



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1047 OF 2014

SAMUEL OMONDI WAGA.....CLAIMANT

VERSUS

BIDCO OIL REFINERIES LIMITED.....RESPONDENT

JUDGMENT

1. This Cause was heard on 13 February 2019, 12 February 2019 and on 20 June 2019. Samuel Omondi Waga (Claimant) and Zipporah Mburu, Human Resources Officer with Bidco Oil Refineries Ltd (Respondent) testified.
2. The Claimant's submissions were not on file by this morning while the Respondent filed its submissions on 27 August 2019.
3. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as
 - (i) Nature of employment relationship
 - (ii) Whether the Claimant had accrued leave by the time of dismissal
 - (iii) Whether the dismissal of the Claimant was unfair and,
 - (iv) Appropriate remedies/orders.

Nature of employment relationship

4. The Respondent contended that the Claimant was a casual employee paid by the day, and that the Claimant had requested that the daily wages be accumulated and be paid weekly. The Respondent further asserted that the Claimant never worked continuously but took breaks in between.
5. It is not in dispute that the Claimant worked for the Respondent severally from 1998 to 2012.
6. The length of engagement, even with breaks as contended by the Respondent suggests that the work/tasks the Claimant was performing could not be completed within less than three months in the aggregate as envisaged under section 9(1) of the Employment Act, 2007.
7. Consequently, in the view of the Court, the Claimant was not a *casual employee* as defined in section 2 of the Employment Act, 2007. The Claimant was on term contract of an indefinite duration, as contemplated by section 37 of the Act and the Court so finds.

Accrued Leave

8. The Claimant sought Kshs 267,150/- on account of accrued but untaken leave during the 13 years of employment with the Respondent.
9. Section 28(4) of the Employment Act, 2007 circumscribes the leave which can be carried forward as 18 months, and because the Claimant did not demonstrate that he accumulated leave with the concurrence of the Respondent, or that he applied for annual leave but was denied, the Court finds that the Respondent was not in breach of contract or statute in respect to annual leave.

Unfair termination of employment

10. The Claimant and the Respondent gave inconsistent narrations as to how the separation occurred.
11. The Claimant asserted that he was dismissed by the Respondent's Human Resources Manager when he declined to withdraw an injury claim he had lodged in Court against the Respondent.
12. The Respondent on the other hand contended that the Claimant left work on his own volition after working the night-shift on 17 January 2012.
13. If indeed the Claimant left work on his own volition, then he was repudiating the contract of employment.
14. *Repudiation of contract*, as a general rule in common law, does not terminate an employment contract. The innocent party should accept the repudiation (see *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).
15. The Court also wishes to observe that in *Geys v Societe Generale, London Branch* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the legal principle that a repudiated employment contract does not end until the repudiation is accepted by the innocent party.
16. In the *Geys* decision, the Supreme Court rejected the *automatic termination principle*, that repudiated employment contracts are ended immediately upon repudiation in favour of the *election principle*.
17. The decision to formally end the employment relationship should come from the innocent party.
18. The Court holds that technically, there was unfair termination of employment as the Respondent did not ask the Claimant to show cause, give notice of termination of employment on account of repudiation by accepting the repudiation, or conduct a hearing as envisaged by section 41 as read with 44(4)(a) of the Employment Act, 2007.

Gratuity/service pay

19. Among the reliefs sought by the Claimant was Kshs 123,300/- as service pay/gratuity.
20. The Respondent produced records to show that contributions/deductions towards the *National Social Security Fund* were made on behalf of the Claimant.
21. *Service pay* therefore becomes inapplicable by virtue of section 35(5) & (6) of the Employment Act, 2007. If there was a contractual or any other legal foundation to this head of relief, it was not demonstrated.

Conclusion and Orders

22. Although the Court has found and held there was unfair termination of employment, it is of the view that compensation, a discretionary remedy is not appropriate in the circumstances obtaining herein.
23. The reliefs are declined.
24. No order as to costs.

Delivered, dated and signed in Nairobi on this 20th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent Mrs. Omondi instructed by Oraro & Co. Advocates

Court Assistant Lindsey