



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 2327 OF 2012

FRED MUDEMBEI SHILAGAVA.....CLAIMANT

VS

EMCO BILLETS AND STEEL LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of a Memorandum of Claim dated 2nd November and filed in Court on 16th November 2012 seeks compensation for unlawful termination of employment and payment of terminal dues. The Respondent's defence is contained in a Response dated 17th December and filed in Court on 18th December 2012. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource and Administration Manager, John Njenga Ngugi.

The Claimant's Case

2. The Claimant told the Court that he was employed by the Respondent as a manual labourer from March 2010 at a daily rate of Kshs.365.00 which was later increased to Kshs.394.00. The Claimant worked for the Respondent until December 2011 when his employment was terminated. He testified that in December 2011, he fell ill with typhoid and that he was given time off by his supervisor, a Mr. Ng'ang'a to go and seek medical attention. He was attended at a hospital whose name he could not recall. He stayed at home for one week and upon return to work he was locked out.

3. The Claimant pleads that in terminating his employment, the Respondent failed to comply with the provisions of Section 41 of the Employment Act, 2007. He therefore claims the following:

- a. 1 month's salary in lieu of notice.....Kshs.11,820.00
- b. Service pay for 1 ½ years.....Kshs.8,865.00
- c. Leave pay for 39 days.....Kshs.15,366.00
- d. 12 months' salary in compensation for unlawful termination.....Kshs.141,840.00
- e. Certificate of service
- f. Costs and interest

The Respondent's Case

4. In its Response filed on 18th December 2012, the Respondent admits having employed the Claimant as a helper in its dispatch section from 8th February 2010 at a daily rate of Kshs.365.00. The Respondent

denies terminating the Claimant's employment and states that the Claimant himself deserted duty from 24th February 2012. The Respondent therefore contends that the Claimant cannot bring a claim for unlawful termination of employment. Further, since the Claimant was a casual employee, his claim for terminal dues is unsustainable.

5. With specific reference to the claim for service pay, the Respondent pleads that that the Claimant was a contributing member of the National Social Security Fund (NSSF) and this claim cannot therefore stand. On the claim for leave pay, the Respondent states that the Claimant's leave entitlement was tabulated and paid alongside his daily wage.

Findings and Determination

6. From the pleadings and evidence on record, the following issues emerge for determination before the Court;

- a) Whether the Claimant was a casual or full time employee;
- b) Whether the Claimant absconded duty or was terminated by the Respondent;
- c) If the Claimant was terminated, whether the termination was lawful and fair;
- d) Whether the Claimant is entitled to the remedies sought.

The Claimant's Employment Status

7. The Respondent states that the Claimant was a casual employee and cannot therefore lay a claim for unlawful termination of employment. The Claimant on the other hand states that he worked for the Respondent from March 2010 up to December 2011 when his employment was terminated.

8. In the submissions filed on behalf of the Claimant it is submitted that the fact that National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues were paid by the Respondent in favour of the Claimant was inconsistent with a casual employment.

9. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose employment provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”

10. Section 37 of the Act goes on to provide that the employment of a casual employee who works continuously for at least one month is deemed to be converted to a term contract by operation of law (see **Onyango J in Wilfred Bukachi Opwaka Vs Ready Consultancy Company Limited (Industrial Court Cause No 471 of 2012)**).

11. In support of its assertion that the Claimant was a casual employee, the Respondent produced casual payment details for selected periods. The Respondent's Human Resource and Administration Manager, John Njenga Ngugi told the Court that from the Respondent's records, the longest continuous period during which the Claimant had worked was eleven (11) days running from 21st November to 18th December 2011.

12. Ngugi was however unable to explain the circumstances under which the Respondent paid full NSSF and NHIF dues on account of the Claimant who was not a full time employee. This coupled with the fact that the documents submitted by the Respondent were neither signed nor stamped for authenticity creates doubt in the mind of the Court as to the veracity of the Respondent's evidence that the Claimant was a casual employee.

13. In light of this, I find that the Claimant was a full time employee on term contract. With regard to

his salary, the Court adopts the figure of Kshs. 11,820 made up of a daily rate of Kshs. 394 which was pleaded by the Claimant and was not controverted in evidence by the Respondent.

The Termination

14. The Claimant states that his employment was terminated unlawfully and unfairly. On its part, the Respondent denies this assertion stating that the Claimant was guilty of desertion of duty. The Claimant told the Court that sometime in December 2011, he stayed away from work for a period of one week after falling ill and upon return, he was locked out.

15. Section 44(4) of the Employment Act, 2007 provides that desertion of duty is a valid ground for summary dismissal. However, like all other grounds of misconduct, an employer who relies on this ground must demonstrate its existence. There is now firm jurisprudence from this Court that an assertion by an employer that an employee has deserted duty must be evidenced by a notice to show cause why employment should not be terminated on this ground (see **Abuodha J in Geoffrey Muringi Mwangi Vs Rwaken Investments Limited (Cause No. 1658 of 2012)**). In the instant case, the Respondent did not demonstrate any steps taken in this direction and the assertion of desertion could not therefore be ascertained.

16. That said, I now turn to the Claimant's explanation that he was away from work for one week because he was unwell. Section 30(1) of the Employment Act, 2007 provides for seven (7) days sick leave with full pay for an employee who has been in employment for at least two (2) consecutive months. In view of my finding that the Claimant was a term contract employee, he would have been so entitled.

17. However, Section 30(2) of the Act requires an employee who seeks sick leave to notify the employer of their absence as soon as is reasonably practical. Indeed as held by **Mbaru J in Banking, Insurance & Finance Union (Kenya) Vs Barclays Bank of Kenya Limited [2014] eKLR** failure by an employee to notify their employer of their illness avails the employer a good defence in a claim for unlawful termination of employment.

18. The Claimant did not adduce any evidence to show notification of his illness and resultant sick off to his employer. For this reason therefore, the Court finds that the Respondent had a valid reason for terminating the Claimant's employment as required under Section 43 of the Act.

Termination Procedure

19. I will now examine the procedure used in terminating the Claimant's employment. From the record, the reason for the Claimant's termination would fall under gross misconduct and the procedural fairness requirements under Section 41 of the Employment Act would therefore apply. My examination of the circumstances surrounding the Claimant's separation from the Respondent's employment did not reveal any attempt towards compliance with the requirements of Section 41 and the termination was therefore unfair for want of due procedure.

Remedies

20. Having found the Claimant's employment procedurally unfair, I award him three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and my finding that the Respondent had a valid reason for terminating his employment. Additionally, I have taken into account the Respondent's failure to follow due procedure in effecting the termination. I also award the Claimant one (1) month's salary in lieu of notice.

21. The Respondent did not produce any records to counter the Claimant's claim for leave pay which therefore succeeds and is allowed. The claim for service pay was abandoned in final submissions.

22. In the final analysis, I make an award in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation for
unfair termination.....Kshs.35,460.00
- b) 1 month's salary in lieu of notice.....Kshs.11,820.00
- c) 39 days' leave pay ($11,820/30 \times 39$).....Kshs.15,366.00
- Total.....Kshs.62,646.00**

23. I direct the Respondent to issue the Claimant with a certificate of service and to meet the costs of this case.

24. The award amount shall attract interest at court rates from the date of the award until payment in full.

25. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MAY 2015

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JUDGE

Appearance:

Mr. Musili for the Claimant

Mr. Omuga for the Respondent