



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.453 OF 2016

ZABLON AKALICHE MUKOSHI.....CLAIMANT

VERSUS

MEGA PARK (K) LTD.....RESPONDENT

JUDGEMENT

On 10th March, 2014 the claimant was employed by the respondent on a contract ending on 30th June, 2014, a period of 4 months. The contract was renewed on 1st July, to 31st December, 2014. The claimant remained in the Dispatch section and at a wage of ksh.9,025.00 as basic pay and ksh.1,354.00 house allowance all being ksh.10,379.00 per month.

The work hours were 8am to 9pm without compensation for overtime.

In March, 2015 the claimant was promoted to work in shift as a Folk Lift Driver at a salary of ksh.11,554.00 and ksh.1,733.00 house allowance all being ksh.13,287.00 per month.

On 18th May, 2016 the claimant was found talking with another employee and he was issued with a letter of reprimand. The claimant responded on 19th May, 2016 and denied the allegations made. He was called to the office and issued with letter dated 19th May, 2016 and directed to go and wait for a call by the human resource manager. He was never called back to work.

The claimant had worked for the respondent for a period of over 6 years with any case of misconduct. His employment was terminated without notice or being given any reasons or being allowed to give a defence.

The claimant was not paid his owing terminal dues. As a folk lift driver the claimant was underpaid, as the due wage was Kshs.13, 259.30 per month and he was paid ksh.13, 287.00 less Ksh.27.70 per month.

The claimant was entitled to a hearing under the provisions of section 41 and 45 of the Employment Act and he is entitled to compensation.

The claims are for;

- a) Payment of notice pay ksh.13,259.90;
- b) 19 days worked ksh.11,400.00;
- c) Annual leave Ksh.7,282.000.30;
- d) Underpayments Ksh.75,476.65; and
- e) Compensation.

The claimant testified in support of his case.

The defence is that the claimant was employed under various distinct and fixed term contracts as a leader in dispatch section. On 18th May, 2016 the claimant was found chatting idly and sitting down instead of working and concentrating with his work against the set rules and regulations. He was issued with a notice to show cause why disciplinary action should not be taken against him in the presence of the chief shop steward Wensius Barasa and was required to respond by 19th May, 2016. The claimant did not reply or report to work.

On 21st May, 2016 the respondent summoned the chief shop steward in order to contact the claimant so as to conclude the disciplinary matter but the claimant refused to attend work. The subsisting contract ended on 30th June, 2016 and was not renewed. He was removed from the payroll.

The respondent paid the due salary for the month of May, 2016; owing leave days through the claimant's account with Metropolitan national Sacco account No.xxxxxxxx.

The defence is also that claimant owes the respondent Ksh.8, 946.00.

Eric Njenga the human resource manager for the respondent testified that the claimant was employed under fixed term contract the last ending 30th June, 2016. On 18th May, 2016 the claimant was found sitting down and chatting with Luka Misango instead of working and was issued with a notice to show cause as this was contrary to work rules. Misango admitted to the offence and apologised but the claimant did not reply and failed to attend work since such date. The chief shop steward was present when the show cause notice was issued and effort to reach out to the claimant to attend work and close the matter of his indiscipline bore no fruits. Upon lapse of contract he was removed from the payroll.

Wensius Barasa the chief shop steward also testified that he is employed by the respondent as a machine operator and on 18th May, 2016 he was called after the claimant had been found idling while at work and witnessed him being issued with a notice to show cause and was to reply by the next day which he failed to do or attend work. Efforts to reach him to return to work were not fruitful.

The respondent has field work records and particularly the various contract under which the claimant was employed. There is contract for the period;

10th March to 30th June, 2014;

1st July to 31st December, 2014;

2nd January to 30th June, 2015;

1st July to 31st December, 2015; and

1st January to 30th June, 2016.

These contracts are signed by the claimant for work in *Dispatch*. Upon each renewal, the claimant accepted the same and signed with his hand and national identity card number.

On the show cause notice issued to the claimant on 18th May, 2016 he was required to answer to allegations that;

You were found sitting down and chatting with Luka Misango ...

The claimant was required to respond by the next day, 19th May, 2016 at 8am.

The claimant asserts that he had his defence but was not allowed to submit it with the human resource manager. He has filed the reply with his pleadings and where he states that;

Following yesterday's incident that I was next to the machine operator; we were talking about which paper to be issued on the machine. That was to make me alert without stopping or inconveniencing the smooth flow of work. My shift was to end at 2.30pm so I was to make sure the work was continuous.

The claimant testified that to enter the workplace one was allowed log in a the gate and proceed to the assigned duties.

On the notice to show cause, he was not stopped from attending work but that when he reported back to work the next day he was sent away by the human resource manager. The work records filed do not support these evidence. The claimant was not clocked in at work on the next day he alleged to have tried to submit his response and was sent away by the human resource manager. In any event, the co-worker he was alleged to have been chatting and idling with Misango was able to respondent to the same show cause, he apologised and remained at work.

A show cause notice is not termination of employment. Even where the claimant contested the allegations levelled against him, reason demanded that he should attend and respond to the show cause notice and with such response state his case in defence.

Failure to attend work on the grounds that the claimant had been issued with a show cause notice only worked to frustrate his own employment and noting he was under a fixed term contract ending 30th June, 2016 by operation of time; such contract lapsed and was not renewed.

Such lapse of contract cannot be visited upon he employer with a claim for unfair termination of employment. Where the claimant due to his misconduct failed to attend as required under the notice to show cause, he frustrated his own employability and possible renewal of hi contract of employment.

Compensation is not due.

With the contract lapsing on its terms, notice pay is not due.

The claimant was paid ksh.8, 946.00 in terminal dues. Such pay included wage for days worked and the leave days. The deposit in the claimant's account is not challenged. He receive these monies.

On the claims made, the claimant has based his claims on the grounds that he was a folk lift driver and not a general worker in the dispatch section. However such claims are without any evidence as there are contracts which defined the position held by the claimant and even where he used a folk lift in his duties, such does not define him as ad river for the purpose of assessing he wages due and to claim underpayments in that regard.

On the claim for leave due for 2 years, the payment statement for December, 2014 has leave pay for ksh.4,738.00; and December, 2015 pay statement had leave pay for ksh.8,088.00. With these records of payments, to claim for leave pay is to seek unjust enrichment.

The court finds the claimant has not discharged his legal duty under section 47(5) of the Employment Act, 2007 which requires him to prove there was unfair termination of employment and based on the work records filed by the respondent, the termination of employment premised on the fixed term contract was lawful.

Accordingly the claims made are without merit and are hereby dismissed.

Costs to the respondent.

Delivered at Nakuru this 14th day of March, 2019

M. MBARU JUDGE

In the presence of: