



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NO. 711 OF 2013

ALEXANDER MUTUA.....CLAIMANT

VERSUS

HAGGAI MULTI-CARGO HANDLING SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Claim on 16th May 2013 seeking determination of the issue he framed as unfair termination/dismissal and non-payment of terminal dues & compensatory damages for the unlawful termination of his services with the Respondent. He averred that he was employed on 4th February 2008 as a loader and was constructively dismissed by the Respondent. He averred that on 28th February 2011 he was asked by his supervisor Mr. Njanja not to come to work the following day and instead see the HR Manager one Judy and that he tried to see her for a whole in vain as he was advised she was not in and that when he finally was summoned by her he was advised to wait until he was recalled to the company. He averred that to date he has not been called back hence his surmise that he was constructively dismissed from service. He averred that he sought the intervention of Labour officials who summoned the Respondent's officials to resolve the issue but the summons went unheeded. He thus claimed his one month salary in lieu of notice, payment in lieu of leave not taken for one and a half years, service gratuity for calculated at the rate of 18 days for each completed year of service, compensatory damages for wrongful and unfair termination, certificate of service, costs of the suit and interest.
2. The Respondent filed a Reply to the Memorandum of Claim on 30th July 2013 and averred whereas the Claimant was its employee it denied that in February 2011 the Claimant was informed not to enter the Respondent's premises or that the Claimant was stopped at the entrance for one week. It was averred the Claimant reported to work on the material date and discharged his duties as usual and was never summoned by the said Judith or at all. It was averred that on 15th March 2011 the Claimant was suspended for 2 weeks for using abusive language to one of his supervisors Mohamed Janja and that the Claimant resumed duty on 28th March 2011 but thereafter absconded duty and did not resume work and efforts by the Respondent to reach the Claimant proved futile. The Respondent denied that it was summoned by labour officials and the letters purportedly addressed to it were never received at all by the Respondent.
3. The Claimant testified on 4th December 2013 and stated that he worked for the Respondent from

4th February 2008 and was earning 350/- a day for the 6 days he worked for the Respondent in week. He testified that on 28th February 2011 he reported to work as usual and he was told by a supervisor George Majanja to wait at the gate and that Judith would tell the Claimant why. He testified that he waited and on the third day he saw her and George went and told her and she came to the gate and said he would not be told why he was not allowed at the time and that he would be called. He was not called and he went to the Labour offices and got a letter from the labour office dated 25th May 2011. He took the letters to the office of the company and that he was told it did not matter how many letters he took there. He decided to seek legal intervention through a lawyer. He refuted the averments of being at work in March 2011 and denied that he spoke to Janja rudely or without respect.

4. In cross examination he admitted that he was given a gate pass serial No. 037 which was a Casual Worker Gate Pass that allowed him entry into the premises and that he was a labourer and casual worker. He was paid Kshs. 325/- per day which rose to 350/- per day by the time of termination. He was paid weekly. He denied being abusive to Janja, being suspended or deserting work or being at work on 28th March 2011.
5. The Respondent called Judith Akoth Owino who worked for the Respondent as a Clerk. She testified that her duties as Clerk entailed taking records, keeping records, checking muster roll and confirming payments of casuals is done. She testified that she knew the Claimant who was employed as a temporary casual in the loading department. She testified that she was called by Mohamed Bakari Janja a supervisor in charge of the loading department who informed her that the Claimant had insulted him. She called both of them to her office on 15th March 2011 so that she could hear them and that she suspended the Claimant for 2 weeks due to his disrespect to his bosses. She testified that the Claimant had reported to work on 15th March and was not back until 28th March. She testified that the Claimant reported to work on 29th as shown by the muster roll but from 30th to date the Claimant has not returned to work. She testified that the Claimant was paid daily. He was not entitled to leave and was a temporary casual.
6. In cross examination she testified that she is a Clerk and as such a senior supervisor of staff and that she can discipline staff and suspend them but cannot dismiss employees. She maintained that she called Janja and the Claimant to her office and heard them both. She testified that there were other staff who heard and this was not the first time the Claimant was summoned. She confirmed that the daily work logs and the muster roll did not have figures and signatures on certain parts. She stated that if one does not come and finds work elsewhere they can go and if they return they can be reengaged. That marked the end of oral testimony by both parties.
7. The Claimant filed Written Submissions on 30th April 2014 and in the submission he submitted that the employment was continuous for 3 years and therefore in terms of Section 37 of the Employment Act his contract of service is therefore deemed to be one where wages are paid monthly. He relied on the case of **Wilfred Bukachi Opwaka v Ready Consultancy Co. Ltd. Cause No. 671 of 2012** and **William Opetu v Mukesh Patel Cause No. 909 of 2011**. The Claimant disputed the version of events as testified to by the Respondent's witness and maintained that he was constructively dismissed by the Respondent and the Claimant's submission also stated that if indeed the Claimant was abusive to Janja then why was he not called to testify? Additionally it was submitted that the records produced did not have signatures and thus were not evidence that could be relied on to show the Claimant was paid or was at work at all on the dates alleged. The Claimant thus urged the Court to grant the prayers sought as the Claimant had proved the case against the Respondent.
8. The Respondent's Written Submissions were filed on 15th May 2014 and in the submissions the Respondent submitted that it was not disputed that the Claimant was an employee of the Respondent and that the contract of service was not reduced into writing. It was disputed that the Claimant worked continuously for the Respondent. It was submitted that the Respondent's witness testified that the Claimant was employed when work was available and was paid a piece rate

which was for the work done and the payment was made at the end of the day and not weekly as suggested. The Respondent relied on the provisions of Section 2 of the Employment Act which defines a casual employee as someone whose terms of service provide for his payment at the end of each day and who is not engaged for a longer period than 24 hours at a time. The Respondent also relied on the case of **Wifred Opwaka v Ready Consultancy** above. The Respondent relied on the provisions of Section 45(2) and 47(5) of the Employment Act to prove fair termination and failure by the Claimant to prove he was unfairly terminated. The Respondent relied on the cases of **Eliud Musila King'oo v. David K. Mativo [2014] eKLR** and **Joseph Njoroge Kiama v Summer Limited [2014] eKLR**.

9. The issues distilled for determination are whether there was any dismissal of the Claimant or whether he absconded from duty. If it is found that there was dismissal then I would have to evaluate if the dismissal of the Claimant was fair within the meaning of Section 45 of the Employment Act and whether the procedure adopted in the process of termination of service was in compliance with Section 41 of the Employment Act.
10. The Claimant averred that he was employed as a loader and earned Kshs. 325/- per day which rose to 350/- per day over the years. No document was shown to support this. The Claimant testified that he was constructively dismissed by the Respondent's HR manager one Judith. The Respondent's witness Judith testified that the Claimant was employed as a daily casual and was paid a piece rate and that the payment of wages was daily. She testified that the Claimant absconded duty after a verbal altercation led to his suspension in March 2011. She produced a muster roll and the daily casual work sheet which suggested the Claimant worked in March 2011.
11. In the Muster Roll for March 2011, the Claimant is indicated as having been at work on 1st, 11th, 12th, 14th, 15th and 29th of March while in February he was at work on 3rd, 4th, 5th, 7th, 8th, 10th, 11th, 12th, 14th, 15th, 17th, 18th, 19th, 21st, 22nd, 24th, 25th, 26th and 28th.
12. The Employment Act Section 2 defines a casual employee as follows:-

“casual employee” means a person the terms of whose engagement 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;
13. On the basis of the provisions of Section 2 of the Employment Act 2007 the Claimant who, according to the records held by the Respondent, was at work on 19 days in February 2011 and 6 days in March 2011 cannot be said to be a monthly employee. He fits squarely within the confines of a casual employee.
14. Section 47(5) of the Employment Act provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The Claimant thus had a burden to prove that an unfair termination had occurred. In his testimony he said that he was told to see the HR officer by a Mr. George and that he waited to see the officer. He feigned ignorance as to why he was asked to see the officer. The person he was waiting to see was Judith who happened to be the Respondent's witness. The Claimant was not being truthful when he testified that he was not aware of the reason for the work stoppage and his summons to the see the HR officer. He was therefore dishonest in his pleadings and I find that he did not discharge the evidentiary burden of proof. He did not prove that an unfair termination had occurred.
15. He sought various reliefs which varied from the demands he had made when he went to the Labour Officer. He sought notice for one month while his employ did not fit in the category of a monthly employee, he sought one month salary in lieu of notice, payment in lieu of leave not

taken for one and a half years, service gratuity calculated at the rate of 18 days for each completed year of service, compensatory damages for wrongful and unfair termination, certificate of service, costs of the suit and interest. These claims fail and are dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of June 2014

Nzioki wa Makau

JUDGE