



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 337 OF 2017

BETWEEN

KAZI SULEIMAN JUMA.....CLAIMANT

VERSUS

MILLY GLASS WORKERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company Advocates for the Claimant

Muthee Soni & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 26th April 2017. He avers that he was employed by the Respondent as a Casual Employee, on 1st November 2007. His contract was terminated by Respondent's Human Resource Manager by word of mouth, on 10th April 2016. He was not heard and did not receive notice of termination. At paragraph 10 of the Statement of Claim, he avers however, that 'the Claimant was terminated on account of redundancy.' He was last paid a daily rate of Kshs. 525. He prays the Court to find that termination was unfair, and grant to him the following Orders:-

- a) Notice at Kshs. 15,750.
- b) Annual leave of 9 years at Kshs. 141,750.
- c) 12 months' salary in compensation for unfair termination at Kshs. 189,000.
- d) Severance at Kshs. 70,875.

Total...Kshs. 471,375.

- e) Costs.
- f) Certificate of Service.

2. The Respondent filed its Statement of Response on 19th December 2017. The Response is in the nature of general denial. It is claimed that without prejudice to this general denial, the Claimant deserted. The Respondent prays the Court to dismiss the Claim.

3. The Claimant, and Respondent's Human Resource Manager Georgina Ndunge Kilonzo, gave evidence on 5th March 2019 when hearing closed.

4. The Claimant restated in his evidence, the averments of his Statement of Claim. He was told the Respondent had decided to reduce its Staff. It is not true that the Claimant left employment without notifying the Respondent. The department he worked in [ACL] did not

function continuously. Employees would be taken to other departments on certain occasions. Cross-examined, he told the Court that he worked for about 9 years. N.H.I.F Data By-Product exhibited by the Respondent, shows the Claimant had 3 different Employer Numbers. It is not true that he worked for 3 different Employers. He did not cease working, when ACL department was not functional. It is not true that the Claimant deserted on 6th March 2016. He was not able, on redirection, to explain the different Numbers given in the N.H.I.F card.

5. Kilonzo told the Court N.H.I.F Number 01553 is unique to the Respondent. Other Numbers show the Claimant worked for other Employers at some point. The records show the Claimant was employed by the Respondent from June 2015 to February 2016. He did not work continuously from 2007 to 2016. He was a General Worker in ACL department. ACL stands for Applied Colour Labeling. Operations in ACL depend on orders placed for bottles, from Respondent's Clients such as Coca Cola or Pepsi. Additional Staff when operations were not on was not necessary. The Human Resource Manager did not terminate Claimant's contract. There was no redundancy in April 2016. The Respondent would follow redundancy law, if there was redundancy.

6. Cross-examined, Kilonzo informed the Court that there was redundancy in November 2016, during which the Respondent followed redundancy law. She did not have evidence of this process. The Claimant started working in 2012. She did not have Claimant's job card which would show when he clocked in and out. The N.H.I.F document was just a spreadsheet, unsupported by other documents. Leave records show the Claimant worked zero days. This is not correct. The Respondent did not take disciplinary measure against the Claimant for desertion, because the Claimant was in casual employment. It was assumed the Claimant was no willing to continue working. Redirected, the Witness told the Court all the Numbers given in the N.H.I.F record, cannot have belonged to the Respondent.

The Court Finds:-

7. The Claimant worked in Respondent's ACL department. He states he was employed as a Casual Employee, on 1st November 2007.

8. There is common evidence that ACL department was not operational all through. The Claimant explained that he worked in other departments during such stoppage, but did not disclose to the Court, which these other departments were.

9. He alleges his contract was terminated by word of mouth, by a Human Resource Officer he named as Ndambuki. He was not given notice to show cause, notice of termination, and was not heard.

10. In the same breath, he avers his contract was terminated on account of redundancy, which he states did not amount to a justifiable termination reason.

11. This evidence is mumbled, and cannot be accepted by the Court. Section 47 [5] of the Employment Act 2007 requires that in any complaint of unfair termination or wrongful dismissal, the burden of proving unfair termination or wrongful dismissal has occurred, rests with the Employee. The burden of justifying termination or dismissal rests with the Employer. Quite clearly, the Employee in this dispute did not show that his contract was unfairly terminated or that he was wrongfully dismissed by the Respondent.

12. The Respondent states, and the Claimant confirms, that he was employed as a Casual Employee. At no time did the Claimant seek conversion, and did not even ask the Court to declare that he was entitled to conversion. He left employment and the Respondent assumed that because he was in casual employment, he was not willing to resume work. This was not an unreasonable assumption. There would be no need to call the Claimant to a disciplinary hearing for the offence of desertion, considering that he was in casual employment. He describes his terms of employment as casual and did not pursue the line of argument normally taken by Employees in his position, that he merited conversion.

13. Other than his self description as casual, there were other indicators showing he did not work in continuity. The N.H.I.F records show different Employer Numbers. There is evidence ACL department was not open for business in continuity. The Claimant as stated elsewhere did not establish in which department he worked other than ACL.

14. Even if the Court were to determinatively find that the Claimant had worked in continuity and merited to be treated as a regular Employee, he has not as stated above, proved his contract was terminated unfairly by the Respondent.

15. The prayers for notice pay and compensation for unfair termination have no support in evidence and are declined. Similarly, the prayer for accrued annual leave of 9 years is based on the wrong premise, that, the Claimant worked in continuity for the Respondent for 9 years. He did not, as ACL was not functional throughout, and the Claimant describes himself as having been employed as a Casual. When ACL was not functional, the Claimant was most likely resting. He did not state categorically which alternative departments he worked in. He did not establish that he was employed solely by the Respondent. His prayer for annual leave over a period of 9 years has not been established. He seeks severance pay. Again this is unsupported. As concluded above, there was no redundancy situation leading to termination. Severance cannot be paid where redundancy has not been established.

16. The Claimant has not established his Claim. ***The Claim is dismissed with no order on the costs.***

Dated and delivered at Mombasa this 27th day of September 2019.

James Rika

Judge