



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 281 OF 2015

BETWEEN

MWINYIHAJI HAMISI.....CLAIMANT

VERSUS

COOK "N" LITE LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Aboo & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 4th May 2015. He avers, he was employed by the Respondent in early 1991, as a Crane Machine Operator. He was initially on casual terms. He worked for 23 years, until 6th September 2014 when the Respondent terminated his contract of employment. He was paid a daily wage at the rate of Kshs. 508, by the time of termination.

2. He worked 7 days a week, 8 hours daily. The Claimants Co-Employees went on strike while the Claimant was on sick leave. He was informed that the Respondent had decided to sack all Employees on account of the strike, including the Claimant. The Claimant urges the Court to find that termination of his contract was unfair, because he was not there when the strike took place; he was on lawful sick leave; and was not in any event, heard before termination. He prays for Judgment in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 16,493.
- b) Annual leave of 21 days for 23 years at Kshs. 306,391.
- c) Underpayment of salary in the last 3 years of employment at Kshs. 67,818.
- d) Service pay at 15 days' salary for each of the 23 years completed in service, Kshs. 218,850.
- e) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 197,917.
- f) Punitive damages.
- g) Certificate of Service to issue.
- h) Costs.
- i) Interest.

j) Any other suitable order.

3. The Respondent filed its Statement of Response on 18th June 2015. Its position is that it was only registered as a Company in 1998. It did not exist in 1991. It started operations in 1999. The Respondent is a manufacturing industry, and does not operate cranes. The Claimant was a Pickler, not a Crane Operator, working in the enamel department. He was a Casual Employee, who worked only a number of days in a month, when there was some work for him to do. His contract was not terminated by the Respondent. He was away for approximately 1 year as he was involved and injured in a motor vehicle accident which occurred in October 2013. He reported back in September 2014. He was advised by the Respondent that the Respondent would create for him another position, because the work he was doing previously was manual and another Employee, had already been engaged to do this work. The Claimant left, but did not return to pursue the fresh assignment offered. He was registered with the N.S.S.F, and is not entitled to service pay. The Respondent prays the Court to dismiss the Claim.

4. The Claimant gave evidence, and closed his case, on the 27th February 2017. Respondent's Witness Sajja Otieka, who serves a Production Manager, gave evidence for the Respondent on 13th March 2019, bringing the hearing to a close.

5. The Claimant explained that the Respondent business previously operated as Kaluworks Limited, before changing to Cook 'N' Lite Limited in later years. Its Management did not change. Employees were not involved with the change. There was no termination of contracts upon changeover. The Claimant was employed in 1991 as Assistant Crane Operator. He would arrange cargo, and forward to the boiler for oil-processing. It is true he was injured and placed on sick leave. On return he was told there was a strike during his absence. All Employees were sacked. He was instructed by the Operations Manager that because he was in the category of Employees who were involved in the strike, his services were similarly un-needed. He wrote demand to the Respondent before institution of the Claim. There was no response. The Claimant agreed that he was actively subscribed to the N.S.S.F. He abandoned the prayer for service pay.

6. Cross-examined, the Claimant testified he was employed in 1991. He did not know the difference between the 2 Companies which employed him. He knew their Director was one Manu Chandaria. He did not have a document to show he was employed by Kaluworks. The Respondent manufactured sufurias, but stopped this, venturing into production of such items as soap. The Claimant was involved in de-greasing, also called pickling. There were cranes, lifting items which the Claimant arranged. He was an Assistant. He was injured and away for about 1 year. He was asked to leave by Operations Manager through word of mouth. The Employees had 1 rest day every week. He worked as a Casual Employee, earning Kshs. 520 daily. The law was followed. Redirected, the Claimant told the Court he de-greased, as well as operated the crane. Wage increment was implemented, the day after it was announced every Labour Day. The Employer followed the Wage Orders.

7. Sajja Otieka was employed by the Respondent in 1999. He told the Court that the Claimant was engaged on a daily basis, and on other occasions, a weekly basis. He was a De-greasing Assistant, not a Crane Operator. The Respondent does not have Cranes. The Claimant arranged items systematically. He would lift the items and hang them on the rail, putting them in a de-greasing solution. He could use the hoisting machine. He was not a permanent Employee. The Work Registers exhibited by the Respondent show he did not work in continuity. The Respondent was incorporated in 1998 as shown in the Certificate of Incorporation on record. The Claimant was involved in a traffic accident. A neighbour of his relayed the information to the Respondent. A year after, the Claimant reported to work and informed Sajja that his body had sufficiently mended, to enable him resume work. Sajja asked the Claimant to give the Respondent time to look for an opening, as another Employee had already taken up Claimant's position. The Claimant did not return. His contract was not terminated by the Respondent.

8. Sajja confirmed on cross-examination that he was employed by Kaluworks Limited in 1996. Kaluworks was Respondent's predecessor. The Witness was not able to say if the Claimant worked for both Companies. The Claimant worked for the Respondent for long. He would operate the hoist machine. He worked in continuity.

The Court Finds:-

9. The Claimant in his evidence discounted in clear terms, his prayer for underpayment of salary. He stated that the Respondent implemented Wage Increment the day after Wage Increment was announced by the Minister for Labour, on Labour Day. He testified on redirection from his Advocate, that his Employer followed the law. So why make a claim for underpayment of salary?

10. He conceded also, that he was actively subscribed to the N.S.S.F, and therefore not entitled to service pay. He withdraws the prayer for service pay.

11. The Work Register shows the Claimant was not at work 7 days a week, as pleaded at paragraph III [c] of his Statement of Claim. In his evidence, he stated he rested 1 day each week. He was away for 1 full year after he was involved in a car accident. The Court does not think that there is merit in his prayer for annual leave days spread over a period of 23 years.

12. The prayer for punitive damages has not been factually proved, and legally justified and is declined.

13. The balance of the Claim relates to Notice Pay, Compensation for unfair termination, Certificate of Service, Costs and Interest.

14. Parties agree that the Claimant was injured and away for about 1 year. They agree that he reported back after 1 year. They do not agree on what transpired when the Claimant reported back in September 2014.

15. The Claimant alleges he was told he belonged to a category of Employees who had been sacked for involvement in a strike. He could not be taken in after his colleagues had been dismissed. The Respondent did not wish to engage former Employees.

16. The Respondent alleges the Claimant was advised that another Employee had already been taken in, to discharge the role the Claimant previously discharged. He was advised the Respondent would look for a fresh role for the Claimant. The Claimant did not go back to find out if a new position had been carved out for him. The Respondent did not terminate his contract.

17. Upon return in September 2014, the Respondent states it was ready to reabsorb the Claimant. Considering the role he performed was physical, and given that he was in a process of recuperation, the Respondent offered to reassign the Claimant another suitable role. Another Employee was already de-greasing. There is however no document showing that this was the advice passed on to the Claimant. There was no written offer for reassignment.

18. The Respondent does not seem to have been keen on returning the Claimant to work, after 1 year of sick leave, and probably after Claimant's close Colleagues had left on dismissal for engagement in a strike. It was for the Respondent to prove the reason for termination. It has not shown that the Claimant left voluntarily, or that he was offered an opportunity to go on working, which he declined.

19. The Court accepts Claimant's evidence that he worked from 1991 to 2013. Sajja agreed Kaluworks was the precursor of the Respondent, and he himself indeed worked for Kaluworks from 1996. Sajja was not able to say if the Claimant worked for Kaluworks. The Claimant was clear that he worked for Kaluworks from 1991. Employees did not take part in the changeover, and the management of the business did not change. The Court agrees that this was the same business, albeit operated through different vehicles.

20. The Claimant merits notice pay and compensation for unfair termination.

21. As he has not established the prayer for underpayment, the applicable rate for purposes of computing notice and compensation, shall be Kshs. 508 daily, translated to Kshs. 15,240. This is in accordance with Section 37 [2] of the Employment Act 2007.

22. **Notice pay is allowed at Kshs. 15,240.**

23. The Claimant worked for 23 years. His record was unblemished. He intended to go on working, and offered himself for assignment of duty, after 1 year of sick leave. He did not have a role in the decision made by the Respondent, to keep him away from resumption of duty. **The Claimant is entitled to compensation which the Court grants to him, assessed at equivalent of 7 ½ months' salary at Kshs.114,300.**

24. **Certificate of Service to issue.**

25. **Costs to the Claimant.**

26. **Interest granted at 14% per annum from the date of Judgment, till payment is made in full.**

IN SUM, IT IS ORDERED:-

a) **Termination was unfair.**

b) **The Respondent shall pay to the Claimant notice at Kshs. 15,240 and compensation for unfair termination, equivalent of 7 ½ months' salary at Kshs. 114,300- total Kshs. 129,540.**

c) **Certificate of Service to issue.**

d) **Costs to the Claimant.**

e) **Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

Dated and delivered at Mombasa this 26th day of September 2019.

James Rika

Judge