



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.754 OF 2014**

**AUGUSTINO MUTWIRI MURUNGI.....CLAIMANT**

**VERSUS**

**UNITED MILLERS LIMITED.....RESPONDENT**

**Consolidated with**

**CAUSE NO.756 OF 2014**

**JOSEPH OBERI NDEGE.....CLAIMANT**

**VERSUS**

**UNITED MILLERS LIMITED.....RESPONDENT**

**JUDGEMENT**

**Backgrounds** - Both suit under Cause No.754 and 756 of 2014 were heard separately and upon retreat to write judgement is became apparent that these suits arose out of the same cause of action and related to events occurring on 12<sup>th</sup> July, 2014 and relates to the same respondent. These suits ought to have been consolidated to avoid different findings and to save of judicial time. The claims made are a replica of each other.

Judgement herein thus relates to both suits.

**Claims**

The claimants were employed by the respondent as general workers in August and November, 2008 respectively and reporting to work in shifts of 8am to 6pm or 6pm to 8am.

The claim is that there was overtime work and without pay and the claimants with other work colleagues read a notice posted by the respondent that their wages would be subject to PAYE deduction and they questioned the criteria used as they were being paid weekly and this led to dismissal from employment contrary to the provisions of section 35, 41, and 43 of the Employment Act. The claimants were then directed to surrender his uniforms and paid ksh.3,536.00 for 12 days worked and nothing else despite working for the respondent for 5 years and 10 months.

The claim is for the payment of notice pay at ksh.16,236.00; overtime ksh.346,889.30 for Mr Mutwiri and Ksh.341,306.50 for Mr Ndege. Both also claim for compensation.

The claimants testified in support of the claims.

that upon work for each shift in day and night there was a different wage paid and on 12<sup>th</sup> July, 2014 which was a Saturday the one picking their identity cards at the gate refused to do so and the claimants were sent away and later returned on Monday when each was issued with a show cause notice then sent way by Mr Tobias who alleged they had been drunk which was not true. On 25<sup>th</sup> the claimants were each called and issued with letter terminating his employment and was paid for days worked which was unfair and claim the dues set out in the memorandum of claim.

Defence

The defence is that the claimants were casual employees between the year 2008 to July, 2014 earning a monthly wage of Ksh.23,193.00 and Ksh.21,035.00 respectively but on 12<sup>th</sup> July, 2014 they reported to work for night shift at around 6pm intoxicated and in a state that could not perform allocated duties and the supervisor together with other employees witnessed the incident and recorded statement where the claimants caused a commotion and disturbance. Mr Okusimba who was in the same night shift called the head of department Mr Tobias who returned to work and witnessed what was happening and was forced to call the general manager who returned and directed the claimants to go home and report back the next morning.

The defence is also that on 14<sup>th</sup> July, 2014 the claimants were invited to attend before the disciplinary hearing regarding his conduct and present was the shop steward and where each failed to give satisfactory response. The claimants were then required to give further defences in writing but failed to show good cause. There was summary dismissal on 24<sup>th</sup> July, 2014 for gross misconduct and paid payment of final dues.

Daniel Shiraku testified that he worked with the claimants in the printing department and on Saturday 12<sup>th</sup> July, 2014 they were due to attend work in the night shift but at 5.30pm while at the gate together they forced their entry into the premises ignoring the security guard and the supervisor directions to wait for the collection of identity cards. The claimants proceeded to the duty station but due to being intoxication they could not undertake allocated duties properly causing work disruption. The production line for wrapping soap and placing bars of soap in the cartons while paper was rolling and would go empty without soap. It was obvious they were drunk and this forced him to call the supervisor as the claimants were a danger to self and to other employees in the section. Mr Tobias came and stopped the machines as production was being disrupted and who then called the general manager who sent the claimants home. The claimants did not return to work.

Tobias Ogolla testified that he worked with the claimants and on 12<sup>th</sup> July, 2014 after he had left his day shift he was called back following work disruptions by the claimants and two other employees who were drunk and upon return he noted the claimants could not undertake their duties properly for being drunk and he called the general manager who stopped the entire department but other employees protested as this was going to affect all of them. They wrote statements and protested that the claimants and their colleagues who were drunk should not affect their shift and should be sent off alone which was addressed. The claimants were therefore removed from the shop floor and on 14<sup>th</sup> July, 2014 called for a disciplinary hearing but failed to give proper explanation for misconduct and were later dismissed for forcing their entry into the premises, being drunk and causing a commotion at work.

Evans Omweri testified that he is the human resource manager and the claimants were invited to attend before the disciplinary hearing and where failed to explain themselves with regard to the notice to show cause and there was dismissal from employment for gross misconduct for being drunk while at work, causing a commotion at the shop floor and all his final dues were paid.

Both parties filed written submissions.

The claim is that the claimant's employment was terminated after questioning why the paid wage was being deducted PAYE. However in evidence each testified that on 12<sup>th</sup> July, 2014 Mr Tobias sent them home over allegations that they were drunk while at work which was not true.

In this regard, the respondent called Mr Shiraku and Ogolla who testified that on 12<sup>th</sup> July, 2014 they were on the shop floor and witnessed the state and conduct of the claimants as supervisor and head of department, there was work disruption and commotion leading to stoppage of work and the general manager directed the end of shift upon which other employees protested and wrote statements and demanded the claimant and two other employees who were drunk be removed so that production could proceed.

The evidence by the resident's witnesses is not challenged in any material way.

Section 44(4) of the Employment Act, 2007 allow the employer to summarily dismiss the employee found intoxicated while at work. The claimants were found intoxicated while at work, instead of summary dismissal were sent home and invited to show cause and attended a disciplinary hearing and present was the shop steward. I take it on the night of 12<sup>th</sup> July, 2014 the claimants were intoxicated to a point a disciplinary hearing contemplated under section 41(2) of the Employment Act, 2007 could not reasonably be held. It was also during the night shift and work had stopped for over 15 minutes as the matter was being resolved. To allow for production to continue the claimants were removed from the shop floor and invited to attend hearing on Monday 14<sup>th</sup> July, 2014.

In the circumstances of the claimants conduct, failure to explain why there was work attendance intoxicated, summary dismissal was justified. The claim that the termination of employment was due to a complaint over deduction of PAYE form the paid wage holds not merit as where the claimant was within the wage band necessitating a deduction of PAYE this became a legal requirement for the employer to comply.

At the point the respondent as the employer reasonably believed their existed good basis to terminated employment, there existed good and genuine reasons to justify the same in accordance with section 43 of the employment Act, 2007. In **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2017] eKLR** it was held that;

*Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist," causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of.*

In summary dismissal which is justified, notice and compensation is not available.

On the claim for overtime pay, the claimants in tabulating his due pay has set out a good order in how he was earning while on day shift and on night shift. Such wages addressed vies-a-vies the applicable wage orders go over and above the minimum wage due.

The claimants have also attached the P9 forms which show them earning different wages every month. These address with regard to the due minimum wage, to claim overtime is to seek unjust enrichment.

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

**Delivered at Nakuru this 11<sup>th</sup> December, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

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