



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.29 OF 2017

JACKSON MBAZA IMBALL.....CLAIMANT

VERSUS

MENENGAI OIL REFINERIES LTD.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in the year 2003 as a Casual employee at a monthly wage of Kshs.156.00 per day until the year 2004. In the year 2004 the claimant was assigned duties as a machine operator (boiler) at a daily wage of Kshs.180.00 a position he held until his employment was terminated.

The claim is that the claimant was not allocated leave days or paid in lieu thereof. In August, 2016 the claimant's employment was terminated without notice or a hearing. He reported the matter to the county labour officer and a meeting was held at the respondent's offices but the respondent refused to give any justification for the termination of employment. The respondent only issued the claimant with a cheque for Kshs.28, 596.00 without giving any explanation.

The claimant is seeking payment for due annual leave for 13 years for 21 days all being Kshs.152,525.10; pay for working during public holidays at Kshs.150,849.00; pay in lieu of off duties for 13 years all at Kshs.697,257.60; underpayments for 20 months all due at kshs.59,220.00 and compensation for unfair termination of employment.

The claimant testified in support of his claims. upon employment the claimant was not issued with a written contract of employment and remained a casual employee until 2004 when he was assigned machine operator duties and his wages increased. He would work in a shift throughout the week for 7 days without a break or rest day and in each given month he worked for a total of 21 days. The wage changed from Kshs.173.00 to Kshs.280.00 per day. The claimant held his position until August, 2016. His NSSF was paid for by the respondent and the last wage Kshs.460.00 per day.

The claimant also testified that on the material day while at work another employee went to his work station and when the manager saw him he started shouting at him. the other employee has been a casual doing construction work and not known to the claimant. The manager pushed the claimant out and directed him to remove work clothes.

The claimant also testified that there was a time the respondent company closed but later reopened. The claimant also testified that he worked for Gilanis Supermarket for a week.

Defence

The respondent in response states that the claimant was employed on casual basis as a machine operator from 2014 to 2016 and in August, 2017 he remained absent from work and efforts to trace him were fruitless. The claimant reported a dispute to the county labour office and who established that the claimant had been dismissed for valid reasons. The labour officer directed that the claimant be paid for leave days due. the claimant accepted the same in settlement of the claim.

The defence is also that the claimant absented himself from work without valid reasons. Despite efforts to trace him, the claimant failed to communicate and the dismissal was justified. The respondent has made effort to pay the claimant his dues.

In evidence the respondent called Peter Muchiri the Assistant human resource officer of the respondent and who testified that the claimant was working with the respondent from 2013 to 2016. The claimant had previously worked for the respondent from 2006 to 2009 when he stopped. He was also with the respondent in 2010 to 2012. There was no continuous employment.

Mr Muchiri also testified that there was money lost in production and following the shortfall, the claimant absconded duty and was replaced. He could not be reached. The respondent reported to the county labour officer and efforts to reach the claimant were through his wife who was also unable to get his whereabouts. When the county labour officer met with the parties it was established that the claimant had left work without justification and was to be paid his leave days due. the respondent complied so as to resolve the matters amicably.

Mr Muchiri also testified that the claimant was not wholly working for the respondent as claimed for 13 years. He has filed Cause No.247 of 2014 (Nakuru) against Gilanis Supermarket for unfair termination. In that suit the claimant case is that he was working with Gilanis Supermarket from the year 2000 to December, 2011 the same time the claimant alleges to have been working for the respondent herein.

The claimant was with the respondent from 2013 to 2016 when he absconded duty.

The claimant has lied to the court on his facts and claims.

At the close of the hearing, both parties filed written submissions. These have been taken into account together with the pleadings and evidence of the parties. The court has also drawn from **Cause No.247 of 2014(Nakuru)** and obtained crucial facts from therein and which shall be taken into account in the analysis and assessment of the claims herein.

Section 3 of the Employment and Labour Relations Court Act, 2011 sets out an important principle for parties attending before this court and provides that;

3. The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

Unlike any other court in the land, parties engaged in employment and labour relations disputes must assist the court in any proceedings to arrive at just decision. To do so parties must approach the court with clean hands, submit the appropriate work records or any other material relevant and towards the achievement of the court's principal objectives.

Therefore where parties to proceedings before this court fail to share the whole truth or avoid certain parts with regard to work history and records, the obvious can only result. The court is denied the full history and material for a just and fair outcome.

In this case The claimant has admitted that he was working in a shift and would be at work for 21 days in a month. Such then gave him over 10 days off each month. Such cannot be explained in any other way unless such constituted his off days together with leave. In any given month there are 4 off days. This gave the claimant an extra 6 days. My reading of section 28 and section 27(2) of the Employment Act, 2007 the claimant had the requisite leave and rest days. He cannot claim for more outside of what he already enjoyed based on his own evidence.

The claims for work during public holidays are not cronologised. Where the claimant worked in his shift and was a casual employee and was allocated rest days and remained at work for only 21 days, I take this was appropriate compensation for his work. Without the public holidays worked being set out, the cumulative effect is that such were taken into account within the 21 days the claimant was at work.

The claimant has pleaded that he was underpaid for 20 months. This period in light of the findings that the claimant worked for several employers is marred. Such record of double employment should not benefit the claimant.

The claimant also admitted in cross-examination that he left the respondents employment to join Gilanis Supermarket as an employee. I have since drawn from the records in **Cause No.247 of 2014 (Nakuru)** and indeed find the claimant in this cause failed to articulate that his period of employment with the respondent is not as pleaded. He cannot as an employee have been working for two employers at the same time. One has to give way and to the disadvantage of the claimant. Where the claimant was a casual employee with the respondent, then such casual employment must be taken as the truth.

On the above findings, the intervention of the county labour officer that the termination of employment was justified and that the claimant should be paid his due leave is a generous payment. The county labour officer was able to meet with the parties and obtain evidence from the shop floor. Such evidence by the County Labour officer must be relied upon by the court noting matters set out above.

Accordingly, the claim is found without merit. The same is dismissed. Costs to the respondent.

Dated and delivered at Nakuru this 3rd day of October, 2018.

M. MBARU JUDGE

In the presence of:

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