



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 868 OF 2012

MUSTAFA ABAS MISRI CLAIMANT

VERSUS

AKIYDA 2000 LIMITED RESPONDENT

JUDGEMENT

1. On 23rd May 2012 the claimant filed his claim for wrongful termination by the respondent. A defence was filed on 24th July 2012 denying the claim. Both parties were heard and at the close of each case filed written submissions.

Claimant's case.

2. The claimant was employed by the respondent in November 2000 through a verbal contract, as a Machine Operator and rose through the ranks to a supervisor at a monthly salary of Kshs.16, 280.00 a month. On 5th January 2011 the claimant was terminated from his employment after he was told to go on leave and to wait until he was called back but the respondent failed to do so effectively terminating him. The claimant went back to seek the respondent to return him to work but there was no response. Before he was terminated there was no notice and despite being unionised his union was not informed.

3. The claimant is seeking notice pay, service pay, and severance pay as benefits due to him under the law. He is also seeking compensation for unfair termination together with unpaid leave for 10 years and an order directing the respondent to remit all unpaid dues to NSSF and NHIF that are unpaid for the 10 years he was employed by the respondent.

4. In evidence in support of his case, the claimant stated that he commenced employment with the respondent in November 2000 until 5th January 2011 when he was unfairly terminated without notice or payment in lieu of notice. He commenced work as a casual employee where his salary was paid at the end of each day, no contract was issued for the entire duration he worked with the respondent for 10 years. The daily wage did not provide for dues to NSSF or NHIF and the respondent did not remit any such statutory dues to these bodies.

5. Over time the claimant rose through the ranks and became the supervisor in the production of bread, he filed all his chats on bread production. He never took leave days as he was treated as a casual employee. Events leading to his termination were that while in his shift, the manager found him taking records bread production and noted that there were pieces of bread not properly recorded as every bag had the expected number of loaves and in this case the claimant had some damaged loaves which were not taken into account while these were added to new lots and ended up producing more and hence had an extra 12 loaves which he was able to account for and were part of the records. The claimant was accused

of stealing bread and was thus terminated. No warning letter was issued or warning. When the operations manager was called, he confirmed with the manager and the claimant was told to leave.

6. The claimant also stated that he was unionised and there was a Collective Bargaining Agreement (CBA) but he was never issued with a contract. He had an identification card from the respondent as the only document from the respondent. The claimant confirmed his claim to include payment of his terminal dues, compensation for unfair termination, notice pay and remittance of his NSSF and NHIF dues.

7. In cross-examination the claimant stated that in his taking of records he may have committed human errors to the chats, these were confirmed with a signature from the manager. He was working at Githurai branch and after making errors was sent to Gilgil Branch. When he made errors he was given a chance to explain and as a unionised member before termination he was never given any warning or his union informed of any misconduct.

Respondent's case

8. The respondent in defence stated that the claimant was a temporal and freelance machine operator and on casual terms with them only employed on demand when work was available and was never employed on permanent basis and when given casual work was paid at the end of the day. No document of identification was allocated or issued to the claimant as he was not an employee; he was taken on ad hoc basis. He was on intermittent employment and never for more than 3 months. No union has a CBA with the respondent for casual workers and the dues claimed for notice pay, compensation and remittance of statutory dues are not payable by the claimant.

9. Further that the claimant was summarily dismissed due to breach of the terms of engagement and violation of the law where he manipulated records leading to substantial detriment of the respondent's property, habitual neglect of assigned duties, and forgery of records, failure to obey lawful orders, dishonesty, insolence and breach of terms of engagement. The claimant is also accused of engaging in numerous malpractices and misconduct while employed as a casual by the respondent when he manipulated records and altered the mixing charts in an attempt to declare less production leading to breach of contract. Several warning was issued and the claimant gave his apologies and when he committed acts of gross misconduct, the respondent was forced to summarily dismiss the claimant. That there are no dues owing since the claimant was a casual and cannot rely on the CBA as he was not recognised under the same. No severance pay was due or notice pay.

10. To support the respondent's case, Benjamin Munene Nderi gave evidence as the Gilgil Branch manager of the respondent and stated that he worked with the claimant as his supervisor in production where records had to be taken according to respondent operational policy. The claimant was moved to several branches but he remained a casual as he was hired in the morning and repaid at the end of day and never worked for more than 5 days in a week and only upon demand.

11. The last incident that caused the dismissal of the claimant was when he was at Gilgil branch after a transfer from Githurai 6 months before when he committed a mistake and was suspended. The claimant apologised and was pardoned and transferred to Gilgil but again failed to take proper records which was deliberate as he knew it was wrong to take wrong records of bread production. It was thus recommend that the claimant be terminated as his failure to take proper records was neglect of duty and potentially could cause huge damage to the respondent business where the Kenya bureau of Standards found substandard products the respondent would be found liable to pay huge penalties and face criminal sanctions and this was a huge risk if the claimant continued to be their employee. The respondent thus summarily dismissed the claimant and also directed that he be blacklisted so that he was not going to be employed by any other branch of the respondent. His dismissal was inevitable as he was a dishonest person

Submissions

12. In submissions, the claimant stated that his contract of employment was verbal and worked for the

respondent for over 10 years where he only signed the daily work sheets which were kept by the respondent but were never produced. The claimant was a supervisor a position similar to the one held by a permanent employee of the respondent called Jacob Malonza but he was treated differently as no contract was issued to him as he was taken to be a casual contrary to section 37 of the Employment Act.

13. The claimant also submitted that he was summarily dismissed without notice or hearing which confirmed was by the respondent witness. There was a CBA that was not referred to or its terms applied with regard to the dismissal of the claimant. That this was contrary to section 43 where an employer is required to prove the reasons for termination and where there is failure to do so, the termination is unfair. There was no hearing before termination which the respondent admitted and wrongly justified the same with evidence that the claimant was a casual and not entitled to a hearing which has been challenged.

14. To support these submissions, the claimant relied on the provisions of Article 47(1) of the Constitution noting that every person was entitled to proper administration action that is expeditious, efficient, reasonable and procedurally fair which can be supported by section 45(5) of the Employment Act. That the claimant was not given a hearing before summary dismissal nor was he given any reasons for the termination. There was no due process. In the circumstances the claimant reiterated his claim for 3 months' notice pay; prorated leave, leave travelling allowance as under the CBA, service pay and compensation.

15. The respondent on their part submitted that there was no contract of employment between the parties herein as the claimant was a casual. He was paid daily when the contract ended and cannot rely on section 35 of the Employment Act. That while the claimant was engaged as a casual he engaged in malpractices and despite repeated warnings, he failed to redeem himself forcing the respondent to summarily dismiss him. These malpractices were contrary to section 44 of the Employment Act that allow summary dismissal for gross misconduct and thus not entitled to payment in lieu of notice or anything under the CBA as he was not unionised.

16. From the proceedings, the Claimant asserted that he was employed by the respondent continuously as a full time employee hence his claim for terminal benefits. On the other hand the Respondent asserted that the Claimant was employed as a casual for all intents and purposes and hence no dues were owing as at the time he was paid his daily wages at the end of each day.

17. So then what was the true nature of the relationship between the parties? Under the Employment Act an 'employee' is defined as:

Means a person employed for wages or a salary and includes an

Apprentice and indentured learner.

18. The Labour Relations Act on the other hand defines an 'employee' as:

Means a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner

19. It was not in dispute that the Claimant had a daily wage that was computed and paid every day to a total of Kshs.16, 280.00 per month. He worked for 5 days in the 3 shifts of the respondent schedule. For this purpose, the Respondent kept their own work sheets.

20. Did this therefore make the Claimant a full time employee eligible for the claims outlined in the claim? No records were submitted to guide Court in this assessment. This duty rests on the employer. In the absence of any other record and on the basis of the evidence before Court only the applicable law can resolve the issue. Under Section 18(2) (a) a person paid at the end of each day is a 'casual' since the terms of engagement end each day or is a person who is not engaged for a longer period than twenty four hours at a time.

21. On the other hand by operation of the law Section 37(1) becomes applicable where one is continuously engaged as a casual thus:

... Where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

22. This Court is further guided by judicial authorities in this regard in interpreting these provisions of the law. In establishing what kind of relationship was between the parties the following principles apply:

1. The manner in which the person works is subject to the control or direction of another person;
2. The persons' hours are subject to control and direction
3. The degree of integration within the organisation;
4. The person has worked for that other person for an average of at least 40 hours to month over the last 3 months;
5. The person is economically dependent on the other person for who he works or renders services;
6. The person is provided with the tools of trade or work equipment by the other person;
7. The person only works for or renders services to one person

23. I note that even though the Claimant was paid a daily wage computed and paid every day for the days worked, the period before his termination was worked continuously for 6 months, making it a period of more than three (3) months stipulated under the Section 37(1) of the Employment Act. This was the evidence of the Claimant and the same was confirmed by the Respondent Witness. By operation of the law, the Claimant ceased serving as a casual from the time his engagement went beyond the 3 months contemplated under the law.

24. Based on Respondent's nature of work, it was their duty in law to engage their workers as appropriate based on the duration of the contract or work availability. If the work available required service contracts or piece work performance, it was at their discretion to reduce the details into writing to avoid any ambiguities and to ensure each party understood the terms and conditions of engagement. The continued enjoyment of the Claimants labour continuously for a period exceeding 3 months as a casual is thus protected by the law and has consequences.

25. Further, I note that it is the duty of every employer it is the duty of every employer to keep employee records. Pay slips and leave schedules, should have been issued to the claimant as of right by the employer. Court notes that under Section 10 of the Employment Act, in a relationship as between the parties herein there are specific details that must be incorporated. Thus the employment particulars;

A written contract ... shall state particulars of the employment ... shall contain particulars as at a specified date ... [stating] any terms and conditions relating to any of the following –

- i. *Entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);*
- ii. *...*
- iii. *Pension and pension schemes.*

(b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.

26. The second principle is on the control of work hours. The Claimant stated that his hours of work were in the second shift and was a supervisor. He worked in a similar position as Jacob but was never given similar terms. For the duration when the Claimant was continuously engaged by the Respondent, he became economically dependent and was supplied with his tools at work to undertake his duties as a supervisor exclusively for the respondent benefit.

27. These were principles outlined in the case of ***State Information Technology Agency versus (2008) 29 ILJ 2234 (LAC) page 12***, the Court held that when determining the question of an employment relationship the following criteria should be applied:

1. *An employer's right to control and supervision;*
2. *Whether the employee forms an integral part of the organisation with the employer; and*
3. *The extent to which the employee was economically dependent upon the employer.*

28. In ***SA Broadcasting Corporation versus Mckenzie (1999) 20 ILJ 585 (LAC) 9***, the Court in a similar case established that the label that the parties generally place on the nature of the relationship is not helpful. It is the realities of the relationship that has to determine its true nature. The claimant when he erred while at Githurai branch, he was suspended which ordinarily does not happen for a casual employee whose contract should end at the end of the day. He apologized, was pardoned and resumed duty. Soon after he committed other acts of misconduct and was transferred to Gilgil Branch, again, this ordinarily does not happen with casual employees to be moved from one place to the next unless they are taken as part and parcel of a business and can be given instructions as they are taken to be part of the enterprise. If anything, the claimant should have been terminated while at Githurai Branch but the respondent opted to continue the enjoyment of his labour.

29. The claimant stated that he was unionised and his dues were deducted from his daily wages. This evidence was not challenged in any material way by the respondent. The claimant could not however recall how much of his salary went to the union raising doubts as to whether he was unionised or not. This was the claimant's duty to confirm as being unionised was his individual duty and not upon the respondent.

30. On the finding that the claimant was an employee of the respondent the next issue is whether his termination was unfair. In this regard, the respondent admitted in evidence that indeed the claimant was summarily terminated due to acts of gross misconduct. This court has held in *Cause No. 701 of 2010, Stephen Ongoya versus The Nairobi Academy Ltd* that Even in a serious case of gross misconduct which warrants summary dismissal, the provisions of section 41 apply. An employee faced with a dismissal or a termination must be given a hearing and in the presence of a fellow employee of their own choice. This essentially is to ensure the rules of natural justice are respected and that there is a witness present to confirm that indeed an employee was treated fairly before an adverse decision is made against him. The respondent does not claim to have applied the above provisions and I therefore find this was an unfair labour practice.

31. In remedies, the claimant is seeking unpaid salaries and unpaid leave for 10 years. There was no evidence of any outstanding salaries unpaid and this will be declined. Leave is however due as this was not challenged in any material way and will be granted as due by virtue of section 28 of the Employment Act all amounting to kshs.165, 020.00.

32. There is no record that the respondent made any remittances to the NSSF or NHIF for the claimant as under section 20(2) (b), 21(1) and under section 35 becomes beneficiary of service pay at 15 days' pay for each full year worked which is 10 years since November 2000 to January 2011 all based on the last gross pay earned last of kshs.16, 280.00 all amounting to Kshs.81, 400.00.

33. The claim for severance pay only arises in a case for redundancy. This was not such case and this will be declined.

34. The claimant is awarded one months' pay in lieu of notice at kshs.16, 280.00. Further compensation

is awarded at one months' pay at Kshs.16, 280.00.

In conclusion therefore, judgement is entered for the claimant against the respondent in the following terms;

- a. A declaration that the termination of the claimant was unfair;**
- b. Award for unfair termination at one months' gross salary at Kshs. 16,280.00;**
- c. Notice pay at Kshs.16,280.00;**
- d. Service pay at Kshs.81,400.00**
- e. Each party to bear their own costs.**

Dated at Nairobi this 7th day of May 2014.

M. Mbaru

Judge

In the presence of:

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