



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.761 OF 2014

AMOS BENGO ONDUSO.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent in August, 2011 as a general worker and would report on duty at 8am to 6pm on the day shift and 6pm to 8am in night shift and without compensation for overtime work.

The claim is that the claimant and his workmates read a notice by the respondent that their salaries would be deducted PAYE and they questioned the criteria used since their salaries were paid weekly. This led to dismissal from employment without notice, hearing or reasons being given contrary to the law. The claimant was only paid ksh.3, 536 being pay for 12 days worked in July, 2014.

The claim is also that the claimant had worked for the respondent for 5 years and 10 months and his employment was terminated for no good cause and thus an unfair labour practice. He claims for notice pay; overtime pay; and compensation.

The claimant testified to support his claims.

In defence the respondent admitted the claimant was employed as a general worker from the year 2011 to July, 2014 and earning ksh.12, 852.00 per month.

The defence is also that on 12th July, 2014 the claimant reported on duty on night shift at 6pm intoxicated and could not perform his duties and the supervisor and other employees witnessed his condition and recorded statements of what happened as he proceeded together with others to cause a commotion. On the same night Mr

Okusimba called the head of department Mr Tobias and who had left for the day but came back and confirmed that the claimant was intoxicated forcing him to call the general manager who attended and witnessed the claimant's state and opted to send him home until the following day.

On 14th July, 2014 the claimant was issued with a show cause notice and invited to attend disciplinary hearing following the incident on 12th July, 2014 and his intoxication and forcing his way into the respondent's premises was found not justified. The claimant had been given a chance to urge his defence where he insisted he was not drunk.

The respondent followed the provisions of section 44(4) (b) and dismissed the claimant. Terminal dues were tabulated and paid in full and nothing owes. The claimant was not underpaid and overtime work was paid together with the paid wages and the claims made should be dismissed with costs.

In evidence Mr Okusimba and the one supervising the claimant testified that on 12th July, 2014 while he was on duty the security guard at the gate called him with information that the claimant and two others had forced their way into the premises and started collecting identity cards allowing other employees to get inside using the wrong gate after the guards had opened the main gate to allow access to a vehicle. The claimant and other took the opportunity to force their way inside in a matter where the witness as the workers representative was the one to collect the identity cards.

Mr Okusimba also testified that when the claimant and two others went to their work stations, their work was not done properly and left machines to run without wrapping and taking their duties properly as he could observe they were intoxicated. When he confronted them they became unruly forcing him to call the head of department Mr Tobias who had left from his day shift but he came back and observed the claimant was intoxicated and could not attend to his duties properly. The machine was put off leading to a call to the general manager and who directed all employees in the department to go home but the other 16 protested the conduct of the claimant and two others and it was

decided that the claimant and his other intoxicated colleagues be sent home until the next day.

Mr Okusimba also testified that being the supervisor he signed to the complaints made by other employees on the conduct of the claimant.

Tobias Ouma Ogola also testified that he is the head of department where the claimant was placed and on 12th July, 2014 he was called back after he had left from work only to find the claimant and two others had disrupted production and he stopped the machine as he noted they were intoxicated and could not proceed with their duties. He also learnt from Okusimba that the claimant and they had not followed instructions when they forced themselves into the premises and took an identity card which was not their role. He called the general manager who decided to send the claimant home and to attend the next day when he was issued with a show cause notice and invited of disciplinary hearing. Upon consideration of the matters the claimant was dismissed and paid his dues in full.

The claim that there were PAYE deduction were not correct as such measures had been effected and were running for a period and in any event such was lawful and could not have formed a good basis for the claimant to complain.

At the close of the hearing, both parties filed written submissions.

Section 44(4) of the Employment Act, 2007 allow for summary dismissal particular where an employee is found intoxicated while at work. Section 44(4) (b) specifically provides that the employee is liable for dismissal if;

During working hours, by becoming intoxicated, an employee renders himself unwilling or incapable to perform his work properly.

The employer therefore has the burden not only of proving intoxication, but also the **unwillingness** or **incapability** of the employee to perform his work due to such intoxication as held in the case of **John Rioba Mugo versus Riley Falcon Security Services Limited [2016] eKLR.**

In this regard what the employer is required is to abide the provisions of section 41(2) by inviting the employee to give his defence.

In this case, the court takes it that following events on the night of 12th July, 2014 where the claimant was found intoxicated while at work and the work disruption as

Mr Okusimba and Tobias testified that the general manager by observing his state decided to send him home and allow for time to hear his defence. The defence and evidence of Mr Okusimba was not particular challenged by the claimant in a material way.

The claimant was therefore invited for hearing and allowed a fair chance to defend himself. The claim that the claimant was dismissed for what he considered to be a deduction of PAYE on the face of statements made by his fellow workmates on the same night of 12th July, 2014 is left without credence. Where PAYE was a subject of deduction way before to make it a point of defence and claim for unfair termination after being found intoxicated while at work cannot stand.

The termination of employment followed due process and the claimant was found culpable of disruptive conduct while at work due to intoxication. Such justified termination of his employment and no notice pay of compensation are due.

The claim is made for overtime pay for work from 8am to 6pm during day shift and 6pm to 8am during night shift. The claimant by his own evidence admitted that each shift for day and night was paid differently and in the attached payment statements the respondent factored leave days' pay and overtime payments.

On the applicable Wage Orders for casual employment the wage of ksh.435.00 per day and Ksh.918.00 is over and above the minimum wage and therefore factoring other payments which then must include overtime work as stated in defence.

To claim for overtime pay outside what the claimant was paid would amount to unjust enrichment.

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

Delivered at Nakuru this 24th day of October, 2019.

M. MBARU

JUDGE

In _____ the _____ presence of: _____
