



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

AT NAKURU

CAUSE NO.137 OF 2016

PETER KEGODE.....CLAIMANT

VERSUS

UNITED MILLERS LTD.....RESPONDENT

JUDGEMENT

The claimant was in the years 2002 to 2007 employed by a company known as Palmac Limited as a machine operator. The company was then sold to the respondent and all the employees therein moved to the respondent including him and was earning ksh.217.00 per day. In this period the claimant was working for 10 hours a day from 7.45am to 6pm for 7 days without a rest day. All public holidays found the claimant at work without compensation.

Upon the respondent taking over, the claimant continued to work under the same conditions until the year, 2011 when he was registered with the NSSF and NHIF, was paid monthly and issued with a payment statement.

On 25th July, 2015 the claimant was suspended from duty on alleged failure to follow a lawful command and failure to assemble. By letter dated 31st July, 2015 he was invited to a disciplinary hearing where the claimant wrote letter dated 24th July, 2015 denying the allegations made against him.

On 5th August, 2015 the claimant attended the disciplinary hearing where present were the respondent's management staff and he was not allowed the company of an employee of his choice. The subject allegations were not addressed but other issues not in the letter of suspension. The claimant was then issued with letter terminating his employment, certificate of service and final dues at ksh.23,369.00.

The claimant is seeking the following;

From 2002 to 2007 – overtime pay ksh.175,770.00;

- Public holidays worked Ksh.26,712.50;
- Off days worked ksh.93,744.00;
- Leave Ksh.42,966.00;
- Severance pay Ksh.42,966.00;
- In April, 2011 the claimant had a baby and he applied for paternity leave which was declined and due is ksh.12,851.06;
- General damages for wrongful dismissal ksh.82,614.00; and
- Costs

The claimant testified in support of his claims. on 23rd July, 2015 the claimant reported to work and while in the changing room he was called by the supervisor and security and claimed that he had refused to take lawful command. He was issued with a notice to show cause and invited to a hearing but was not allowed to attend with another employee of his choice and such resulted in unfair termination of employment. The representative the claimant had chosen was rejected.

The defence is that the claimant was a casual employee of the respondent for the period 2007 to 4th September, 2015 when his employment was terminated on valid grounds and was earning a monthly consolidated wage of ksh.26,968.00.

The claimant was working as a machine attendant on casual basis and his employment was regularised to monthly basis. On 23rd July, 2015 together with other employees he was summoned by the general manager to assemble at the car park for roll call and assignment of duty as was the customer but he refused to follow the instructions.

On this date the claimant was supposed to be working at the loading section but instead proceeded to refinery section to carry out duties of stickers which he said were light duties.

The claimant was suspended and required to show cause why he should not be disciplined due to his actions. The claimant responded in writing on 24th July, 2015 and stated the allegations made were not true. On 31st July, 2015 the claimant was invited to a disciplinary hearing on 5th August, 2015 and his defence was found wanting and unsatisfactory.

Various statements from the work committee confirmed the claimant had refused to take instructions on 23rd July, 2015. The statement is signed by 5 members. The claimant was then issued with letter terminating his employment and paid his terminal dues which he acknowledged. The claims made are an afterthought and should be dismissed. The claimant has accepted due at ksh.23,369.00.

Mansur Kherdin a supervisor testified that he worked closely with the claimant who was called to attend duty but declined. The respondent has 18 lines and where there is loading all other duties stop for this purpose but the claimant refused to attend other employee complied but two declined including the claimant. They were called to show cause. The other 16 complained as to why the claimant as being given different treatment and when security was sent to call the claimant he refused to attend the loading duties which led to his suspension.

Evans Ondimu the human resource manager testified that from the records the claimant as dismissed for failure to abide lawful instructions given by his supervisor. The claims made for overtime pay for the period of 2002 to 2007 are not due as the respondent was not the employer. The claims for work during public holidays, severance pay and leave were all paid when due save for severance pay which is not payable in this case. The claimant was paid his terminal dues and he accepted and signed in acknowledgement.

Both parties filed written submissions.

The claimant in his Memorandum of Claim filed with the court on 15th April, 2016 annexed his Certificate of Service dated 4th September, 2015 stating the he was an employee of the respondent from February, 2008 to 4th September, 2005. This document and record from the respondent is not challenged. No alternative letter(s) of appointment, employment or engagement have been submitted by the employer to the contrary.

The Certificate of Service therefore confirms the employment period of the claimant with the respondent. this record is supported by the claims and averments that the claimant was employed by Palmac Limited until the year 2007 when the respondent acquired its assets together with liabilities and which included the claimant as an employee.

While in employment, the claimant was on 23rd July, 2015 issued with suspension and show cause notice following what was stated to be refusal to follow lawful and proper command given by the general manager Mr Keith Cannon. The claimant had been called to assemble at the car park with other employees and he refused.

Section 44(3) and (4) of the Employment Act, 2007 allow an employer to summarily dismiss an employee for gross misconduct and particularly for the reasons set out under section 44(4)(e) that;

e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer

The only condition the employer must abide is to ensure the employee is given a hearing however short the notice as under section 41(2) of the Act which requires 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.

In this case the claimant confirmed that he was invited to hearing following his suspension on account of gross misconduct which allowed for summary dismissal. He was given a hearing which he challenged to have failed to meet the requisite threshold under the law where his representative was not allowed to attend.

However, a hearing at the shop floor and for a matter that amounts to gross misconduct is not similar to what happens in a criminal trial. Where the claimant was given a hearing in the presence of the workers committee, members of staff and for a matter which the law allow summary dismissal, the respondent met the legal duty required in such circumstances.

Joseph Onyango Asere versus Brookside Dairy Limited [2016] eKLR the court held as follows;

The Claimant confirmed that he was given a hearing as required under section 41(2) of the Employment Act. Though not

documented, this is confirmed by the Claimant in his sworn evidence. As submitted in the case of **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.

In this case, due process was followed, the claimant was notified of his gross misconduct, he was given a hearing and a finding made that he had failed to abide the lawful instructions of the employer and the summary dismissal is justified.

Overtime is claimed for the period of 2002 to 2007 outside the employment period with the respondent which commenced in the year 2008 as noted above.

Equally, claims for work during public holidays, off day and leave pay fall under the same chain of work before the claimant was formerly engaged by the respondent. such claims ought to have been made with the previous employer or the respondent before they lapsed and in accordance with section 90 of the Employment Act, 2007 as held by the Court of Appeal in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR**.

On the claim for due pay in lieu of taking paternity leave, the employee enjoys such leave upon application, notice and approval by the employer as held in the case of **Enock Maranga versus B.O.G. Cheptoroi Secondary School Cause No.500 of 2014;**

On the claims for paternity leave for 3 children born to the claimant during his employment with the respondent, such leave is a right under the provisions of section 29(8) of the Act;

8. A male employee shall be entitled to two weeks paternity leave with full pay

Such leave, like in maternity leave is due upon application and notice to the employer in advance or within a reasonable period noting the circumstances of each case and such notice must be in writing. The production of the certificate of birth for the child/children born during such leave period would be an important support document for a male employee seeking or allowed paternity leave. This is not the case for the claimant. He never applied nor submits any certification of birth for any child born to him.

The right under section 29(8) of the Act cannot be claimed in an empty space.

There must exist a birth and such must relate to the subject employee. the claimant herein has not attached any material evidence of having made application with the respondent and the same rejected. There is no evidence of any birth to him of a son as alleged or any record that such birth was brought to the attention of the respondent via application and such was declined. To enjoy the right to paternity leave, action must start with the employee just like the right to maternity leave, the subject employee must make an application and our cause the employer to be notified of such matter and upon reasonable time submit the appropriate evidence.

Such right to paternity leave requires a proactive employee. Without any application and notice to the employer, the payment for paternity leave is declined.

Severance pay is a pay due under the provisions of section 40 of the Employment Act, 2007. The matter herein did not stand out as justified under such provisions.

Severance pay is not due.

General damages for wrongful dismissal are not due as this is not a case premised on the common law provisions for dismissal from employment. Even where compensation for unfair termination should have been claimed, such is not due in a case found to have warranted summary dismissal.

Accordingly, the claims made are without merit and are hereby dismissed. Each party to bear own costs.

Delivered at Nakuru this 14th day of February, 2019.

M. MBARU

JUDGE

In the presence of: