



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1086 OF 2013

SAMMY OJANDA LUKOSE.....CLAIMANT

VERSUS

MAHITAJI ENTERPRISE CO-OPERATIVES LTD.....RESPONDENT

JUDGMENT

1. The claimant averred that he was employed by the respondent in August, 2006 and worked until 2nd January, 2013 when according to him he was illegally and unlawfully dismissed by the respondent. His attempts to amicably resolve the dispute through the union proved unsuccessful hence the present suit. According to the claimant, prior to his dismissal the claimant had not been issued with any warning letter over incompetence, misconduct or any wrong doing. The claimant therefore sought an order of the Court directed to the respondent to compensate him for wrongful dismissal and unfair termination of services as well as payment of his accrued and terminal dues.

2. The respondent via a memorandum of response filed on 11th September, 2013 averred that on 31st December, 2012 the respondent made a proposal to convert the terms of all casual employees including the claimant to permanent terms under outsourced company known as Patpic Enterprises Ltd and under the arrangement the claimant had a choice to continue working under previous terms or not. According to the respondent the claimant decided to abscond work without informing the respondent hence the allegations that his dismissal was unlawful and malicious are not true. The respondent further denied refusing to pay the claimant his terminal dues since the claimant left employment on his own volition. The respondent further averred that the claimant was earning a daily wage of Kshs.515/= and not a monthly salary of Kshs.12,300 as claimed. Concerning leave the respondent averred that the claimant was not entitled to payment of annual leave as he had taken all his leave by the time he left employment.

3. At the oral hearing the claimant testified that he was employed by the respondent in 2009 as an off-loader and worked for three years. According to him, he was paid 410/= per day. It was his evidence that in 2012 they were asked to sign contracts to be transferred to a broker who would then be responsible for their pay but they refused and were terminated. He denied refusing to work. According to him, he only refused to be transferred to a broker. In cross-examination he said he was earning Kshs.410/= per day and denied knowledge of Kshs.12,300/= per day.

4. The respondent's witness Mr. John Wanyanga who testified that he joined the respondent in 2011 denied the claimant was unfairly terminated. He stated that from the company's records, the claimant was a casual worker. In 2013 the respondent decided to outsource casual employment

and all casual employees were informed. Those who did not agree remained casual employees for the respondent. According to him, most casual employees crossed over. Those who did not, continued to work for the respondent under old terms. He stated that the claimant neither accepted to cross-over nor continue to work for the respondent. He instead left the respondent's employment.

5. From the brief evidence and the pleadings it would seem that there arose a dispute between the claimant and some of his colleagues with the respondent over outsourcing of casual workers. The claimant in his evidence clearly stated that he did not refuse work but refused to be taken over by what he called a broker. The respondent's witness Mr. Wanyanga stated that the decision to outsource was administrative and that those who did not want to cross-over were allowed to work under old terms.

6. The attitude of this Court has been that it must not be seen to interfere with matters which are purely under management discretion. Courts cannot assume the role of managers who run these organizations since they are the ones best placed to understand and manage these organizations in best interest of their shareholders and investors.

7. Outsourcing, down-sizing, redundancy are quite common these days in employment industry. An employee save for his own job protection and emoluments cannot stand in the way of any decision by management to better its operations or cut losses. From the evidence it is clear that the claimant herein refused to cross-over to the outsourcing company. It was his right, but it came with the consequence that he remains in employment with respondent under old terms. The claimant instead chose to walk away. Being a casual employee he could terminate his services at the end of any day without notice which he did.

8. No averment has been made by him either in his oral testimony nor in pleadings that he consistently worked for the respondent for an aggregate period of more than a month. In fact in re-examination he stated that there were times they could be stopped from working may be once or twice a week.

9. In the circumstance the Court finds this claim without merit and hereby dismisses the same with costs.

10. It is so ordered.

Dated at Nairobi this 26th day of February 2016

Abuodha J. N.

Judge

Delivered this 18th day of March 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge