



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.187 OF 2017

BENARD OGALLO ANIMU.....CLAIMANT

VERSUS

GILANIS SUPERMARKET LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a General Workers on 14th May, 2016 at a wage of Ksh.14,100.00 per month being a consolidated pay and comprising Ksh.10,122.00 basic pay, Ksh.1,519.00 house allowances and a fixed overtime pay of Ksh.2,459.00.

The claimant though employed as a General Worker was allocated work of a turn boy from June, 2016 but remained on the salary of a general worker. He claimant was allocated work in Lorry KBM 217V. he would supply goods to western Kenya region in town of Kakamega, Butali Sugar Company and Nairobi where he would also collect goods for the respondent.

On 22nd February, 2017 the claimant's employment was terminated. On 19th February, 2017 a Sunday he was sent to Nairobi at 5.30pm and slept at Karerina in Nairobi. On Monday 20th February, 2017 the claimant and his driver went to Thika to supply sugar to a shop called Summer Africa. They later went to Karian company in Nairobi to collect Afya Juice to which was to be brought to Nakuru. They slept at Katerina.

On 21st February, the claimant and his driver drove to Nakuru and reached at 12 noon and parked the vehicle at the go down in industrial area. They found the stores full and were directed to the town shop for offloading. For the day they only offloaded half the goods. The manager directed the claimant to close the lorry for offloading the next day.

On 22nd February, 2017 the claimant and two other employees offloaded the remaining good. At around 11am the claimant had finished offloading and the manager confirmed all the goods had been accounted for. the claimant remained in the lorry where he found one case of 300ml mixed fruits with 12 bottles of juice in the lorry. He informed he manager and it was established this was in excess of the goods but he manager started shouting at the claimant and sent him to the human resource manager and informed him that the claimant wanted to steal the goods.

The claimant was directed to write a statement explaining himself and under duress was forced to write a letter of resignation. The respondent refused to pay the clamant for the days worked, notice of accrued leave days. Such was contrary to the law and due process.

The claim is that the claimant was forced and was under duress to resign from his employment and the summary dismissal was not warranted. The claimant is seeking the following;

- a) Pay in lieu of notice at Ksh.10,496.90;
- b) Pay for 22 days worked in February, 2017 at Ksh.8,818.40;
- c) Annual eave Ksh.6,358.30;
- d) Underpayments Ksh.3,443.20;
- e) Fixed overtime for 7 months Ksh.4,910.00
- f) Costs of the suit;
- g) Compensation; and

h) Certificate of service.

The claimant testified in support of his claims.

In response, the respondent admit the claimant was employed on 14th May, 2016 to 22nd February, 2017 when he resigned. At the time the claimant was earning a consolidated wage of Ksh.14,100.00 which included house allowance. The claimant wilfully signed his employment contract with terms and conditions of his employment as a general worker. Occasionally the claimant was assigned duties of a turn man reliever when need arose and was paid the due allowances thereof.

On 22nd February, 2017 it was discovered that the claimant had violate the rules and regulations of the respondent by loading one excess case of 300ml mixed fruit juice and failed to disclose that fact and went on to conceal the case in a heap of waste cartons when he was discovered by the manager. The claimant was unable to explain his conduct to the human resource manager and noting he had committed a felony the respondent had the right to terminate his employment. The claimant was issued with a warning letter and show cause and invited to a disciplinary hearing but the claimant in response issued notice to resign from his employment.

The claimant had been involved in an act in breach of his contract of employment and there was a lawful cause to dismiss him from employment. The claimant voluntarily resigned and the due sought are not justified.

The respondent was willing to pay the claimant his final dues but the claimant has failed to clear and collect the same. The certificate of service is ready for collection.

On the claim for underpayment and pro-rata leave such are not legitimate claims and should be dismissed.

In evidence, Zedrick Waweru the human resource officer for the respondent testified that on 22nd February, 2017 the claimant was discovered hiding a case of bottled fruit juice in the waste cartons and when questioned about it he was unable to give a satisfactory explanation. The claimant was offloading goods with two other employees and upon completing the task being the last in the lorry he was found to have been hiding the case. This amounted to theft as he was required to disclose all goods in the lorry for conciliation.

Mr Waweru also testified that the claimant was invited to a hearing where he wrote an apology and opted to resign from his employment after being issued with a show cause notice.

The claimant was entitled to his salary at Ksh.10,575.00, he had 22 leave days at Ksh.8,565.00 and 5 off days and all total due was Ksh.21,768.00 which amount was to be paid less notice pay upon resignation and an advance pay he had taken at Ksh.5,000.00.

The claimant failed to collect his terminal dues which are still held by the respondent at ksh.9,268.00.

At the close of the hearing both parties field written submissions.

Following events taken place at the respondent entity on 22nd February, 2017 where the claimant was offloading goods from motor vehicle KBM 217V he wrote a letter of apology to the effect that;

... as we had finished the remaining products one case of afia mixed fruit 300ml was found by mistake in the waste boxes inside the lorry.

Therefore I request for the management to forgive me for the mistake.

To this letter of the claimant, Bernard Kipkorir Tarus had also written his statement noting the claimant upon completing offloading he lorry, the claimant attempted to close the door when the manager directed him to clear all waste and it was discovered there was a case of afia mixed fruit juice 300ml containing 12 pieces. The claimant had been hiding the goods and was sent to the human resource office carrying the hidden case with him.

On equal date there is a notice to show cause issued to the claimant to explain himself for being found hiding the case of afia mixed fruit juice under waste paper. The claimant acknowledged receipt of the notice.

On equal date, the claimant has his resignation notice to the respondent. it was with immediate effect.

The claimant testified that such resignation letter was done under duress. That he was not paid his terminal dues.

The claimant has however not explained why he failed to respond to the notice to show cause issued to him if at all he never voluntarily resigned from his employment.

On the letter admitting he had committed a mistake and asked for forgiveness, the claimant having then been issued with a notice to show cause as to why his employment should not be terminated, where he found the process of his resignation to have been forced on him and done under duress, then he ought to have addressed the show cause notice. This is not the case.

I take the notice to resign as the claimant's own action and without duress. Had the claimant been forced to resign, he ought to have protested the same. Despite making demand for his terminal dues vide letter dated 2nd March, 2017, there is no mention of being forced to resign from

employment.

The resignation of the claimant from his employment with the respondent was voluntary. It was however without notice to the respondent as required under section 35 of the Employment Act, 2007. Notice pay is due from the claimant to the respondent.

The claimant was employed as a general worker. He was issued with a letter to this effect. His wage was paid in accordance with the Wage Orders applicable to a general worker.

The employer has the duty to effect changes to employment and issue the employee with written notice of such change. This should be in accordance with section 10(5) read together with section 13 of the Employment Act, 2007.

The duty being on the employer, the claimant cannot confer on himself a title that was not allocated to him by the employer. As a general worker he was allocated such duties and his position was not changed. The claimant remained a general worker to the point of his resignation.

As noted above, the claimant is the one to pay the respondent for notice at Ksh.14,100.00 being the gross pay.

Compensation is not due in a case where the claimant voluntarily left his employment with the respondent. Underpayment is not due as the claimant remained a general worker and was paid a wage commensurate to such position.

For the 8 full months the claimant was in employment he was entitled to 1 $\frac{3}{4}$ leave days in accordance with section 28(1)(b) of the Employment Act, 2007. Such amounts to 14 days of leave.

The computation therefrom done by the respondent in addressing the terminal dues owing to the claimant upon his resignation are reasonable and fair. To claim for anything else outside the same is not justified.

The claimant shall therefore clear with the respondent, his dues shall be processed and paid to him. A certificate of service should also issue in accordance with the law.

Accordingly, the claims are hereby dismissed. Each party shall bear own costs.

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of:.....