



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2470 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

NELSON OKELLO GUNGA.....CLAIMANT

-VERSUS-

BIDCO OIL REFINERIES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Nelson Okello Gunga, filed a Memorandum of Claim dated 10th December 2012 for unlawful and unfair termination of his employment and seeking payment of his terminal dues and compensatory damages against the Respondent, Bidco Oil Refineries Limited.

2. He avers that he was employed by the Respondent on 14th April, 2010 as a Soap Transporter and continuously worked satisfactorily while earning a salary of Kshs. 19,800/= per month. That on 11/08/2012 while he was on duty, he was arrested by one Mr. Liboso, the security in charge at the Respondent's premises and taken to Thika Police Station where he was legally detained and then released on 13/08/2012 without being given any reasons for his detention or being charged in Court.

3. That upon his release, he was advised by the police officers to proceed to Mr. Liboso's office where he was told to hand over the company's property and leave the premises immediately and that when he visited the Respondent's premises again on 15/08/2012, he was told he had been dismissed.

4. Further, that the Respondent did not observe the requirements of labour laws and the right to fair labour practice as enshrined in the Constitution in that there was no written charges served upon him, no hearing that took place, non-adherence to due procedure and that he was dismissed for unknown reasons.

5. He avers that the Respondent's actions amounted to unlawful, unfair and inhumane termination of his employment which was further aggravated with the Respondent refusing and/or declining to pay him his terminal benefits which he now demands as calculated hereunder:-

i) One month's salary in lieu of notice.....Kshs.19,800/=.

ii) Service/gratuity at 18 days salary for every completed year of service (18/30 x 19,800 x 2years).....Kshs. 23,760/=.

iii) Payment in lieu of untaken leave for the entire period of service (19,800 x 2 years).....Kshs. 39,600/=

iv) General Damages for loss of employment

(19,800 x 12 months).....Kshs. 237,600/=.

v) Damages for trauma and inability to meet continuing obligations, illegal, unlawful, unfair and inhumane termination of employment (19,800 x 12 months)..... Kshs. 237,600/=.

vi) General damages for violation of his constitutional right to liberty and wrongful/unlawful detention/imprisonment to be assessed by the Court.

6. He prays for judgment against the Respondent for:-

- a) *A declaration that the termination of the Claimant's employment by the Respondent was illegal, unlawful, unfair and inhumane and the Claimant is entitled to payment of his due terminal benefits and damages.*
- b) *An order for the Respondent to pay the Claimant terminal dues and compensatory damages totalling to Kshs. 558,360/=*
- c) *A declaration that the Claimant is entitled to compensation and damages for violation of his constitutional rights.*
- d) *An order for the Respondent to pay the Claimant's costs of this claim plus interest thereon.*
- e) *An order for the Respondent to pay the Claimant general damages for violation of his constitutional rights.*

Respondent's Case

7. The Respondent filed a Response to the Memorandum of Claim dated 18/01/2013 on 21/01/2013 denying the employment terms as averred by the Claimant. It also denies that the Claimant was arrested while on duty as alleged or that he was dismissed without a reason and in violation of the constitution and that it put him to strict proof.

8. The Respondent admitted that demand was indeed served upon it by the Claimant but that the same was of no consequence in view of its Reply. It prays that the Claimant's suit against it be dismissed with costs.

9. The Respondent further filed a List and Bundle of Documents on 11/06/2018 dated 8th June 2018, consisting mainly of the *Casual's Payroll Statement for 26964042 Gunga Nelson Okello, running from 7th April 2010 to 30th September 2012.*

Evidence

10. The Claimant testified that he worked for the Respondent for 5 days per week with 2 days off until 11/08/2012 and used to be paid according to time worked and that he was not given any appointment letter. That on the said 11/08/2012, he was on night shift duty from 6.30pm when at around 9pm to 10 pm he was told by the Clerk in their department to go home without explaining to him why and that the Clerk then left and came back with Mr. Laboso who took him to the Police Station at Thika. He stated that he was not a casual employee, he worked throughout and that he never went on leave throughout the period he worked for the Respondent.

11. In cross-examination, the Claimant stated that he was paid overtime and that he used to clock in when reporting to work is as per the Respondent's documents. Further, that the document shows that he was not on duty on two occasions when he was on duty because sometimes the clock in machine used to jam and not record the time but the head of department would submit the real position and they would be paid.

12. He confirmed that he was a member of NSSF and that the Respondent used to pay his NSSF. In re-examination, he confirmed that there were two systems for clocking in, one through the machine and the other was manual and that they were not given records to show how NSSF had been paid.

13. RW1 who used to work for the Respondent from June 2013 to July 2018 as the head of employee relations in the HR department testified that the Claimant was employed on casual basis paid weekly which was calculated on his daily attendance or rate of Kshs. 379/=. She stated that prior to the alleged day of termination of the Claimant, he had not been working from 14/07/2012 to 10/08/2012 and that he did not report to work on the said 11/08/2012.

14. She also stated that they were not aware of any incident between the Claimant and the Police and confirmed that no dismissal letter was issued to him and further, that the Respondent used to have casual workers in 2012. In cross-examination, she testified that not all employees hired on casual basis are given appointment letters and stated that if an employee failed in one way or another, he would be terminated using the laid down procedure.

Claimant's Submissions

15. The Claimant submits that the daily wage rate was just a formula used to arrive at a just remuneration for his employment, the duties he rendered and to realize high yields in production and that under **Section 37 of the Employment Act, 2007** this court has the power to vary employment terms and declare that employees are employed on terms and conditions consistent with the Act.

16. That under **Section 37(1) (a)**, he had become protected from arbitrary dismissal by **Section 35(1) (c)** and that the Respondent was therefore barred from terminating his employment without a prior written notice of 28 days stipulated under **Section 31(1) (c)** of the Act. He cites the case of **Charles Onchoke vs Kisii University (2018) eKLR** where Justice Marete quoted **Sikuku Nzuvi Ngii v Gacal Merchants Ltd [2015] eKLR**, where Makau J. reiterating the same position in making his findings Held that:-

"It is further the considered view of the court that the claimant's employment had been converted from casual to permanent employee under section 37 (1) (a), (2) and (3) of the Employment Act."

17. He submits that he is entitled to full compensation for 12 months because the actions of the Respondent in orchestrating his arrest so as to commence the process of severing the employment relationship amounted to barbaric, rogue and unfair labour practices and that this decision was inhumane considering the Claimant was held in police custody for 2 days for no mistake. That in **Paul Ngeno v Pyrethrum Board of Kenya [2013] eKLR**, the Court awarded the claimant 12 month's salary compensation as a result of the unlawful and unfair termination of

his employment. The Claimant prays that the claim be allowed as prayed and for costs and interest.

Respondent's Submissions

18. The Respondent submits that the Claimant last reported to work in June 2012 and that he would only go to work when he needed money and further, that he took long periods away or absented himself from work on several occasions between 2010 and 2012 as evidenced in its list of documents as follows:-

- 1) Friday 18/06/2010- Wednesday 23/06/2010
- 2) Thursday 24/06/2010- Wednesday 30/06/2010
- 3) Monday 19/07/2010 - Friday 30/07/2010
- 4) Tuesday 03/08/2010 - Friday 06/08/2010
- 5) Tuesday 24/08/2010 - Saturday 28/08/2010
- 6) Monday 11/10/2010- Friday 16/10/2010
- 7) Wednesday 18/05/2011 - Saturday 11/06/2011
- 8) Wednesday 20/07/2011 - Wednesday 03/08/2011
- 9) Friday 26/08/2011 - Thursday 08/09/2011
- 10) Friday 09/09/2011 - Thursday 15/09/2011
- 11) Friday 30/09/2011 - Tuesday 04/10/2011
- 12) Wednesday 09/11/2011 - Monday 14/11/2011
- 13) Friday 06/04/2012 - Tuesday 01/05/2012
- 14) Friday 25/05/2012 - Wednesday 11/07/2012

19. That the actions of the Claimant constitute a ground for summary dismissal under **Section 44 (4) (a) of the Employment Act, 2007** and it cites the case of **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR**, where Justice Mbaru held as follows with regard to the issue of absconding duty:-

“An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labour Court in SACWU v Dyasi [2001] 7 BLLR 731 (LAC) the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee fails to render service. Failing to contact the respondent constitutes unexplained absence for the period the grievant was away....Absence from work without a justifiable reason or permission and or authorisation and notice to the employer is a subject for summary dismissal under Section 44 of the Act”.

20. It submits that the Claimant did not tender in court any evidence proving the arrest allegations and confinement at the Police Station while the Respondent produced documentary evidence showing the Claimant was never seen at the Respondent's premises during the said dates and further, that his statements are frivolous, hence amounting to an abuse of this Honourable Court's process.

21. That in the absence of any evidence to the contrary, the Respondent's records must be taken as the true position of events and it cites the Court of Appeal's decision in **Gitobu Imanvara & 2 others v Attorney General [2016] eKLR** where the Court reiterated the evidentiary principle that the party claiming has a duty to lay evidence before the trial Court in respect of facts contended against the defendant and the trial court has the duty to examine such evidence to satisfy itself that the claim has been proved. The learned Judges of Appeal rendered themselves as follows:-

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed.”

22. The Respondent submits that since the Claimant was liable for misconduct and wilfully absconded duty, he is nor deserving of any of the reliefs sought in his Memorandum of Claim and that it has been held that where an employee is terminated for absconding duty, no compensation is due as in the case of **Patrick Wambasi Mutoro vs Moi University (2018) eKLR**, where Justice Nzioki wa Makau stated as follows:-

“The Respondent terminated the Claimant’s employment on account of the absconding...He would not be entitled to any compensation despite the error of the Respondent backdating the termination...By absconding his employment and failing to comply with the terms of the bond did not disentitle the Claimant to his pension dues.”

23. Further, that there is no merit in the claim for Notice Pay as no notice is applicable where an employee wilfully absconds duty. That under **Section 35 (5) of the Employment Act**, it is not liable to pay service/gratuity since the Claimant is a member of the National Social Security Fund and that it also effected deductions against his salary, which was confirmed in Court by both the Claimant and Respondent witness.

24. That the claim for untaken leave days is dishonest and amounts to an attempt for unjust enrichment and further, that the Claimant is also not entitled to prayers (iv) and (v) in his Claim and that in the event this court would be inclined to find there was unfair termination, it should be guided by **Section 49(1) (c) of the Employment Act**. It relies on **Naomi Ruwa v Peter Odote [2018] eKLR** where Justice Onesmus Makau, despite finding that the Claimant had been unfairly terminated awarded three (3) months’ salary in compensation and that similarly in **Benard Mutunga Kiio & Charles Mutuku Mbatha v Kenya Aerotech Limited [2015] eKLR**, this Court granted the Claimants three (3) months’ salary in compensation.

25. The Respondent finally submits that **Rule 28 (1) (e) of the Employment and Labour Relations Court (Procedure) Rules, 2016** grants the Court the discretion to make an order for the payment of costs and that the same should be exercised judiciously. That since the Claimant has failed to prove his case on a balance of probabilities he should consequently bear the costs of the suit.

26. I have examined evidence on record from both parties. The Claimant contend that the Respondent instigated his arrest by the police and then dismissed him. The Respondent on their part aver that they are not aware of any incidence with the police involving the Claimant.

27. The Claimant indeed served the Respondent for over 2 years as agreed by the Respondent. The Respondents contend that he was a casual employee and so could not be entitled to remedies sought.

28. Section 37 (1) of Employment Act states as follows:-

“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”.

29. Given that the Claimant served the Respondent for over 3 months, he was automatically converted to a permanent and pensionable worker and thereafter subject to fair dismissal on termination process as provided under Section 41 of Employment Act.

30. The Respondent have averred that the Claimant disappeared and never came back to work. However being their employee, the Respondent had a duty to seek out the Claimant and issue a Notice to show cause (NTSC) as to why his services should not be terminated for absconding duty.

31. This was never done and so it is my finding that the Claimant was condemned unheard. In the circumstances, I find the Claimant’s dismissal unfair and unjustified as provided for under Section 45 of Employment Act which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..”.

32. In terms of remedies I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 19,800/=

2. 8 months’ salary as compensation for unlawful termination = 8 x 19,800/=158,400/=

TOTAL = 178,200/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **20th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mukeli for Claimant – Present

Respondent – Absent