



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 818 OF 2016

MARTIN SIKUKU WAMALWA.....CLAIMANT

VS

DIAMOND INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Martin Sikuku Wamalwa against his former employer, Diamond Industries Limited. The claim is contained in a Memorandum of Claim dated 14th October 2014 and filed in court on 17th October 2016. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Supervisor, Aggrey Akalongo. Both parties also filed written submissions.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent as a cutter in January 1999. He was promoted to the position of machine operator in the year 2003.

3. He avers that he worked for the Respondent from 1999 until 5th March 2015 when he was dismissed without notice. At the time of dismissal, the Claimant earned a daily rate of Kshs. 520 which was paid weekly at the rate of Kshs. 3,640.

4. The Claimant claims that he worked from 8.00 am to 5.00 pm during day shift and from 4.30 pm to 8.00 am during night shift. He adds that he worked overtime without compensation and that he never went on leave. The Claimant pleads that his dismissal was without justifiable cause and in violation of due procedure.

5. The Claimant accuses the Respondent of the following unfair labour practices:

- a) Keeping him in casual employment for 16 years;
- b) Failing to remit his National Social Security Fund and National Hospital Insurance Fund dues;
- c) Denying him the right to join a trade union ;
- d) Denying him annual leave for 16 years;
- e) Terminating his employment without reason and notice;
- f) Failure to pay his terminal benefits;
- g) Subjecting him to verbal abuses and mistreatment.

6. The Claimant now seeks the following remedies:

- a) Reinstatement
- b) One month's salary in lieu of notice.....Kshs. 15,600

- c) Unpaid leave for 16 years.....249,600
- d) House allowance for 16 years.....449,280
- e) Terminal benefits.....124,800
- f) Overtime compensation for 7 days a month for 16 years.....806,400
- g) 12 months' salary in compensation.....187,200
- h) Damages and aggravated damages
- i) Costs plus interest

The Respondent's Case

7. In its Memorandum of Response dated 17th May 2017 and filed in court on 18th May 2017, the Respondent states that the Claimant was engaged on casual basis in the position of wrapping machine operator. He earned a daily rate of Kshs. 536 payable weekly.

8. On 5th March 2015, the Claimant produced 66,000 pieces of wrapped fortune tablet soap negligently without reporting or correcting the poor quality products. He left the poor quality soap tablets on the floor and proceeded to collect his pay.

9. The Quality Manager reported the occurrence to the Factory Manager who then reported the matter to the Human Resource Manager for disciplinary action. The Claimant was issued with a show cause letter in the presence of his shop steward but he declined to receive it. The Claimant then left and did not return to work. The Respondent wrote to the Ministry of Labour informing them of the occurrence.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful dismissal;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Dismissal?

11. In response to the Claimant's claim for unlawful dismissal, the Respondent states that following faulty production of goods, the Claimant was issued with a notice to show cause which he refused to receive.

12. In his testimony before the Court, the Claimant himself admitted the Respondent's averment stating that he refused to receive the letter because he was being forced to accept that he had made an error. He added that he had been advised by his union not to accept such a letter without consulting them.

13. In the final submissions filed on behalf of the Respondent on 10th July 2018, the Court was referred to its own decision in *Jackson Butiya v Eastern Produce Limited (Cause No 335 of 2011)* where the following was held:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say, ‘I refused to talk with those people and therefore I was not heard, order them to pay me.’”

14. By his own admission, the Claimant chose not to avail himself of the internal disciplinary procedure offered by his employer. He cannot now come to court and lay a claim for unlawful and unfair dismissal. The claim thereon therefore fails and is dismissed. The same fate meets the claim for notice pay.

Other Remedies

15. The Claimant further claims leave pay for his entire period of service. The Respondent's defence to this claim is that the Claimant was a casual employee who was paid a daily rate. The Respondent's witness however admitted in cross examination that the Claimant had worked for the Respondent continuously for a long time. The Claimant was therefore entitled to annual leave and in the absence of leave records to show that he had exhausted his leave days, the claim thereon succeeds.

16. Regarding the claim for house allowance, the only thing to say is that the Claimant's salary was calculated on the basis of a daily rate which is ordinarily a consolidated pay rate. The claim for house allowance therefore fails. No basis was laid for the claim for terminal benefits and damages which therefore fail and are dismissed. The claim for overtime compensation was not proved and is also dismissed.

17. Ultimately, I enter judgment in favour of the Claimant in the sum of Kshs. 174,720 being leave pay for 16 years.

18. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant will have the costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngaira for the Claimant

Miss Opolo for the Respondent