



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 905 OF 2012

BENEDICT MBELETI KILINDUCLAIMANT

VERSUS

BOB MILL INDUSTRIESRESPONDENT

JUDGMENT

The Claimant Benedict Mbeleti Kisilu filed this suit against the Respondent Bob Mill Industries Ltd alleging unfair termination of his employment and non payment of terminal dues and compensatory damages. In his Memorandum of claim dated 28th May 2012 he seeks the following orders:-

- a. A declaration that the Respondent's dismissal of the Claimant from employment was inhumane, wrongful and unlawful and the claimant is entitled to payment of his terminal benefits and compensatory damages.
- b. An order for the Respondent to pay the Claimant a total sum of Kshs 247,470/- in damages and terminal benefits as pleaded in paragraph 8 of the Claim.
- c. Costs of this suit plus interest thereon.

The Respondent filed an Answer to the Memorandum of Claim on 9th August 2012 in which it avers that the Claimant was a casual employee who did not work for any continuous period amounting to either 6 days to constitute a week or 30 days to constitute a month. The Respondent attached 139 pages of attendance sheets for the Claimant spanning the period January 2008 to November 2011. The Respondent also attached a petty cash voucher for Shs. 12,000/- signed by the Claimant on 22nd December 2011 in full and final settlement of his final dues.

The case was heard on 5th November 2013 and 23rd January 2014. Ms Akhaabi instructed by Namada & Co. Advocates while the Respondent was represented by Mr. Gathu instructed by Mucheru - Oyatta & Associates. The Claimant testified on his behalf while the Respondent called Musyoka Mbuluu RW1 and Tecla Adeka Adika RW.2. The parties thereafter filed written submissions.

The Claimant testified that he was employed on 23rd May 2005 as a helper to production attendant. He worked daily except on rest days and public holidays. He was paid every 3 days at a daily wage of Shs. 365/-. He signed wage sheet to acknowledge payment. He reported to work at 8.00 am and left at 5.00 pm.

On 2nd December 2011 he reported to work as usual. At around midday he was called to the Human Resource office where he was told that Mr. Musyoka a supervisor in foam cutting Section had reported that the Claimant failed to perform work given to him by Mr. Musyoka. The Claimant explained that he

had been given an assignment to tie, arrange and measure off-cuts for sale by his supervisor Mr. Vetrivel, the production manager. He had told Mr. Musyoka that he could not leave the work of the Production Manager unless someone else was assigned to do it. The Human Resources Officer did not listen to him. The Claimant asked that Mr. Musyoka be called but was told to wait outside. After waiting for about 30 minutes he was told that there was no work for him and that management had decided to terminate his employment. He denied that he had refused to work or that he had left work on his own volition. He was later paid Shs. 12,000. He seeks payment of notice, NSSF deducted but not remitted, leave, and damages.

For the Respondent, RW1 Musyoka Mbuluu testified that he was a Supervisor with Bobmill the Respondent where he had worked for 25 years. The Claimant was a casual in his department in foam cutting department. On 22nd December 2011 work in the department reduced and the Claimant was transferred to a different department as was the case with other staff of the department. He assigned the Claimant general work but the Claimant said he cannot do the work because he knows where he works and he can only work where he works. RW.1 immediately reported to the Human Resources Officer, RW2. The Claimant went to see the RW2 and then went away.

RW1 stated that Mr. Vetrivel is the factory Manager and cannot assign work to any worker except through a Supervisor. RW1 further testified that the Claimant used to report to Kahn who is in charge of another department.

RW2 Tecla Adeka Adika the Human Resources Officer of the Respondent testified that the Claimant was a casual employee of the Respondent. On 22nd December 2011 the Claimant was assigned work by the Supervisor but declined to do it. His reason was that his immediate Supervisor cannot assign him work. That he can only be assigned work by the Factory Manager. This was reported by the Claimant's immediate Supervisor. RW 2 asked the Factory Manager if the Claimant could only be assigned work by him and he said he does not assign work. That it is the Supervisor who assigns work. She testified that when she told the Claimant what the Factory Manager had said, the Claimant said if there was no work he would better go, and left. The Claimant was paid Shs. 12,000 being 2 years leave. RW2 testified that the Claimant did not work for the Respondent prior to 2008 and the Respondent did not have his records prior to 2008.

I have carefully considered the pleadings, the evidence adduced in court and the written submissions filed by the parties.

The issues arising for determination are the following:-

1. When did the Claimant start working for the Respondent?
2. Was the Claimant a casual?
3. Was the Claimant dismissed unfairly?
4. Is the Claimant entitled to his prayers?

1. When was the Claimant employed?

The Claimant testified that he was employed on 23rd May 2005. RW2 however testified that the Claimant started working in January 2008. Her reasons for stating so was because there were no records relating to the Claimant for the period prior to January 2008. RW2 testified that she started working for the Respondent in April 2009. The testimony of RW2 about the date on which the Claimant started working is therefore not from her personal knowledge. RW1 who testified that he had worked for the Respondent for 25 years was never asked when the Claimant started working for the Respondent.

The Claimant testified that he signed his first contract when Joyce Karuri was the Human Resources Officer, followed by Edward Adambi before RW.2 Tecla Adeka Adika took over. This information was not contested by the respondent.

This court has held in many previous decisions that Section 10 and 74 of the Employment Act place an

obligation on the employer to keep records of employment failing which the allegations of a Claimant that are not contested would be upheld by the courts. In this case the Claimant testified that he signed wage sheets for confirmation of payment. None of the wage sheets was produced yet this fact was also not contested by the Respondent. No records of 2005 to 2007 were produced to confirm that the Claimant's name was not in those records.

For the foregoing reasons I find that the Respondent has not discharged its burden of disproving the allegations of the Claimant that he started working on 23rd May 2005. I uphold the Claimant's position that he started working for the Respondent on 23rd May 2005.

2. Was the Claimant a Casual employee?

Section 37 of the Employment Act provides that a casual employee who works continuously for a month or intermittently for a number of working days which in the aggregate is equivalent to three months is by operation of the law converted to a monthly paid contract. The attendance sheets attached to the Respondent's Answer to the Memorandum of claim attest to the fact that the Claimant worked continuously and was only absent occasionally. The Claimant himself testified that he worked continuously except for Sundays and public holidays. This was not contested by the Respondent's witnesses.

For these reasons I find that the Claimant was not a casual employee but a monthly contract employee by operation of Section 37 of the Employment Act.

3. Was the Claimant unfairly dismissed from Employment?

The Claimant testified that he was dismissed by RW2 after being summoned to her office following the report made by RW1. RW1 said he saw the Claimant leave after coming from the office of RW2. RW2 testified that the Claimant left on his own volition. Apart from the evidence of RW2 there is no other evidence to support the testimony of RW.2. The law requires such matters to be proved by way of employment records.

I have noted that the petty cash voucher for payment made to the Claimant in the sum of Shs. 12,000/- bears the same date that he left employment. The fact that there was time to prepare a petty cash voucher and to pay the Claimant is not consistent with the testimony of RW2 that the Claimant was asked to go back to work but said it is better to go and left. Again on the last attendance list which is page 5 of Answer to Memorandum of Claim, there is an endorsement by hand in the following words:-

“Assigned duty by Mr. Khan and refused claiming that he can only be assigned by Mr. Vetri.”

This is contrary to the evidence by both RW1 and RW2 to the effect that Claimant refused to perform work assigned to him by Mr. Musyoka, RW1.

Section 41 of Employment Act sets out the procedure to be followed before an employee can be dismissed or terminated. This was not done in the case of the Claimant.

For the foregoing reasons I find that the Claimant was unfairly dismissed by the Respondent.

4. Is the Claimant entitled to the orders prayed for?

The Claimant prayed for the following:-

a. One month's salary in lieu of notice.

Having found that the Claimant was not a casual employee and was unfairly terminated, he is entitled to pay in lieu of notice of 28 days wages. I award him Shs. 365 x 28 being Shs. 10,220.00/-

b. Unpaid leave from 2005 to 2011

I have found that the Claimant was employed from 23rd May 2005 to 22nd December 2011. RW2 confirmed that the Claimant never took leave and was paid leave for 2 years in the sum of Kshs. 12,000/-.

The Claimant is therefore entitled to pay in lieu of leave for 6 years and 6 months. This amounts to (21 x 6.5 years x 365) Kshs. 49,822.50 I award him the said sum accordingly. From this sum will be deducted Shs. 12,000 paid to the Claimant.

c. Service Gratuity

Having been a member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay by virtue of Section 35 (6) of the Employment Act.

The Respondent is however directed to file a statement with all remittances made to NSSF in court within 30 days from the date of judgment.

d. 12 months' Salary Compensation

The Claimant having been unfairly terminated is entitled to compensation by virtue of Section 49 (1) (c) of the Employment Act. I have taken into account his length of service, the manner in which his employment was terminated and the fact that he was subjected to casual terms of employment for more than six years. For these reasons I consider maximum compensation of 12 months' salary as reasonable. I therefore award him Shs. 131,400 being 12 months' Salary as compensation.

e. Costs.

The Respondent shall meet the Claimants costs of the case.

f. Interest

The Claimant shall be entitled for interest at court rates from date of judgment.

All payments herein shall be net of Pay As You Earn provided that the Respondent will be required to submit proof of remittance of PAYE to the Claimant at the time of payment of the decretal sum.

Orders accordingly.

Dated and delivered at Nairobi this 30th Day of June 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant

Onyango holding brief for Gathu for Respondent