge summary from the hospital but had no sick off. No reason was given for being away from work. The discharge summary was after admission in hospital for a day. A summary dismissal had issued and copied to the union and labour officer.

In tabulation of terminal dues, The claimant had an advance, he had earned leave for 6 months, had a leave travelling allowance, the due arrears for the year 2013 which were submitted with the labour office after the claimant declined to collect.

Both parties filed written submissions.

The issues which emerge for determination can be summarised as follows;

The duration of employment;

Whether there was unfair termination of employment;

Whether the remedies claimed are due.

It is common cause that the claimant was employed by the respondent from the year 1997 and by application dated 7<sup>th</sup> August, 2000 he applied for employment following what he stated to be;

In the year 1997 December I deserted your company due to domestic instability (tribal clashes).

Having been at home for those two years I do now apply to come back as a drawer or .... Since I am now stable. ...

There was a break in employment.

The letter of employment dated 30<sup>th</sup> September, 2009 is not challenged. The claimant was appointed as Machine Attendant. This is on the basis that there was his union which negotiated for all casual employees to be absorbed on permanent basis.

Such letter of employment is permissible, legitimate and in accordance with section 10 (1) and 2(j) of the Employment Act, 2007. The respondent issued the claimant with letter of appointment giving particulars, nature of payments and benefits and that the period of employment was permanent.

The letter of appointment was issued following a CBA with the Tailors and Textiles Workers Union.

Employment subsisting between the parties was therefore thus regulated. It commenced vide such letter of employment on 30<sup>th</sup> September, 2009.

conversion of causal terms employment is allowed under the law.

The last date the claimant was logged in at work was 9<sup>th</sup> July, 2013. The logging system was biometric and required his hand to check into the respondent's premises.

The claimant asserts that he was involved in an accident on 10<sup>th</sup> July, 2013 and was admitted in hospital where he was discharged with mental disorientation and only reported back to work on 13<sup>th</sup> August, 2013 with his discharge summary.

By such date and on 13<sup>th</sup> August, 2013 the claimant had been dismissed from his employment for being absent for over 7 days and in accordance with the CBA.

Section 30 of the Employment Act, 2007 give an employee the right of taking sick leave following illness. Such should be with full pay.

The condition for taking sick leave is that the employee must inform the employer of any incapacity, sickness or illness as soon as is reasonably practical. The law is generous to the extent that a third party is allowed to notify the employer of the subject employee being sick or unwell.

### *30. Sick leave*

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.

2. For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

Upon discharge from any incapacity, the employee has the legal duty to submit a medical certificate signed by a medical practitioner to the employer. The condition of notification and submission of a medical certificate are mandatory.

The rationale is that absence from work without good cause, permission and approval of the employer is a condition for summary dismissal and pursuant to the provisions of section 44(4) (a);

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

The claimant has submitted letter dated 30<sup>th</sup> August, 2013, a medical report issued by Dr Karanja noting he suffered head injury on 10<sup>th</sup> July, 2013 following a road traffic accident. There is also letter from Dr Kinyua dated 13<sup>th</sup> August, 2013 stating that the claimant had memory loss from 13<sup>th</sup> July to 13<sup>th</sup> August, 2013 following an accident. There is a discharge summary noting the claimant was admitted at the Provincial general hospital, Nakuru for a day following an accident.

As much as the court sympathises with the claimant, the mandatory provisions of the law required him to notify the employer of any incapacity within reasonable time. Such matter cannot be attended to after the fact. The alleged memory lapse noted by the doctor cannot

have just occurred when the claimant testified that he reported back to work on 13<sup>th</sup> August, 2013 and discovered that letter of summary dismissal had issued.

Where there was an accident on 10<sup>th</sup> July, 2013 and the claimant was admitted for one day, reason demanded that he should make a report with the employer immediately. Where the claimant was able to attend psychrist clinic from 13<sup>th</sup> July to 13<sup>th</sup> August, 2013 as noted by Dr Kinyua in the letter dated 13<sup>th</sup> August, 2013 great reason demanded that the respondent, as the employer be notified of any absence from work.

The summary dismissal of the claimant is hereby found justified. The notice issued to him was also copied to the union and to the labour officer.

On the remedies, the parties were regulated under a CBA between the respondent and Tailors and Textiles workers Union. This came into force in the year 2009 when the claimant benefited with permanent employment and a letter of appointment was issued.

From the CBA schedule for agreed wages, there is no allocation for a *Machine Attendant*.

Under the applicable Wage Orders effective 1<sup>st</sup> May, 2009 a Machine Attendant had a minimum wage of Ksh.6, 465.00 per month. The payment statement submitted by the respondent for 30<sup>th</sup> July, 2009 the claimant had a wage of Ksh.9, 049.00 which included a house allowance of Ksh.1, 550.00 and night allowance of Ksh.105.00 for the month.

Such wages are replicated in subsequent months. The only differences are the overtime payment. However the wage paid is above the legal minimum.

The pay statements submitted by the respondent with regard to the claimant and other employees [annexures 13 to the defence] are in consonance with the provisions of section 10 (2) (h) read together with section 20 of the Employment Act, 2007. A comparison of the minimum wage for the years 2010 to 2013 and the monthly wages paid to the claimant there is no underpayment.

For the period of employment from 2009 to 2013, there is no underpayment.

Overtime pay is factored in every payment statement. This is evidenced by the payment statement submitted in defence. What remained and owing has since been computed and submitted with the labour officer. Such dues should be collected by the claimant at his own ease.

The claim for compensation, such is not due in a case where the court has made a finding the summary dismissal was justified. Notice pay is equally not due.

On the claim for general damages, there is no evidence or submissions as to why these damages should be paid. A claim for general damages cannot be left at large. It must be premised on evidence of the claimant. It must be with justification for the court to assess and award as appropriate. This is declined.

The upshot of the above, the claims made are without merit.

**Accordingly, the claim is hereby dismissed. Each party shall bear own costs.**

**Delivered at Nakuru this 21<sup>st</sup> day of February, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....