



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO. 2472 OF 2012

BERNARD MARIITA NYANGARACLAIMANT

VERSUS

PACKAGING INDUSTRIES LIMITEDRESPONDENT

JUDGEMENT

1. Issue in dispute is the unfair and unlawful dismissal of the Claimant from his employment and non-payment of his terminal dues by the respondent.
2. The claim is that the Claimant was employed by the Respondent as a Machine Operator in 2006. Before his formal employment, the Claimant had worked for the Respondent between 1996 and May 2006. On 9th October 2010, the claimant's employment was terminated through summary dismissal. That he was not issued with any notice, there was no hearing and the collective bargaining agreement was not applied. The Claimant is seeking damages for the unlawful termination; notice pay; unpaid house allowance; unpaid overtime; unpaid night allowance and costs of the suit.
3. The Claimant testified that upon his employment by the Respondent in 2006 he served well until 10th October 2010. He had previously worked for the Respondent but following a strike, he did not resume duty until he was recalled on new terms of piece work. He was paid for work done and on daily allocation of work. He would start work at 8 am and leave at 5.30pm. Payments were done after a week. Previously he was earning overtime, house and night allowance, but the new terms and payments were all inclusive based on piece work done.
4. On 10th October 2010 he left from work, he was searched by security and went home. On 11th October 2010 when he reported to work he did not find his card for work allocation. He was called by the human resource officer who stated that following an operation, his card had been withdrawn and was thus told to go home. He refused to take his payments as he felt not treated fairly and there was no termination notice or given a hearing to know what had happened. He reported the matter to the labour officer who recommended that he be reinstated.
5. That the Respondent refused to effect the labour officer recommendations, this has put the Claimant into hardships as he had a family that depended on him and thus is seeking all his terminal dues and damages.
6. In cross-examination, the Claimant confirmed that he was under a contract of employment with the Respondent and was paid on piece work. On 10th October 2010 he was no night duty and upon completing his tasks he did a hand over and left for home. He was searched by security before he left. They did not find any hidden papers. He was not told to report for disciplinary hearing but the following

day he was not allowed to resume his duties. He denied that his termination was as a result of theft.

7. In defence, the Respondent stated that the Claimant was engaged on contract for a period of 6 months. A contract was done for the period of 8th July 2010 to 31st December 2010. The contract made provision that any misconduct would result in summary dismissal. The contract had provided for set targets that the Claimant had to meet without a compromise on quality. In September 2010, it came to the attention of the Respondent that in collusion with others, the security guards, there had been theft of plastic bags from production centre which was detrimental to the respondent's business. The claimants were required to check out their cards after night shift with security guards charges with searching the workers to prevent theft. On 10th October 2010 as the Claimant was at the line to clock out his card the Respondent changed the security guards doing the search and upon noticing the changes, the Claimant and several other employees, without any provocation and in an attempt to conceal their fraudulent behaviour suddenly started running back into the respondent's premises in an attempt to escape capture with the stolen goods. The Claimant was thus terminated as per his contract. He failed to report on duty on 11th October 2010. He has never reported back to work.

8. The Respondent also stated that they still hold claimant's wages for October 2010 together with his benefits as he refused to collect these despite numerous requests. His terms of contract were specified, his wages were dependent on piece work and the more he was able to produce, the higher his wages were supposed to be. Under his contract, there was no overtime entitlement, no house allowance or night shift allowances. His employment depended on his efforts and he was under a contract.

9. In the circumstances of the Claimant absconding duty, the Respondent issued him with a termination letter on 18th October 2010 setting out the reasons for the termination. The termination was therefore lawful and nothing remains unpaid to the Claimant save for his non-collection of his terminal dues.

10. In evidence, the Respondent called Julius Mulei Mutua who has worked with the Respondent at the Security Officer since 1998 and is well known to the claimant. That security checks at the Respondent require a search of all staff before they log out and they have contracted KK Security Guards and Pipta Security Co. to conduct body searches. Such searches are done 3 times a day, at 8am shift change; 12.30pm during lunch and at 3.30pm at shift change. To confirm hours of work for each employee, the Respondent has allocated clocking cards. On 10th October 2010, during clocking out, the employees including the Claimant were lined up for body search when he joined the security guards but upon the Claimant and other employees realising this, they started running off to avoid the body search. Some were captured and polythene bags were found fastened to their bodies. The witness made effort to chase the Claimant but he escaped before he could be arrested. The Claimant however dropped his time card and polythene bags as he run off. The Claimant never resumed duty and has never gone back to collect his October dues.

Submissions

11. Only the Respondent filed their Witten submissions on 14th July 2015. The Respondent thus submitted that under section 44(4) of the Employment Act, the employer is allowed in law to effect summary dismissal upon an employee committing criminal acts. The evidence on record is that the Claimant failed to return to work after he run off to avoid a body search, as he run off he dropped his card and stolen material from the respondent. Notice before termination was therefore not in issue as summary dismissal required instant action where there is a cognisable offence. In this case, despite the Claimant being issued with a letter of termination that did outline the reasons for his dismissal, he never reported back to work. He has refused to collect his terminal dues.

12. The Respondent also submitted that in the event the Court finds that the Claimant was not given a hearing, he should only be paid for 3 months as compensation. He should not be made to benefit from his wrongs. The procedural lapses by the Respondent where they arise, the Court should only grant in the minimum.

13. The Respondent also submitted that the Claimant is not entitled to house, night or overtime allowance. He had a specific contract that had his terms of employment. The Claimant left without completing his term of contract.

14. Piece work is contemplated as lawful under the law. An employer can contract an employee based on the nature of work contemplated. Such a contract is lawful and allowed to specify the terms and conditions that should apply but should not go below the minimum allowed terms and conditions of employment that contemplate a wage below the legal minimum. Section 2 of the Employment Act, 2007 defines 'piece work' to mean;

“Piece work” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance;

15. This is therefore a recognised form of contract that an employer and employee can get into. This was gone into by the Court in the case of **Jowasi Ambudo & Others versus Kenafric Industries Ltd, Cause No.462 of 2010** where the Court held;

Piece work contracts are regulated under the Employment Act ... Such contracts end each day and the payments due to an employee at each end of day as paid are all inclusive and cannot attract other work benefits outside the piece work contract as agreed by the parties. To claim overtime, house allowance, leave and underpayments or such benefits due to a full time employee is a right not due to an employee defined under the law and one issued with a piece work contract. I make reference to sections 2 that define 'piece work contract'

16. It was also held by the Court in **Wycliffe Bengi versus M/s Regal Oil (K) Limited, Cause No.1175 of 2011** that;

... it is now appreciated by the Court that there are various forms of employment contracts where an employee can be sourced to work full time and on permanent terms, an employee can be engaged on contract terms based on time or work to be done, on piece work or casual terms as the case may be. These various forms of employment are recognised in the Employment Act especially under section 7 and 8 with regard to service contracts, oral and written contracts, and section 37 on the conversion of oral contracts by operation of the law.

17. Hence in this case, the Claimant admit that he was under a piece rate contract a matter confirmed by the respondent. Indeed at the time subject of this claim, the Claimant was serving under a specific contract that was to end on 31st December 2010. The terms and conditions of such employment were therefore as under the specific contract. No rights arise outside the agreed upon contract and I find no claim that there was any illegality to the same.

18. With regard to payments for piece work done, section 18(1) (b) apply thus;

18. (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled—

(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier. [Emphasis added].

19. Where the Claimant committed theft, the Respondent should have taken action as this is criminal behaviour. Such conduct of theft of property is a matter serious and warranted proper investigations. To

simply state that the Claimant started running without any provocation so as to hide his fraudulent activities of theft is not enough. Where there was good cause to warrant his dismissal on a matter as serious as criminal conduct, such required investigations and appropriate sanction in law. Equally where the Claimant absconded duty, failed to report to work as under his contract, he was in breach of the same. The Respondent has not shown any effort to recall the Claimant to complete his contract on piece work or as it was running up and until 31st December 2010. No communication was made to the Claimant whatsoever. The termination letter was issued soon after the event on 18th October 2010. The effort to have the matter resolved at the Labour Office is not mentioned by the respondent. In such circumstances and lacking in any material evidence, the evidence by the Claimant has to suffice. He was terminated without any notice, justification or good cause. The Respondent remained the sole custodian of all records with regard to the claimant's employment. Failure to have any written warning, notice, evidence of being heard prior to termination, such lapses must apply to the advantage of the claimant. The resulting effect of this is that the termination was procedurally unfair.

Remedies

20. On the finding that the Respondent erred in lacking the correct procedure, the Claimant is entitled to compensation. The offer by the Respondent to pay for 3 months in compensation though generous, the Claimant shall be awarded one (1) months' pay at Kshs.14,710.00. The Claimant shall also collect any due owed to him for the month of October 2010 that he has failed to collect since. The procrastination in not collecting these dues is not warranted.

21. The Claimant is also seeking payment of overtime, house allowance and night allowances. There was no evidence as to how the overtime claim arose. The Claimant stated that he reported to work at 8am and left at 5.30pm. He was in shifts and upon completing his work he would be searched before clocking out. His time at the Respondent was therefore well regulated and in the absence of a clear outline as to how the overtime arose, the computation of such time, this shall not be awarded. The claim for house and night allowances were never gone into. The Claimant was under a piece work contract that spelled out his terms and conditions of work. To claim outside such a contract, he clearly ought to have addressed each and every item as to how it arose. I find no evidence to warrant the claims. They are declined.

Judgement is entered for the sum of Kshs.14, 710. The Claimant is also awarded 50% of his costs.

Dated and Delivered at Nairobi this 23rd day of July, 2015.

M. Mbaru

Judge

In the presence of:

Court Assistant

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