



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.248 OF 2017**

**JOASH ALUBALE JACOB.....CLAIMANT**

**VERSUS**

**MEGA PACK LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent in January, 2011 as a machine operator and worked until 20<sup>th</sup> November, 2014 when he was dismissed on allegations of taking part in an industrial action.

The claim is that the industrial action resulting in the claimant's termination of employment involved all employees who were agitating for the absolute minimum wage and better working conditions which the respondent ignored and neglected and refused to allow for negotiations. The industrial action was taken in good faith but the respondent used the same to terminate the claimant's employment. The right to assemble is a fundamental right under the Constitution, 2010.

The claimant was not paid any benefits and is seeking payment below the minimum wage being an underpayment, payment for leave days not taken, pay for work during public holidays, gratuity pay and pay in lieu of notice. Such claims are made as follows;

- a) Underpayments ksh.101,229.57;
- b) Leave allowance Ksh.28,239.17;
- c) Pay for work during public holidays ksh.31,739.40;
- d) Service gratuity ksh.18,276.38;
- e) Notice pay Ksh.12,184.25;
- f) Compensation for unfair termination of employment;
- g) General damages; and
- h) Costs.

The claimant testified that as a machine operator he was paid a wage of ksh.10, 300.00 per month until his summary dismissal on 20<sup>th</sup> November, 2014. The respondent alleged that the claimant had participated in a strike which was not true as the claimant was scheduled to work during the third shift between 10pm to 7am but after completing his shift he was detained within the premises as the strike was taking place and he was required to write his name so as to be allowed out but such was used to issue summary dismissal which was unfair.

The claimant's evidence was also that where there was a strike as alleged, such resulted from those attending or required to attend work in the first shift and were agitating for a minimum wage and stoppage of harassment and a good work environment. The employees assembled to agitate for their constitutional rights.

The claimant also testified that his terminal dues were not paid.

Upon cross-examination the claimant testified that there was a trade union representing them while he was working for the respondent. There was a shop steward Hezbon Maranga but the summary dismissal was on the grounds of participating in a strike.

The claimant also testified that he was paid for days worked, leave days due and he singed for ksh.15, 131.00.

In the wage paid for December, 2013 there is a leave pay for ksh.7, 221.00 and overtime work was also paid. During public holidays, a double payment was done.

The defence is that the claimant was employed on contractual basis which were distinct and separate from each other. On 20<sup>th</sup> November, 2014 the claimant together with other employees stopped work and engaged in a strike without issuing the respondent with notice.

The defence is also that the claimant was paid all his owing dues to the last day at work posted to his account at Unaitas Sacco Society Limited. The claimant was earning a wage of Ksh.10, 316.00 and there was no underpayment. The claimant had 21 leave days and upon dismissal the claimant as paid ksh.6, 303.00 for days not taken for leave.

On 21<sup>st</sup> November, 2014 the claimant was issued with repeated appeals to return to work but declined. The summary dismissal was therefore lawful and justified and the claims made are without merit.

Eric Njenga the human resource manager for the respondent testified that the claimant was an employee of the respondent on fixed term contracts since the year 2011 as a production Assistant and not as a machine operator as alleged in the memorandum of claim. The claimant started as trainee printing machine on the level of a general worker and had not been elevated to a machine operator. The paid wage was for the position held of a general worker.

Mr Njenga also testified that the claimant participated in unlawful strike which led to stoppage of work for two (2) days. The respondent made all efforts to urge work resumption but the claimant together with other employees refused to attend work and remained at the gate singing and making noise. Due to the huge losses the respondent suffered due to the unplanned stoppage of work a decision was taken to issue notice which was posted at the gate to urge the employees to return to work but they failed to obey and which led to summary dismissal of the claimant and other employees.

There was a trade union representing employees and had not sanctioned the strike. The union was called together with the labour officer and all agreed to engage in talks but the employees refused to resume work and which led to summary dismissal. This was sanctioned by the union and the labour officer. The notices issued to the claimant and other employees are copied to the union and the labour officer.

The claimant was paid his terminal dues. And nothing owes.

A close of the hearing, both parties filed written submissions. In the judgement the court has looked at the pleadings, the evidence and written submissions and the emerging issues for determination can be summarised as follows;

Whether the summary dismissal was lawful, justified or unfair; and Whether the remedies sought are due.

By letter dated 21<sup>st</sup> November, 2014 the claimant was summarily dismissed by the respondent on the grounds of stoppage of work and participation in an illegal strike and upon issuance of verbal notice and two written notices he refused to return to work.

At paragraph 5 of the memorandum of claim the claimant states that his employment was terminated because a strike had taken place and he was found within the work premises. In the witness statement, the claimant states that he was on the night shift on 20<sup>th</sup> November, 2014 and the next day the first shift did not start as the employees went on strike.

In his testimony, the claimant stated that on 21<sup>st</sup> November, 2014 he did not report to work and despite the notice issued, all employees remained out of work to agitate for better work terms. He was however paid his dues which he accepted but claims for the underpayments, leave days not taken, work during public holidays, service gratuity and notice pay.

Section 46 of the Employment Act, 2007 has unique provisions which give protection to an employee who is engaged in the lawful activities of a trade union. The claimant testified that there was a trade union representing employees while he worked for the respondent. That one Hezron Maranga was the Chief shop steward but he failed to represent his interests.

The provisions of section 46 of the Employment Act, 2007 must be read together with sections Part X (10) of the Labour Relations Act, 2007 to get the meaning and rationale for what constitutes lawful trade union activities and protected strikes. Under section 76 of the Labour Relations Act, 2007 allow for protected strikes and lock-outs as follows;

*76. Protected strikes and lock-outs a person may participate in a strike or lock-out if—*

*(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;*

*(b) the trade dispute is unresolved after conciliation—*

*(i) under this Act; or*

*(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and*

(c) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of—

(i) the trade union, in the case of a strike;

(ii) the employer, group of employers of employers' organisation, in the case of a lock-out.

A trade union must issue notice of not less than 7 days to the employer before engaging in a strike. without such notice the strike is unprotected. Further even where a notice has issued in accordance with section 76 of the Labour Relations Act, 2007 before going on strike the party relying on the same must show efforts taken to engage in conciliation and that despite taking such efforts the matter was referred to the court and the court has allowed and or sanctioned such action.

The provisions of section 76 of the Labour Relations act, 2007 are mandatory. See the case of **Inter-Public Universities' Councils Consultative Forum of**

**Federation of Kenya Employers versus Universities' Academic Staff Union & 5 others [2018] eKLR.**

So serious is a matter where there is no compliance with the provisions of section 76 and 78 of the Labour Relations Act, 2007 as the resulting action is summary. An employee who takes part in a strikes or calls for a strike or incites others to take part in a strike and which strike is not with notice and such matter has not gone for conciliation and upon such conciliation there is no reference to the court for approval, the strike being unprotected attract disciplinary action. Section 80 of the Labour Relations Act, 2007 is important to restate verbatim as follows;

*80. (1) An employee who takes part in, call, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and-*

*(a) is liable for disciplinary action; and*

*(b) is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike*

In this case the claimant asserts that he together with other employee were agitating for better work terms. There was stoppage of work from 21<sup>st</sup> November, 2014 and since such date he did not resume work. The claimant in his evidence was very clear to the extent that he was taking in plural, the 'we' and the 'us' agitated for better terms of work and did not resume duty and kept outside the work premises.

When called to collect terminal dues, the claimant did collect the same and signed in acceptance. This gives the respondent's evidence and particularly the evidence by Mr Njenga that the employee kept outside the gate and refused to return to work and demanded to be paid their earned dues. when invited to the payments, the employees who included the claimant obliged and were paid.

Section 80 of the Labour Relations Act, 2007 contemplated such conduct. An employee, who takes part in, calls, instigates or incites others to take part in a strike that is not protected. Such an employee invites a sanction against himself. In this case, for stoppage of work, nonattendance of work and despite notice and warnings being posted, the claimant failed to resume duty. The summary dismissal which issued was at the invitation of the claimant. He cannot blame the respondent for the sanction issued. It was justified.

From the various contracts issued to the claimant and filed by the respondent as the employer, the claimant was not a machine operator to claim a wage over and above what he was paid. The wage paid was within the lawful due wage for the position held as general worker.

There was no underpayment in whatever form.

In the payment statements submitted, each December, the claimant received pay for balance of leave days. He confirmed this much. To claim for pay for untaken leave days upon receipt of payment for leave days due is without justification.

Similar, under the payment statement, there is overtime 1 and overtime 2. Mr Njenga for the respondent testified that the distinction over the different overtime payment related to overtime hours worked and the second related to work during public holidays. Such pay when due is not under such headings.

The records kept by the respondent stands out.

These cannot be faulted. To claim for overtime and work during the public holidays outside the work records filed is without justification. Such claims are declined.

On the findings that the sanction of summary dismissal was justified, notice pay is not due. the claimant has since received payment for days worked and for leave days due as at 20<sup>th</sup> November, 2014.

Service pay or a gratuity payment is not due where the employer has complied with the provisions of section 35(6) of the Employment Act, 2007.

General damages only arise in a case where there is loss and damage over a breach which must be particularised and evidence led in this regard. In this case the court finds no material for such claim.

**Accordingly, the claims made and found without merit and are hereby dismissed with costs to the respondent.**

**Delivered in open court at Nakuru this 29<sup>th</sup> day of April, 2019.**

**M. MBARU**

**JUDGE**

**In the presence of: .....**