



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 60 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

EMMANUEL MURUNGA.....CLAIMANT

-Versus-

MINI BAKERIES (NAIROBI) LIMITED.....RESPONDENT

JUDGMENT

Emmanuel Murunga, the Claimant herein filed this Claim against the Respondent Mini Bakeries (NRB) Ltd alleging that his employment was unfairly terminated by the Respondent on 28th January 2014.

It is the Claimant's case as set out in his Statement of Claim dated 25th and filed on 26th March 2014 that he was employed by the Respondent, a limited liability company incorporated in Kenya and operating a bakery, as a Dough-Maker in its bakery in Eldoret in the year 2002. He avers that his job title was unilaterally changed from Dough-Maker to Cleaner without his consent in the course of his employment. Originally he earned Kshs. 271 per day which had increased to Kshs. 592 per day translating to a monthly salary of Kshs. 17,760 by the time he left employment. He avers that he was entitled to a house allowance of 15% of basic salary being Kshs. 2,664 based on the General Wages (Amendment) Order, 2013.

It is further the Claimant's averment that he discharged his duties in accordance with his contract and even served as a shop steward for the Bakery, Confectionary, Manufacturing and Allied Workers Union (Kenya) which represents workers in the Respondent's sector, in the years 2003 to 2009.

The Claimant avers that the termination of his employment contract was unlawful for reasons that-

- a). No notice of misconduct was given to the claimant prior to termination.
- b). No opportunity to be heard was accorded prior to termination.
- c). No opportunity to appeal against the decision on termination was given.
- d). No opportunity to be heard in the presence of a union representative or a fellow employee was given.
- e). No notice was given as required.

f). No service pay was given.

g). No certificate of service was issued to him.

The Claimant prays for the following reliefs-

1. A declaration that the termination of the claimant's employment was unlawful, unfair and spurious.

2. i) 3 months' notice pay at Kshs. 20,424 Kshs. 61,272

ii). 12 months' pay as compensation Kshs. 245,088

iii). 12 years' service pay at Kshs. 20,424 Kshs. 245,088

Kshs. 551,448

3. Costs and interests

The Respondent filed a Reply to Statement of Claim denying all the averments in the Claim.

At the hearing of the case the Claimant testified on his behalf while HASSAN ABDULRAHMAN ABUD testified on behalf of the Respondent. The Claimant was represented by Mr. Mogambi instructed by Wambua Kigamwa & Company Advocates while Ms. Ongira instructed by Odhiambo Owiti & Company Advocates appeared for the Respondent. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant (hereinafter referred to as Murunga) testified that he was employed by the Respondent in 2002 as a dough maker on a daily wage of Kshs. 271 per day. He worked for the Respondent until 26th December 2013. While working for the Respondent he was elected as a shop steward for Bakery Confectionary Workers Union from 4th July 2003 to 2009. Murunga testified that on 26th December 2013 he was supposed to be on duty from 2pm to 10pm. He reported to work at 2 p.m. and worked until 8 p.m. when the Operations Manager Mr. Hassan, RW1 (hereinafter referred to as Hassan) arrived at the factory in a vehicle in the company of a lady who operated a kiosk nearby and 2 gunny bags of bread. He testified that he did not know the name of the lady. Hassan called Murunga to the vehicle and asked the lady if Murunga is the one who sold him the bread in the gunny bags but she responded in the negative. Hassan then directed Murunga to remove the bread from the vehicle.

Murunga testified that on 27th December 2013 he reported for work at 2pm but was not allowed into the factory by the security guard at the gate who informed him that no cleaner was allowed to get into the factory that day. After he had waited for a while Hassan arrived. Murunga asked Hassan if he had given instructions that the cleaners should not be allowed to work. Hassan responded that the cleaners should agree among themselves on who had been selling bread to the kiosk lady.

Murunga testified that the following day all the cleaners met and one of them confessed that he had been allowed by the Foreman and Store Keeper to go and throw away the bread but he gave the bread to the kiosk lady. When they went to report this to Hassan he refused to talk to them. The cleaners were not allowed to work after that day and were not informed how long they would be away.

Murunga denied that he incited workers to go on strike on 20th December 2013 as alleged by the Respondent. He testified that he had talked to one of the drivers of the Respondent's vans to give him a lift to Lugari and the driver advised him to be at the factory gate at 4am. He testified that on the material day he was at the factory outside the gate waiting for the driver to give him the lift when he was arrested by guards from G4S who arrived in an alarm van. The guards accused him of organising a strike, hauled

him into the compound and after a while Hassan arrived and accused him with another employee who was at work of inciting workers to go on strike. He testified that he and the other employee were taken to the police station by Hassan and both of them recorded statements. Hassan also recorded a statement. The police told them the issue was work related and they should go back and resolve it at the workplace.

Murunga testified that there was a meeting on 20th January 2014 but he was not at the meeting as he was not aware about it. He later learned from his colleagues that he was among employees whose names appeared on the notice board on 30th January 2014 as having been blacklisted by the Respondent. He obtained a photocopy of the notice through his colleague who had informed him about the backlisting. Murunga testified that the reason for his blacklisting according to the notice was gross misconduct. Murunga testified that he was not given any warning or an opportunity to defend himself. He was also not given any notice. He testified that he worked for the Respondent for 12 years.

He prayed for terminal dues, pay in lieu of notice and costs. He further prayed for house allowance which he testified he was not paid.

Under cross examination Murunga testified that the bread that Hassan brought from the Kiosk was fresh but there was also some that was rotten. He testified that all the bread was damaged. He testified that he was a casual throughout the period he worked for the Respondent and was paid daily. He testified that all cleaners were terminated on 26th December 2013 and he did not work after that day. He testified that on 20th January 2014 he arrived at the gate at 4am but was not going to work. He testified that he was waiting for a driver whose name he could not recall because the driver was new, to give him a lift to Webuye. The vehicle he was to hike a lift in belonged to the Respondent and was transporting bread to the market. He testified that there was no other place he could wait as he could not wait on the road at that hour. He testified he was hiking a lift because he did not have money for public transport. He testified that he had waited for less than 30 minutes by the time the G4S alarm van arrived.

In the written submissions it is submitted that the Respondent's contention that the Claimant was a casual is inconsistent with section 37 of the Employment Act (the Act). The Claimant relied on the decision in the case of **Silas Muthini v Haggai Multi-Cargo Handling Services [2013] eKLR**.

It is further the submission of the Claimant that he was blacklisted without a hearing as provided in section 41 of the Act. It was submitted that the Respondent did not tender any evidence that it invited the Claimant for disciplinary hearing or informed the Claimant of the charges against him. It is submitted that the minutes tendered as evidence of disciplinary hearing are inconclusive and unauthentic for reasons that the minutes do not comply with section 41 of the Act which provides that-

“41(1) Subject to Section 42 (1) an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) notwithstanding any other provision of this part, an employer shall before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make”

The Claimant also relied on the provisions of section 45(5) of the Act and urged the court to find that the Respondent failed to uphold the provisions of employment law. The Claimant further relied on the decision in the case **International Planned Parenthood Federations v Pamela Ebot Arrey Effiom** in which the Court of Appeal held that-

“It is evident that the respondent's employment was terminated prematurely and the letter of termination did not give the reasons for termination. Such termination being involuntary on the respondent's part all she needed to do was allege that termination was unfair. From the record

and facts before us, we are unable to trace any reason for the termination. The appellant did not give any hint as to the likely reasons for the decision to terminate...”

The Claimant prayed for judgment as prayed and relied on the case of **Lilian Nyaboke Nyabiro v Wireless Innovations Nairobi Limited** where the court stated that “***The Respondent took its time at breaching the law and must pay the price for doing so***”.

Respondents Case

RW1 HASSAN ABDULRAHMAN ABUD testified that at the time of giving evidence he was working for the Respondent as Assistant Operations Manager stationed in Nairobi but at the time material to this suit he was working at the Respondent’s bakery in Eldoret where the Claimant also worked as a cleaner. He testified that the Claimant was a casual employee throughout the period he worked for the Respondent and worked 4 or 5 days a week.

Hassan testified that on 26th December 2013 he was informed by one of the workers that bread had been taken out of the company illegally and sold to a lady who sold it in the estates. He went to her kiosk and found her with the bread, interviewed her and learned that the bread was sold to her by cleaners at Mini Bakeries. He took the lady with the bread in 2 gunny bags and went with her to the Bakery. Murunga was at work that evening when he arrived at the Bakery. He called Murunga and showed him the bread. Murunga confirmed it was ‘supa loaf’ which is bread from Mini Bakeries, but denied selling it to the lady. On 27th December 2013 he carried out investigations to find out who sold the bread to the lady. He in the meantime temporarily suspended all the cleaners. The investigations revealed that the bread was taken out with garbage and sold to the lady. He found out that it was not the Claimant but someone else who was removing the bread from the factory.

Hassan testified that the Respondent decided to pardon all the cleaners and gave directions that they should resume duty on 17th January 2014. However Murunga did not resume duty on 17th January in the afternoon as expected and since he was a casual the Respondent did not look for him and got a replacement.

Hassan testified that on 18th January 2014 at around 3am he got a call from the G4S security guards manning the Bakery that they had arrested Murunga trying to incite drivers not to go to sell bread at night. He went to the bakery and arrested Murunga together with another employee by the name Jared Ochieng who was the Works Committee Chairman with whom Murunga was communicating on phone. Murunga instructed Jeremy (the Foreman) not to give keys to drivers. Murunga and Jared were taken to the Police station but the Respondent did not press any charges against them and decided to resolve the matter at the workplace.

Hassan testified that the Respondent does not allow its drivers to carry any goods or passengers and it is therefore not true that Murunga was asking for a lift as he alleged. He testified that there are 3 seats in a canter and normally there are 3 employees in every van.

Hassan testified that all the cleaners were on 18th January 2014 invited to attend a disciplinary hearing on 20th January 2014 at 2pm. The meeting took place and both Murunga and Jared attended but Murunga refused to sign the minutes and walked away after presenting his case. Murunga was blacklisted for inciting workers and his name posted on the notice board used for casual employee notices. He testified that Murunga was not given notice as the Respondent does not give notice to casual employees.

Hassan testified that the disciplinary hearing was attended by the works committee with the shop steward, chairman, secretary, neutral worker and management and the meeting decided that Murunga’s services be terminated. He testified that Murunga is not entitled to the prayers sought.

Under cross-examination, Hassan admitted that there was no evidence in court that Murunga was notified to report back to work, or that he was invited for disciplinary hearing. He further admitted that there was

no evidence that Murunga was notified of the charges against him or of the intention to terminate his employment. He stated that the Respondent did not have a witness to testify that Murunga incited workers to go on strike.

In the written submissions filed on its behalf the Respondent submitted that the Claimant was given a hearing and the termination was therefore fair. The Respondent relied on the cases of **Geoffrey Nyongesa Nyondo v Staright Line Co. Limited [2014 eKLR]** and **Kenya Engineering Workers Union v Auto Spring Manufacturers Limited [2013] eKLR** where the court held that the termination of employment was fair.

On the remedies sought by the Claimant the Respondent submitted he is not entitled to house allowance and relied on the case of **Daniel Njuguna Muchiri v Sagar Bakery Limited [2013]** in which the Court held that only statutory minimum rates of pay are subject to 15% house allowance where the wages paid are below the consolidated statutory minimum wage.

Determination

I have carefully considered the pleadings and the documents filed therewith as well as the testimony of the two witnesses. I have further considered the submissions and authorities cited. The issues arising for determination are the following-

1. Whether the Claimant was a casual employee
2. Whether the Claimant was unfairly terminated, and
3. Whether the Claimant is entitled to the remedies sought.

1. Casual Employment

Section 37(1) of the Act provides for conversion of casual employment to monthly contracts as follows-

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

In the present case the Claimant testified that he worked for 12 years all of which he served as a casual employee. The Respondent did not contest the averments of the Claimant in this respect. The Act is clear that where an employee works continuously for one month or intermittently for 3 months his employment is automatically converted to ***be one where wages are paid monthly***. Having worked for more than 3 months, the Claimant was no longer a casual employee as his services automatically converted to monthly contract employee by operation of the law upon completion of one month's continuous service or three months' intermittent service as was the decided in the case of **Silas Muthini v Haggai Multi-Cargo Handling Services** wherein the court stated that-

“The Employment Act, 2007 has now created a fundamental shift from the previous Employment Act, Cap. 226 with regard to what a casual employee is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified a casual workers or as casual labourers. This shift has extensive ramifications as an employer who employs an employee for

more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and converts such casual employment into term contract status.”

I find that the Claimant was not a casual employee as his employment had long converted to monthly contract and hold accordingly.

2. Was the termination of the Claimant’s employment Unfair

RW1 Hassan admitted that the Respondent did not adduce any evidence that the Claimant was invited to the hearing or informed of the particulars of charges against him. Section 41 of the Employment Act is explicit, that-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The employment of the Claimant having been converted to monthly terms, he was entitled to be taken through the procedure prescribed in section 41. Having not been taken through the mandatory procedure, the termination of his contract was unfair and I find and declare the same.

Remedies

The Claimant prayed for notice, compensation and service pay. Under section 49(1) an employee whose employment has been terminated unfairly is entitled to notice. The Claimant prayed for 3 months’ notice. He did not explain why he was seeking three months as opposed to the one month provided for under section 49(1) and 35(1) of the Act. I award him 1 months’ salary in lieu of notice.

Section 49 further provides for compensation where an employee is found to have been unfairly terminated as in the Claimant’s case. Taking into account all factors of the case and especially the length of service and the casualization thereof, I award the Claimant maximum compensation of 12 months’ salary. The Claimant was earning Kshs.592 per day. This translates to Kshs. 16,576. Daily rates are inclusive of house allowance as provided in the Regulation of Wages (General) Order. 12 months’ salary amounts to Kshs. 198,912 which I award the Claimant.

Service pay is provided for under section 35(5) as read with (6) as follows-

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more

favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

The Respondent did not controvert the prayer for service pay. It did not prove that the Claimant falls under any of the exclusions in section 35(6) to disentitle him to service pay. The Respondent further did not deny that the Claimant worked for 12 years. I therefore award the Claimant service pay at 15 days' pay per year worked being (15 x 592 x 12) Kshs. 106,560.

The Respondent shall also pay Claimant's costs of this suit.

Conclusion

In conclusion I declare that the Claimant was not a casual employee but on monthly contracts and that his employment was unfairly terminated. I award him Kshs. 322,048 as set out above and costs.

DATED AND SIGNED ON THIS 4TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED ON THIS 1ST DAY OF FEBRUARY 2018

MATHEWS NDERI NDUMA

JUDGE