



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 436 OF 2011

BETWEEN

JOHN KYALO MBONDO..... CLAIMANT

VERSUS

DIPPOLY PLASTICS INDUSTRIES LIMITED..... RESPONDENT

Rika J

Court Assistant: Edward Kidemi

Mr. Makokha Advocate instructed by Namada & Company Advocates for the Claimant

Mr. Masese Advocate instructed by the Federation of Kenya Employers for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27[1] [a] of the Industrial Court [Procedure] Rules 2010]

1. This is a relatively old Claim, having been filed on 22nd March 2011. The Claimant states he was employed by the Respondent Company on 30th November 2001. He worked as a Moulder. He became a Supervisor in 2006 in the Production Section. He left employment on 19th January 2011. At the time of leaving, he earned a daily rate of Kshs. 472. He claims the Respondent terminated his employment abruptly, after he raised questions on various irregular deductions made on his salary. Mr. Mbondo alleges termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a. A declaration that termination was arbitrary, unlawful and unfair.
- b. 1 month salary in lieu of notice at Kshs. 14,160.
- c. Annual leave pay for 10 years at Kshs. 14,160 x 10 = Kshs. 141,160.
- d. Service pay at 18 days' salary for every completed year of service at Kshs. 84,960.
- e. Compensation the equivalent of 12 months' salary at Kshs. 169,920

TotalKshs. 410,640

f) Certificate of service to issue.

g) Costs and interest.

2. The Respondent filed its Statement of Response on 17th October 2012. The Claimant was employed by the Respondent as stated in the Claim. He was entrusted Kshs. 700 by the Cashier to forward to fellow Employees Onsongo and Maccane. He paid Maccane only Kshs. 50 and disappeared with the balance. When confronted by the Employer, the Claimant alleged he had made a miscalculation, and would refund the money. He then deserted employment from 2nd January 2011. He was a Casual Employee who only came to work when some work was available. He therefore did not leave employment at the instigation of the Employer; he left on his own volition, after failing to pay his Colleagues money entrusted to him by the Employer. He had not worked for 13 months to merit the claim for unfair termination. The Respondent urges the Court to find the Claim has no merit.

3. The Claimant testified, and closed his case on 15th December 2012. Ms. Lilian Akoth Onyatta, Human Resource Officer of the Respondent, testified on 3rd October 2013. The last Witness for the Respondent, Mr. Vincent Onsongo, a Bakery Worker, testified on 26th January 2015 when the hearing closed. The file was forwarded to the original Trial Judge, the undersigned, at the Mombasa Labour Court for the preparation of this decision on the 7th May 2015.

4. The Claimant testified he requested his Employer to inform him why his salary was being deducted. He was not given an answer. He had risen through the ranks to become a Supervisor. He worked diligently, and was sometime in 2006, injured at work. He earned a daily rate up to the year 2005. After this he was placed on a monthly rate of Kshs. 13,500. He conceded on cross-examination that he did not state anywhere in the Claim, that he was paid monthly.

5. The Claimant was a Member of the Bakery Union. He was not aware of the CBA concluded between the Employer and the Union. He testified the CBA attached to the Statement of Response has a termination of casual employment clause. He held this was between the Employer and the Union; it did not involve him. He did not sign the check offs. His rate was Kshs. 472 per day. His documents showing work injury were genuine. He did not manufacture them. The Claimant denied that he ran away with his Co-Employees money. The Claimant testified on redirection that he was paid Kshs. 13,500 as a Supervisor in cash. There were no records capturing such pay. He was not informed of the CBA. He saw the CBA for the first time in Court.

6. Lilian testified she joined the Respondent in the year 2002. Initially she was a Cashier. She later became Office Administrator and Human Resource Manager. The Company employs Casual Employees, Contractual Employees and Permanent Employees. She was aware the Claimant was an Employee of the Respondent. He was a Casual Employee. His name is captured in the Daily Casual Payment Vouchers at annexure 2 of the Response. The Casuals worked less than 20 days a month.

7. The Claimant was entrusted money by the Cashier to forward to 2 of his Colleagues. He failed to do so. Lilian asked the Cashier to advise the Claimant to return the money. He was called by the Cashier on phone; he did not return the money or report for duty. He just disappeared.

8. The Witness told the Court on cross-examination that the Claimant was employed in the year 2003 or 2005. She could not say with certainty if it was in the year 2001. She did not have a breakdown of days worked by the Claimant from the year 2001. The Claimant's Colleagues confirmed the Claimant did not pay him what was due to them. The Claimant was invited by the Disciplinary Committee to defend himself. Lilian did not call the Claimant to explain his disappearance. The Claimant was paid a daily rate. He rarely reported for duty. He never worked 30 days in continuity. The CBA required a Casual Employee to work a maximum of 20 days to be considered for regular employment. Lilian was unable to say which clause of the CBA stipulated this. She testified the Casual Employees were paid in accordance with the CBA.

9. Vincent Onsongo stated he has worked as a Bakery Worker for the Respondent from 2010. The Claimant worked with for the same Company, in the position of a Moulder. He used to prepare dough. He was a Casual Employee.

10. Onsongo testified he recorded a Statement dated 5th January 2011 on the allegations made by the Employer against the Claimant. He confirmed the Cashier had entrusted the Claimant Kshs. 838 and Kshs. 538, to forward respectively to Onsongo and another Employee named Maccane. The Claimant gave Maccane the sum of Kshs. 50 only and retained the rest. Onsongo and Maccane consulted the Cashier, who called the Claimant on the phone, and demanded the Claimant surrenders his Colleagues' money. The Claimant went back to the workplace, and in the company of Onsongo and Maccane went to see the Cashier. He alleged before the Cashier that he thought all the money was his, promising he would pay what was due to his Colleagues. He had already used the whole amount. Onsongo never saw the Claimant again. The Witness received the sum due to him from the Cashier. Onsongo testified he saw the Claimant receive the money from the Cashier. The Witness did not know if the Claimant was pursued by the Respondent for the missing money.

Submissions

11. The Claimant submits he worked continuously. There was no break in his service. He worked for 10 years. His contract was converted by the operation of Section 37 of the Employment Act 2007 into regular employment, where wages are payable monthly. He cites the **Industrial Court at Nairobi Cause Number 671 of 2012 between Wilfred Bukachi Opwaka v. Ready Consultancy Co Limited** where the Court concluded that an Employee who works continuously for 1 month, ceased to be a Casual Employee. The Claimant submits he was not given the reason for termination; he was simply told to cease working. He had enquired why there were deductions made on his salary. He did not desert employment; this allegation was made by the Respondent in afterthought. He was not heard. The Respondent failed to discharge its obligation under Section 41, 43 and 45 of the Act. The Claimant submits he merits the prayers sought.

12. The Respondent submits the Claimant was employed by the Respondent as a Casual Employee. His daily rate was Kshs. 472. He worked under Clause 27 of the CBA concluded between the Parties, which regulated casual employment. He deserted employment after failing to pay the money due to his Colleagues. The records availed to the Court show the Claimant worked intermittently from the year 2003. These records were not contradicted by the Claimant. The Claimant's case does not match the decision in the case of *Wilfred Bukachi Opwaka* cited above: the Claimant in that case worked for more than 20 days in any given month; in the case of Mbondo, he did not have such continuous service. The Respondent urges the Court to adopt its Award in **Nairobi Cause Number 843 [N] between Kenya Engineering Union v. Rolmil [K] limited** where it was concluded an Employee who had worked for the Employer intermittently from the year 2002 TO 2006, was a Casual Employee, and did not merit conversion under the governing CBA. The Respondent prays for dismissal of the Claim.

The Court Finds:-

13. The Claimant was employed by the Respondent as a Moulder. He later became a Supervisor in the production section. The date and nature of employment are contested. The Claimant states he was employed on 30th November 2001. The Respondent stated it employed the Claimant in July 2003. The Claimant holds he was a regular Employee, who was paid a monthly rate of Kshs. 14,160 as of the date of termination. His contract of employment, he argued, was converted into regular employment by the operation of Section 37 of the Employment Act 2007. The Respondent counters that the Claimant remained a Casual Employee, paid a daily rate of Kshs. 472 as of the date he left employment. The first issue is on the legal status of the Claimant as an Employee of the Respondent.

14. The Court has not found any record from the Employer, conclusively showing the year 2003 as the date of the Respondent employed the Claimant. Annexure 3 of the Response, titled 'KYALO MBONDO WORKSHEET,' covers the period between 2000 and 2011. It is not clear why the Worksheet should go back to the year 2000, if the Claimant was not in employment.

15. The Employer had the obligation to keep proper employment records. What was availed to the Court cannot assist in arriving at a conclusive date when the Claimant was employed. The oral evidence on record is sufficient to persuade the Court find the Claimant's position, that he was employed in November

2001, to be the correct position.

16. Mbondo was clear in his evidence that he was employed on 30th November 2001; he was a Moulder up to 2006; and became a Supervisor in 2006. He testified he was a Casual Employee between 2001 and 2005. Lilian stated on cross-examination that she was unable to say if the Claimant was employed from 2001. An Employer must always be able to point to the date of employment.

17. The Claimant cannot have been a Casual Employee from 2001 to 2011- a period of 10 years. He acknowledges he was in casual employment initially, but was absorbed into regular employment in the year 2006. This position is supported by the letter signed by Lilian to Dr. Ramesh, dated 15th July 2006 which is annexed to the Claim, describing the Claimant as a Supervisor, who sometimes assisted in the oven.

18. The CBA concluded between the Respondent and the Bakery Union no doubt applied to the Claimant. Clause 27 defines a Casual Employee as any individual whose engagement provides for his payment at the end of each day, and who is not engaged for a longer period than 24 hours at a time.

19. Sub-clause [b] states that where such an Employee, works for a period of continuous working days which amount in the aggregate to the equivalent of not less than a month; or performs work which cannot reasonably be expected to be completed within a period, or number of working days amounting in the aggregate to the equivalent of 3 months or more; the contract of service of the Casual Employee shall be deemed to be one where wages are paid monthly.

20. The records supplied by the Respondent in particular the Worksheet mentioned in paragraph 14 above, tend to show the Claimant worked at most for 20 days in a month. The record however appears incomplete. It does not reveal the frequency of the days worked, whether they were in continuity. If the Claimant worked 18 days in January 2004, and continued to work for 17 days continuously in February 2004, these would be continuous working days, which would amount in the aggregate to the equivalent of not less than one month.

21. The nature of the work done by the Claimant similarly suggests to the Court he cannot have been working as a Casual Employee. He was a Moulder initially, then a Supervisor. He continued in his supervisory role for years. He performed work which he was not expected to by the Respondent, and which he did not, complete within a period aggregating 3 months. He worked for over 5 years in the supervisory role.

22. In the view of the Court the Claimant ceased to be a Casual Employee by dint of clause 27 of the CBA, which adopts Section 37 of the Employment Act 2007, and which has judicial approval in the case of *Opwaka* cited by the Claimant in his Submissions. Furthermore the Court has the discretion, under Section 37[4] of the Employment Act, to vary the terms of service of a Casual Employee, and in doing so declare the Employee to be employed on terms and conditions of service consistent with the Act.

23. The decision of this Court in the case of *Kenya Engineering Workers Union* was not based on similar circumstances to the present dispute. Firstly, that decision was based on a different CBA, between different Parties. Clause 24 of the CBA in the *Kenya Engineering Union* case required the Casual Employee to work in excess of 4 calendar months, to qualify for conversion. The Employee therein was, a hammer-man, a role the Court found demanded no continuity of service.

24. The Claimant should therefore have been treated as a regular Employee, and availed the full benefit of the Employment Act 200, available to regular Employees.

25. Was his contract of employment terminated by the Respondent; was it terminated for valid reason and fairly terminated; and lastly, is the Claimant entitled to the remedies pleaded in the Claim?

26. The Claimant testified he was dismissed for persistently demanding from the Respondent, to be told why certain sums of money were being deducted from his salary. The Respondent denies it initiated

termination. Its position is that the Claimant was entrusted money belonging to his 2 Colleagues Onsongo and Maccane. He was to pay the money to his Colleagues. He only paid Kshs 50 to Maccane and pocketed the rest. When confronted by the Respondent for refund, he refused to refund the money; abandoned his job; and disappeared, never to be seen at the workplace.

27. The Court believes the position of the Respondent. The Claimant did not elaborate his assertion about being victimized for demanding to be told about the deduction made on his salary. He did not say when the deduction happened, or what the amount of deduction was. He did not show any demand made. His evidence on the reason for dismissal was pedestrian. The Claimant testified too, that he was injured while at work. He did not relate the work injury to the issues in dispute. The position by the Respondent was substantiated by the evidence given by Lilian, and Onsongo whose money the Claimant stole. Onsongo recorded a Statement way back on 5th January 2011 clearly explaining the nature of deprivation visited upon him by the Claimant. He was consistent in restating the facts in his sworn statement in Court. Onsongo had no reason to lie against the Claimant.

28. The Claimant's behaviour was unacceptable to his Employer, Workmates and the Business as a whole. He betrayed the virtues of trust and confidence, which are the cornerstones of an employment relationship. The Respondent demonstrated valid reason for its decision ending its relationship with the Claimant.

29. The Claimant abandoned his post and cannot be heard to complain he was not given the opportunity to explain himself and defend the allegations against him. He did not offer himself for a disciplinary hearing. He disappeared. The Court finds the Claimant made it impossible for the Respondent to grant him a fair hearing, by placing himself outside the reach of the Respondent.

30. *The prayers for notice pay and compensation for unfair termination or damages for unlawful termination have no merit and are rejected.*

31. The Respondent was not able to show the Claimant's annual leave records. It was presumed that the Claimant served as a Casual Employee, and was not entitled to annual leave. From the year 2006, the Claimant was in a supervisory role. It should have been clear to the Respondent at least from 2006, that the Claimant could no longer be categorized as a Casual Employee, granted the nature of his work, and continuity of service.

32. *The Court grants the Claimant annual leave pay for the period between 2006 and 2011, a period of 5 years, at 21 days' salary for each of the 5 years, amounting to Kshs 472 x 21 x 5 = Kshs. 49,560.*

33. Having served for 10 years, the Claimant was ripe for reward and recognition at the time of his disappearance from work. The law intends that when an Employee's contract is terminated for whatever reason, he is paid all his moneys, allowances and benefits due to him up to the date of termination. Section 18 [4] of the Employment Act 2007 clarifies this should be the case, even in cases of summary dismissal. The Respondent treated the Claimant as a Casual Employee, and did not reward and recognize the Claimant's 10 years of service. There was no suggestion that the Respondent had a Pension Plan at the workplace, from which the Claimant could draw social security in his sunset years. The Respondent made no arrangement to have the Claimant covered under the Statutory National Social Security Fund. In the end, the Claimant left after 10 years, without any form of social security.

34. The Claimant was a Bakery Worker, with 10 creditable years of service. ***He is granted service pay at 18 days' salary for each of the 10 years completed in service, at Kshs 472 x 18 x 10 = Kshs.84,960.***

35. *Parties shall meet their costs of the Claim. The full amount of Kshs. 134,610 shall be paid to the Claimant by the Respondent within 30 days of the delivery of this Award. No order on the costs and interest. Certificate of service is granted to the Claimant under Section 51 of the Employment Act.* In sum, it is ordered:-

a. ***The Claimant's contract was validly and fairly terminated.***

- b. ***The Respondent shall, within 30 days of the delivery of the decision herein, pay to the Claimant a total sum of Kshs. 134,610 comprising annual leave pay and service pay.***
- c. ***The Respondent to release to the Claimant his certificate of service forthwith.***
- d. ***No order on the costs and interest.***

Dated and signed at Mombasa this 22nd day of May 2015

James Rika

Judge

Dated, signed and delivered at Nairobi this 19th day of June 2015

Jorum Nelson Abuodha

Judge