



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 205 OF 2016

ALEX OCHARO

CLAIMANT

v

COMPLY INDUSTRY LIMITED

RESPONDENT

JUDGMENT

1. Alex Ocharo (Claimant) instituted legal proceedings against Comply Industries Ltd (Respondent) on 2 June 2016 alleging breach of contract/unfair termination of employment.
2. On 29 November 2016, the Claimant filed an *Amended Memorandum of Claim* and the Respondent filed a Statement of Response on 5 January 2017, prompting the Claimant to file a Reply to Response on 30 January 2017.
3. Despite the Court directing the parties to agree on the *Issues for determination*, no agreement was reached and the Court on 28 February 2017 adopted the *Issues* as framed by the Claimant.
4. The Claimant testified on 12 July 2017, while the Respondent's 2 witnesses were heard on 12 October 2017.
5. The Claimant filed his submissions on 30 October 2017, while the Respondent filed its submissions on 17 November 2017.
6. The Court has considered the pleadings, evidence presented and the submissions and will analyse each party's contentions in terms of the *Issues* as framed by the Claimant (delivery of this judgment was brought back because the Court is on transfer).

Nature of Claimant's contract

7. Although the Claimant framed an *Issue* as to whether he was an employee of the Respondent and the terms thereof, the real *Issue* should have been whether the Claimant's contract was of a *casual nature* or not.
8. That is so because both the Claimant and the Respondent pleaded and seemed to accept that the Claimant served on *casual terms* from 2010 to 2015.
9. The Claimant produced records from the National Social Security Fund and the National Hospital Insurance Fund which show that the Respondent was making monthly standard contributions to his accounts.

10. In testimony, the Respondent contended that the Claimant was on piece work until 2011 when he was promoted to the position of Grader in the CCA department.

11. Section 9 of the Employment Act, 2007 places an obligation upon an employer to draw up a written contract under certain circumstances.

12. The Claimant served the Respondent for over 5 years.

13. In terms of the aforesaid section, the Respondent should have drawn a formal contract but failed to do so.

14. Further, casual employees are paid at the end of the day. There was no suggestion that the Claimant was paid at the end of the day.

15. Considering the secondary records from National Social Security Fund and the National Hospital Insurance Fund and the failure to draw a formal contract, the Court can conclude that legally, the Claimant was on a contract of indefinite duration and was not a casual employee or on piece work.

Whether there was unfair termination of employment

16. Issues 2 and 3 spoke to the question of unfairness of the separation.

17. The Claimant and the Respondent's witnesses gave inconsistent narrations as to how separation occurred.

18. The Claimant testified that he (and other employees) were informed on 31 March 2017 by the Head of Department called Victor that their services were no longer required because Kenya Power had terminated a contract with the Respondent. No dismissal letters were given.

19. The Respondent, through its witnesses however contended that the Claimant and other employees were instructed to report to the Human Resource department for deployment after Kenya Power terminated a contract, but they refused and later reported a complaint to the Labour Officer.

20. The Respondent was basically contending that the Claimant deserted or absconded work without permission or lawful cause.

21. Now, assuming that the version by the Respondent is correct, the Respondent should have as the employer required the Claimant to show cause for fundamental breach of a contractual obligation (reporting to work at designated place) or disobeying orders in terms of section 41 of the Employment Act, 2007.

22. For failure to appear for work without permission or lawful cause is a fundamental breach and the general rule in contract that a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party (see *London Transport Executive v Clarke* (1981) IRLR 166 and *Geys v Societe Generale, London Branch* (2012) UKSC 63,).

23. Because, the Respondent did not follow that route, the Court can presume that there was procedural unfairness.

Whether the dispute was resolved at conciliation

24. The Claimant and the other employees reported a dispute to the Labour Officer and a demand was written by the Labour Officer on 7 April 2015.

25. The issues of complaint, according to the letter were *unlawful termination, leave, pay in lieu of notice and earned wages*.

26. As a consequence of the intervention of the Labour Office, the Claimant was paid Kshs 36,770/- through the Labour Office.

27. The Respondent therefore contended that the litigation was intended to reopen a settled dispute.

28. It is not clear from the *Payment Agreement/Settlement* whether the payment was in full and final settlement, and because the claims presented by the Claimant go beyond the issues dealt with by the Labour Office, the Court is unable to agree that all the claims presented herein were compromised.

29. Despite that conclusion, the Court would note that during conciliation, it is a question of give and take and that in an appropriate case, resolution on a give and take basis would compromise the claims arising from breach of contract/unfair termination of employment.

Underpayments

30. Unfortunately, the Claimant did not frame underpayments as an *Issue*, though it is clearly a question arising from the pleadings.

31. The Claimant premised his claim for underpayments on a daily rate of pay while his testimony was that he was paid by the week without disclosing the formula for conversion he used in the pleadings.

32. In the view of the Court, the Claimant did not prove to the required standard that he was underpaid.

Overtime

33. Although the Claimant testified that he used to work Monday to Sunday 7.00am to 6.00pm from 2012 to 2015, the Respondent's witness testimony that due to the nature of the work (in the forests), a siren would ring in order to alert the employees to assemble to be transported out of the forest because it was not safe to work beyond 5.00pm, it seems more plausible that there was no overtime

34. In any case, if there was overtime without pay continuously, that would amount to *continuing injury* and in terms of section 90 of the Employment Act, 2007, the Claimant should have moved Court within 12 months. The Claimant moved Court more than 12 months after separation.

Annual leave and pay in lieu of notice

35. The Claimant sought pay for annual leave not taken from 2012 to 2014.

36. The Claimant did not contest the Respondent's first witness testimony that the Kshs 36,770/- included pay in lieu of leave and pay in lieu of notice.

Whether Response was filed on time

37. The Claimant submitted that the Response was filed outside the time granted by Court but because there is no evidence on record when the Amended Memorandum of Claim was served, the Court will not address this *Issue* which was in any case not framed as a question by the Claimant.

Conclusion

38. The Court has addressed most of the heads of claims presented by the Claimant and finds no merit in the same save for the question of compensation.

39. The Claimant served the Respondent for about 5 years, and in consideration of the length of service, the Court is of the view that the equivalent of 5 months gross wages would be appropriate and fair as compensation (daily rate according to Respondent was Kshs 510/- multiplied by 22).

Orders

40. The Claimant is awarded

(i) Compensation **Kshs 56,100/-**

41. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 7th day of December 2017.

Radido Stephen

Judge

Appearances

For Claimant Ms. Mukira instructed by Elizabeth Wangari & Co. Advocates

For Respondent Mr. Masese instructed by Mumia & Njiru & Co. Advocates

Court Assistants Nixon/Martin