



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2299 OF 2014

JOEL KIPLELGO YAHCLAIMANT

VERSUS

HENKEL POLYMER COMPANY LIMITED TRADING AS HENKEL

CHEMICALS EAST AFRICA.....1ST RESPONDENT

HERMANN ROBERT WILHEIM HENKEL.....2ND RESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed by the 1st Respondent on 27th February, 2010 as a driver at a basic monthly salary of Kshs. 15,400/= per month.
2. According to the Claimant he undertook his duties and responsibilities with unrivalled passion and on 8th June, 2010 was confirmed and his basic salary enhanced from Kshs. 15,400 to Kshs. 18,000/=.
3. On 9th October, 2012 his job description was changed from that of being the 1st respondent's driver to that of being the 2nd respondent's personal chauffeur. The Claimant averred that the change of job description entailed other additional responsibilities of taking care of personal needs of the 2nd respondent who was ailing and well advanced in age. The Claimant contended that his salary and allowance were not enhanced notwithstanding the additional duties brought about by the change in his job description.
4. The Claimant further averred that in the change in job description the 2nd respondent engaged him in acts of verbal and non-verbal harassment and threatened him at his workplace. For example, the 2nd respondent frequently made uncalled for derogatory, racist and unwarranted comments about the Claimant's personal conduct, work ethics and etiquette. He further complained that the 2nd respondent insulted him without any reasons and in presence of fellow workers.
5. By a letter dated 10th August, 2013 under the Chairmanship of the Chairman of the Board of Directors of the 1st respondent, he was arbitrarily and unprocedurally terminated without notice.
6. The Claimant therefore sought compensation and payment of terminal benefits in the sum of Kshs. 1,589,299.79.
7. The respondent on its part denied the averment that the Claimant undertook his duties with unrivalled passion and drew attention to warning letters issued by the Claimant on diverse dates during his employment.
8. The 1st respondent averred that on or about 10th August, 2013 while chauffeuring the 2nd respondent, he abandoned him at Mbaraki and left for upcountry without the 1st respondent's consent thereby deserting duties. The 1st respondent decided to compromise and gave the Claimant a chance to continue working on mutual consent.
9. On or about October, 2012 the Claimant yet again engaged the 2nd respondent in a grossly disrespectful and rude manner and further refused to obey lawful comment issued to him by the 2nd respondent by refusing to report to the 1st respondent's office within scheduled time this leading to his dismissal.
10. On the issue of accommodation, the respondent pleaded that this never arose since the 2nd respondent only operated in Nairobi for a

duration of 3 months in year and was most time based in Mombasa in his personal residence where he accommodated the Claimant.

11. On the issue of leave the respondent stated that the Claimant often went on his annual leave and in instances he did not, the Claimant encashed the same. The respondent further pleaded that the issue of overtime never arose since the Claimant on served the 2nd respondent for a period of 11 months for which he was handsomely compensated for the sum of Kshs. 9,365 which monies were never enjoyed by other drivers.

12. In his oral testimony the Claimant stated that he was working as a driver and was employed in 2010. It was his evidence that he used to work from 7.00 am to around 8.00 pm and further that he used to double as the 2nd respondent's personal driver.

13. According to him he was dismissed in August,2013 because he used t demand to go on leave. He denied abandoning the 2nd respondent at any time and that he travelled to Nairobi with the consent of the 2nd respondent. Before dismissal he was never issued with a show cause letter and that he was never paid his terminal dues upon termination.

14. In cross-examination he stated that he changed from a company driver to 2nd respondent's personal driver. It was further his evidence that he could be assigned other duties. When shown the leave from dated 23rd July,2013 he stated that the signature was a forgery and that he had not previously complained about forgery.

15. He denied being dismissed in 2012 and pardoned.

16. In re-examination he said he was paid extra for duties he performed when driving the second respondent when he was not in good health.

17. The 1st respondents' 1st witness Mr. Sebastian Makio stated that he worked for the respondent as a general worker. According to him the Claimant never performed any extra duties in the factory.

18. In cross-examination he stated that he used to do general duties at the factory and later on he would go to the 2nd respondent's house to prepare for him lunch. According to him the work area was open and he could have seen the Claimant of he was assigned other duties.

19. Respondent's second witness Damris Mombo informed the Court that she used to take of the 2nd respondent before he died. According to her the Claimant worked for three years.

20. In cross-examination she stated that the 2nd respondent used to travel with her around the County and East Africa. It was her evidence that she used to provide the deceased with the needed medication and that she was the domestic help for the 2nd respondent.

21. The respondent 3rd witness Mr. Samson Wanyanga stated that he was the respondent's Human Resource Officer. According to him the Claimant was not declared redundant. The Claimant was a member of a pension scheme as well as a contributor to NSSF. According to him the Claimant regularly went on leave and that untaken leave was incised.

22. It was further his evidence that the Claimant had several warning letters. He stated that the Claimant was first dismissed in 2012 but got reinstated. He was dismissed for the second time in 2013.

23. In cross-examination he stated the Claimant's encashed leave was shown in the pay slip. He cementing show cause letter he stated that the was not aware of the Claimant was issued with one.

24. In cross-examination he stated that the Claimant deserted duties after the second reinstatement.

25. The Court has carefully considered and reviewed the pleadings, evidence and submissions by both parties. The Claimant contended that his services were terminated without reason and further that he was never issued with a show cause letter prior to termination. The respondent's witness Mr. Samson Wanyama informed the Court that he was not aware if the Claimant was issued with a show cause letter.

26. Termination of employment has two levels. First, there must exist a reason or reasons for termination. These reasons must be reasonable and justifiable in the eyes of a reasonable employer. The second level is that the termination must be carried out following a fair procedure. That is to say the employee must be accorded an opportunity to respond to the charges for which termination is being considered.

27. From the perusal of documents presented by the respondent in support of the response to the claim, there are several warning letters issued to the Claimant concerning his work performance and other infractions in the course of his duties. The respondent did not exhibit even one show cause letter calling upon the Claimant to explain himself. Prior to the issuance of the termination letter dated August 10,2013 there is no show cause letter calling upon the Claimant to respond to the charges that informed the summary dismissal.

28. Failure to give an employee an opportunity to respond or answer to allegations against such employee before he or she is dismissed would lead to a finding that the termination was unfair. The Court so finds in this particulars case.

29. Concerning claim for unpaid leave and overtime, the Court has been reasonably persuaded that the Claimant is not entitled to make these claims. The respondent has presented several leave forms signed by the Claimant which showed he took leave and that by the time he was terminated he had no leave balance. His claim that the signature purporting to be his on the leave forms, is a forgery is an afterthought since the respondent filed and served these documents with the response to the claim way back in 2015 and he or his counsel never raised the issue

of forgery. Concerning overtime, the respondent has ably shown the Claimant never performed any extra duties and that the 2nd respondent had a domestic servant who took care of him. Besides the Claimant was paid extra allowance over and above his salary as a driver for chauffeuring the 2nd respondent.

30. In conclusion the Court awards the Claimant five months' salary being Kshs. 90,000/= as compensation for unfair termination of service. This award shall attract interest at Court rates from date of judgment until payment in full but shall be net of taxes and statutory deductions. The Claimant shall further have costs of the suit.

31. It is so ordered.

Dated at Nairobi this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge