



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO 690 OF 2013

GEORGE OCHIENG AMOLO.....CLAIMANT

VS

BIDCO OIL REFINERIES.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 14th May and filed in Court on 15th May 2013, the Claimant sued the Respondent for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Response on 17th June 2013 and the case was heard on 16th December 2013 with Mr. Makokha appearing for the Claimant and Miss Thuo for the Respondent. The Claimant testified on his own behalf and the Respondent called its Group Human Resource Officer, Kelly Kaleli Wambua. Both parties then filed written submissions.

The Claimant's Case

2. According to the Claimant, he was employed by the Respondent as a Spray Painter effective June 2012 until 10th January 2013. He was paid a daily rate of Kshs. 827 as at the time he left the Claimant's employment.

3. On 6th January 2013, the Claimant was instructed to paint motor vehicle registration number KAU 112U which was due for inspection. On 7th January 2013, the Respondent's Manager, Kuldip Singh alleged that the Claimant and his colleague Joseph Onyango had stolen some materials assigned for use in this work, an allegation the Claimant denied. On 10th January 2013, the Claimant was dismissed verbally by the Respondent's Manager, Kupal Singh.

4. The Claimant therefore claims the following:

- a. A declaration that the termination of his employment was unlawful and unfair
- b. One month's salary in lieu of notice (827x30).....Kshs. 24,810
- c. Prorata leave (24,810x1/2) year.....Kshs.12,505
- d. 12 months' salary in compensation for unfair termination.....Kshs. 297,720
- e. Costs plus interest

The Respondent's Case

5. In its Response to the Memorandum of Claim, the Respondent denied terminating the Claimant's employment on 10th January 2013. Kelly Kaleli Wambua testified that the Claimant was employed on 7th June 2012 and worked for 5 days every week. Wambua added that apart from the off days, there was no other day that the Claimant did not work. The Claimant worked for 9 and ½ hours per day and was paid standard over time.

Findings and Determination

6. The first issue for determination has to do with the nature of the Claimant's employment. It was the Respondent's case that the Claimant was a casual employee paid on a daily basis and was therefore not entitled to the reliefs sought.

7. 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”

8. The Respondent produced a casual's payroll running from 1st June 2012 to 11th January 2013 showing the Claimant having worked on shifts of varying durations ranging from 5 days to 11 days with off days in between.

9. In the case of ***Wilfred Bukachi Opwaka Vs Ready Consultancy Company Limited (Industrial Court Cause No 471 of 2012) Maureen Onyango J*** held that under Section 37 of the Employment Act, 2007 once an employee employed on casual basis works continuously for at least one month, the employment automatically converts to monthly contract terms.

10. From the evidence on record, it seems to me that the Claimant worked continuously and that the days on which he did not work would be normal off days that would be taken by any regular employee. I therefore find that the Claimant was employed on monthly basis in terms of Section 37 of the Employment Act, 2007.

11. The next question is whether the Claimant's employment was terminated unfairly. The Claimant told the Court that he was terminated verbally by the Respondent's Manager, Kupal Singh. The Respondent proffered a general denial in this regard and its witness, Kelly Kaleli Wambua was not privy to any discussions between the Claimant and Kupal Singh.

12. There was no explanation as to why the Respondent did not call Kupal Singh to controvert the Claimant's evidence with regard to the circumstances leading to the cessation of the Claimant's employment. The Court therefore adopts the Claimant's account and finds that the verbal termination of his employment was unfair within the meaning of Section 45 of the Employment Act, 2007.

13. I consequently award the Claimant two months' salary in compensation as well as one month's salary in lieu of notice. In view of my finding that the Claimant was not a casual employee, he is entitled to prorata leave.

14. In tabulating the Claimant's award, the Court has adopted the figure of Kshs. 19,364 based on the basic daily rate of Kshs. 645.46 as the Claimant's monthly salary.

The net effect of this award is as follows:

a) 2 months' salary in compensation for unfair

termination.....Kshs.38,728

b) 1 month's salary in lieu of notice.....Kshs.19,364

c) Prorata leave (19,364/30x1.75x6).....Kshs. 6,777

Total.....Kshs. 64,869

I further award the Claimant the costs of this case.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF MARCH 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*