



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 232 OF 2016

BROWN OPATI NDIYA.....CLAIMANT

v

NAKURU INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. For determination are the questions

- i. What was the nature and duration of Claimant's contract?
- ii. Whether the Claimant's contract was unfairly terminated.
- iii. Whether the Claimant was underpaid.
- iv. Whether the Claimant was paid wages for December 2013 and July 2015.
- v. Appropriate remedies/orders.

2. Although the parties filed *Agreed Issues* on 16 February 2017, the same were way offside the real issues in dispute.

3. The Cause was heard on 10 April 2017 and the Claimant filed his submissions on 4 May 2017 while the Respondent filed its submissions on 12 June 2017 (Respondent asserted in the submissions that the Claimant did not serve the submissions upon it).

Nature and duration of contract

4. The parties agreed that the Claimant was employed in 1994.

5. However, according to the Claimant, he served as a Carding Mechanic until 7 August 2015 when he was dismissed.

6. The Respondent on the other hand contended that the Claimant resigned in 2011, and was thereafter engaged on renewable contractual terms and that the Claimant deserted on 6 August 2015. The Respondent produced copies of the contracts.

7. From the documentation produced in Court, the Court is satisfied and finds that the Claimant was on

fixed term contracts from 2011 up to time of separation.

Unfair termination

8. The Claimant asserted that his contract was unfairly terminated and testified that his last day at work was on 7 August 2015.

9. On the actual events surrounding the dismissal, the Claimant stated that one of the Respondent's directors came to his work station twice and thereafter summoned him to his office at 2.00pm wherein he was dismissed. No reasons were given.

10. Under cross examination, the Claimant admitted that he did not resume work after lunch break, but denied absconding from work.

11. The Claimant denied receiving a letter dated 23 May 2015 declaring him as having deserted from work.

12. The Respondent's witness, a Supervisor testified that the Claimant had an altercation with a director and that he did not report back to work after lunch break on 7 August 2015.

13. The Court observed the Claimant keenly. He was not forthcoming with information as regards the true and full circumstances of the separation.

14. In one breathe he stated the director summoned him to his office at 2.00pm, and in the same breathe he revealed that he did not resume work after lunch break.

15. In the view of the Court, it is therefore improbable that the Claimant was dismissed by the director at 2.00pm. In as much as there could have been a threat to dismiss, the Claimant failed to attend before the director for a decision to dismiss to be conveyed or made.

16. The Court therefore reaches a conclusion that the Claimant has failed to satisfy the low threshold expected of employees by section 47(5) of the Employment Act, 2007 that an unfair termination of employment occurred.

Underpayments

17. The Claimant pleaded that he was underpaid from 1 May 2013 to 30 July 2015.

18. According to the pleadings, during that period the Claimant was a Storekeeper.

19. However, according to the contracts of service produced in Court, the Claimant was a Packer and he only became a *Spares Store* effective 1 May 2015.

20. The Claimant did not disclose to Court any particular Regulation of Wages Order with a designation of *Spares Store*.

21. A *Spares Store* is not one of the occupations listed in any of the Regulation of Wages Orders perused by the Court.

22. Further, the Claimant did not detail his day to day duties in the stores in any useful manner, and therefore the Court cannot conclude that he was entitled to the prescribed wages for a store keeper.

Wages for December 2013 and July 2015

23. This was issue 5 in the *Agreed Issues*.

24. The Claimant did not refer to this head of claim during examination in chief. During cross examination, he merely said that he did not get his pay slip for July 2015 and was not paid wages for December 2013 and admitted that he was being paid through his account.

25. Shown a copy of the December 2013 pay slip, the Claimant admitted he had loans he was repaying.

26. Having admitted that he was paid through an account, it would have been simple for the Claimant to produce copies of his account statements to demonstrate he was not paid for the 2 months as alleged. He did not prove this head of claim.

Leave for 2014/2015

27. Although pleaded, this question was not among the issues agreed for the Court's determination.

Conclusion and Orders

28. Arising from the above, the Court finds no merit in the Cause herein and orders that it be dismissed with costs to the Respondent. It is so ordered.

Delivered, dated and signed in Nakuru on this 20th day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maragia instructed by Korongo & Co. Advocates

For Respondent Mr. Ndubi instructed by Robert Ndubi & Co. Advocates

Court Assistant Nixon