



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 294 OF 2015

CONSOLIDATED WITH CAUSE NO 296 OF 2015

JAMES MWANGI WAITHIRA.....1ST CLAIMANT

PAUL MATHENGE NDEGWA.....2ND CLAIMANT

VERSUS

QRISTOL TANKS.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated claim is brought by James Mwangi Waithira and Paul Mathenge Ndegwa against their former employer, Qristol Tanks. The claim is contained in Memoranda of Claim dated 3rd March 2015 and filed in Court on 4th March 2015. The Respondent filed separate responses on 22nd February 2016.

2. When the matter came up for hearing the 1st Claimant testified for the Claimants and the Respondent called its Human Resource Manager, Jeremiah Joel Nyagah. Both parties also filed written submissions.

The Claimants' Case

3. The 1st Claimant, James Mwangi Waithira was employed by the Respondent as a general labourer from October 2012. His monthly salary as at the time of leaving employment stood at Kshs. 11,000.

4. On 5th December 2014, the Claimant reported for duty as usual. He worked the whole day and at around 5.00 pm he notified a supervisor by the name Justus that he was unable to work overtime on that day since he needed to attend to his wife who was unwell.

5. When the claimant reported for duty on 6th December 2014, he was told by the Respondent's Director to go back home and never to report for work again. On making inquiries, the Claimant was notified that he had been dismissed because he had refused to work overtime the previous day.

6. The Claimant's plea for an opportunity to explain the reason why he had not worked overtime the previous day was rejected and he was told to leave the Respondent's premises.

7. It is the 1st Claimant's case that the Respondent's action amounted to unlawful and unfair summary

dismissal. He now claims the following:

- a) A declaration that the Respondent's action amounts to unlawful dismissal
- b) One month's salary in lieu of notice.....Kshs. 11,000
- c) Leave pay for 2012-2014.....22,000
- d) Service gratuity for 2 years.....11,000
- e) 12 months' salary in compensation for unlawful dismissal.....132,000
- f) Costs plus interest

8. The 2nd Claimant, Paul Mathenge Ndegwa was employed by the Respondent as a general labourer on 12th July 2013. He earned a monthly salary of Kshs. 10,000.

9. On 5th December 2014 after having performed his duties, the 2nd Claimant notified the Respondent's supervisor one Mr. Justus that he would not be able to work overtime because he was unwell. When he reported to work on 6th December 2014, the 2nd Claimant was told by the Respondent's Director to go back home and never to report to work again.

10. Upon inquiry, the 2nd Claimant was informed that he was being dismissed because he had refused to work overtime the previous day. He states that he was not granted an opportunity to explain why he had not worked overtime.

The 2nd Claimant avers that the Respondent's action amounted to unlawful and unfair summary dismissal. He now claims the following:

- a) A declaration that the Respondent's action amounts to unlawful dismissal
- b) One month's salary in lieu of notice.....Kshs. 10,000
- c) Leave pay for 2013-2014.....10,000
- d) Service gratuity for 1 year.....5,000
- e) 12 months' salary in compensation for unlawful dismissal.....120,000
- f) Costs plus interest

The Respondent's Case

11. In its response to the 1st Claimant's claim dated 22nd February 2016 and filed on even date, the Respondent admits that the 1st Claimant was its employee. The Respondent states that the Claimant reported to work on 5th December 2014 but failed to discharge his duties and declined to take lawful instructions from his supervisor.

12. The Respondent further states that on 5th December 2014, the 1st Claimant sought and was granted permission to seek medical attention but he never reported to work from that date.

13. The Respondent denies dismissing the 1st Claimant and states that it was the 1st Claimant himself who failed to report to work after the lapse of his sick leave.

14. In its response to the 2nd Claimant's claim also dated 22nd February 2016 and filed in Court on even date, the Respondent admits that the 2nd Claimant was its employee.

15. The Respondent avers that the 2nd Claimant reported on duty on 5th December 2014 but failed to discharge his duties and declined to take lawful instructions from his supervisor. The 2nd Claimant sought and was granted permission to seek medical attention but never reported to work from that date.

16. The Respondent denies dismissing the 2nd Claimant and adds that it is the 2nd Claimant who refused to report back to work after his sick leave.

Findings and Determination

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

- a) Whether the Claimants deserted work or were unlawfully dismissed;
- b) Whether the Claimants are entitled to the remedies sought.

Unlawful Dismissal or Desertion of Duty?

18. The Claimants' plea is that they were unlawfully dismissed on 6th December 2014 after failing to work overtime on 5th December 2014, for reasons they had explained to their supervisor.

19. The Respondent on the other hand states that the Claimants deserted duty from 6th December 2014. Desertion of duty is a lawful reason for dismissal of an employee. However, like all other grounds it must be proved. In addressing this issue in *Godfrey Anjere v Unique Suppliers Limited [2015] eKLR Abuodha J* stated as follows:

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse.”

20. In his testimony before the Court, the Respondent's Human Resource Manager, Jeremiah Joel Nyagah referred to a letter dated 19th December 2014 allegedly issued to the Claimants. He however did not produce any such letter and the Court was unable to verify the veracity of his testimony in this regard.

21. Further, in the responses filed by the Respondent as well as the witness statement filed by Nyagah, several allegations of misconduct and poor performance were made against the Claimants. The Court formed the opinion that these allegations which were not supported by any evidence were an attempt by the Respondent to find a justification for dismissing the Claimants.

22. Overall, the Court finds that the Respondent not only failed to establish a valid reason for the Claimants' dismissal as required under Section 43 of the Employment Act, 2007 but also violated the mandatory procedural fairness requirements set out under Section 41 of the Act.

Remedies

23. Pursuant to the foregoing findings I award each of the Claimants six (6) months' salary in compensation. In making this award I have considered the Claimants' length of service as well as the Respondent's conduct prior to the dismissal. I further award the Claimants one (1) month's salary in lieu of notice.

24. In the absence of any leave records to counter the Claimants' claim for leave pay, this claim succeeds

and is allowed. In similar vein, since the Respondent did not adduce any evidence to prove that all the Claimants' National Social Security Fund (NSSF) dues had been remitted, I will allow the claim for service pay.

25. Ultimately I enter judgment in favour of the Claimants as follows:

1st Claimant: James Mwangi Waithira

a) 6 months' salary in compensation.....	Kshs. 66,000
b) 1 month's salary in lieu of notice.....	11,000
c) Leave pay for 2 years (11,000/30x21x2).....	15,400
d) Service pay for 2 years (11,000/30x15x2).....	<u>11,000</u>
Total.....	103,400

2nd Claimant: Paul Mathenge Ndegwa

e) 6 months' salary in compensation.....	Kshs. 60,000
f) 1 month's salary in lieu of notice.....	10,000
g) Leave pay for 1 years & 4 months (10,000/30x21x1+10,000/30x1.75x4).....	9,333
h) Service pay for 1 year (10,000/30x15x1).....	<u>5,000</u>
Total.....	84,333

26. These amounts will attract interest at court rates from the date of judgment until payment in full.

27. The Claimants will have the costs of the case.

28. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF MAY 2017

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JUDGE

Appearance:

Mr. Wathome for the Claimant

Mr. Wafula for the Respondent