



**REPUBLIC OF KENYA**

**THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 175 OF 2011**

**PETER ADONGO ACHOLA.....CLAIMANT**

**VERSUS**

**BIDCO OIL REFINERIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed the suit on 11<sup>th</sup> February 2011 seeking the resolution of a dispute relating to his alleged unlawful termination from the employ with the Respondent on 24<sup>th</sup> August 2010. He averred that on the material date he was asked by the Warehouse Supervisor to leave and return the next day. The Claimant was restrained by Security Officers on 25<sup>th</sup> August 2010 from accessing the premises of the Respondent on the basis that he was no longer allowed into the Respondent's premises. He averred that the decision to lock him out without any cause amounted to constructive termination of his services which was highhanded and unlawful. He sought the payment of one month's salary in lieu of notice, pay in lieu of leave not taken for 6 years, service/gratuity pay at rate of 18 days for each year of completed service. He also sought compensatory damages, costs of the suit and interest thereon. He in addition claimed for his certificate of service.

2. The Respondent filed a Response to the Memorandum of Claim on 17<sup>th</sup> October 2011 and in the Response averred that the Claimant who was a casual employee absconded from duty after it emerged the Claimant had taken his –co-worker's mobile phone. The Respondent paid the Claimant his salary for work done in month of August 2010 and his wage arrears were paid in September 2010. The lockout claimed by the Claimant was denied by the Respondent and all claims on terminal dues as sought by the Claimant was rejected.

3. The Claimant testified on 18<sup>th</sup> March 2014 and stated that he was employed by the Respondent on 1<sup>st</sup> September 2004 and was not given a letter of appointment as the Respondent picks workers at the gate with ID. He worked in the warehouse where he counted the products as they were loaded. He worked for 5 days in a week and rested on the weekends. He went to work on Monday 24<sup>th</sup> August and was told by the Supervisor Harold Ausi to go. He returned the next day but the G4S security guards at the gate refused to allow him to enter as the Security Manager had given instructions that the Claimant should not enter. he also testified of an time he wanted to see the HR Manager but was not allowed into the premises. He denied receiving any warning letter or having taken anyone's phone and if there had been theft he would have been taken to the police station. He denied knowledge of Stephen Ochola and Paul Muia Mutisya. He denied he was summoned by the Respondent's security Manager Mr. Liboso.

4. In cross examination by Mrs. Ochieng for the Respondent the witness testified that he was a loading clerk as he tallied the oil as it was loaded. He confirmed he was not given a letter of employment. He stated the money that was sent to the bank was for the week he worked only and it was Kshs. 2,700/- only. As for leave he testified that he never went on leave. He was paid wages weekly. He did not answer the question put to him by Mrs. Ochieng on the terminal benefits he would be entitled to. He testified that he did not have any document showing termination or certificate of service.

5. In re-examination by Mr. Makokha, the witness stated that the Respondent replied to the demand letter and that it was the employer who could write a letter of employment. He was entitled to leave and NSSF dues.

6. Mrs. Ochieng for the Respondent stated that she was not offering any evidence and closed the defence case.

7. Parties filed submissions and in his Submissions filled on 26<sup>th</sup> March 2014 the Claimant submitted that the issues to be determined were 3

- i. What is the legal status of the Claimant's employment?
- ii. Whether fair procedure was applied before dismissing the Claimant; and
- iii. Whether the Claimant is entitled to the remedies sought in the memorandum of Claim.

The Claimant relied on the case of **Wilfred Bukachi Opwaka v Ready Consultant Co. Ltd Cause No. 671 of 2012** where Onyango J. summarised the law relating to casual employees under Section 37 of the Employment Act. He urged the Court to be persuaded by the reasoning in that decision and hold that he was entitled to notice in terms of Section 37. He submitted that fair procedure was not followed in his termination and that Section 41 of the Employment Act was not followed. The Court was urged to hold that under Section 45 of the Employment Act the employer must not only prove the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. He thus urged the Court to find that he is entitled to the prayers sought in his Memorandum of Claim.

8. The Respondent filed its submissions on 31<sup>st</sup> March 2014. In the submissions the Respondent submitted that the Claimant was a daily rated casual worker with the Respondent as confirmed by the Claimant's evidence where he confirmed that he did not have a contract of employment with the Respondent and that he worked for 5 days a week. It was submitted that Section 37 contemplates six working days with paid rest day. On fair procedure the Respondent submitted that the Claimant left employment on his own volition and thus absconded duty. It was submitted that the Claimant should have called the security officers who denied him entry into the Respondent's premises. Further it was submitted that the Claimant did not write to the HR Manager to find out why he was allegedly denied entry into the premises. It was submitted that there was no evidence that the Claimant was dismissed from duty or that the Claimant was unfairly or unlawfully dismissed from duty. Regarding the remedies sought by the Claimant, the Respondent submitted that the Claimant is not entitled to the prayers sought as he absconded from duty. His claims that he did not go on leave and that NSSF dues were not paid were not supported by evidence. It was also submitted that the Claimant was paid his dues for the period worked, did not follow up the issue of the Certificate of Service and that the Claimant had no other claim and his suit should accordingly be dismissed with costs. The Respondent relied on the cases of **Anthony Mutua Kiilu v Athi River Steel Plant Limited Cause No. 1998 of 2012** and **Patrick Wambua Mulela v Athi River Steel Plant Limited Cause No. 2002 of 2012**. Finally the Respondent submitted that the claim on payment in lieu of leave not taken was unfounded and should be dismissed.

9. In the dispute before me the Claimant alleges he was unfairly dismissed from his employment. It is uncontroverted that he was employed by the Respondent from September 2002 until August 2010 when the employment relationship terminated. The Claimant asserts the employment relationship was brought to an end by the Respondent through the Supervisor and carried out by the Security officers who denied him entry into the Respondent's premises. The Respondent on its part asserts that the Claimant absconded duty and thus was the author of his own termination. Under the provisions of Section 74 of the Employment Act 2007 the law provides as follows:

74. (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars?

- (a) of a policy statement under section 7(2) where applicable;
- (b) specified in section 10(3);
- (c) specified in section 13;
- (d) specified in sections 21 and 22
- (e) of an employee's weekly rest days specified in section 27;
- (f) of an employees annual leave entitlement, days taken and days due specified in section 28;
- (g) of maternity leave specified in section 29;
- (h) of sick leave specified in section 30;
- (i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;
- (j) of food rations where applicable; (k) specified in section 61;
- (l) of a record of warning letters or other evidence of misconduct of an employee; and
- (m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.

(2) An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty-six months to examine the record.

(3) Where an employer who employs a child maintains a register in accordance with section 61, the employer shall be deemed to have complied with this section if the register contains in relation to each child, the particulars required to be kept by the employer under subsection (1).

10. This is to be read with Section 37 of the Employment Act in mind. Section 37 provides as follows:-

37. (1) Notwithstanding any provisions of this Act, 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 can not 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.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 88 of this Act shall apply.

11. It is clear that the Claimant worked for the Respondent for a period in excess of 3 months from September 2002 to August 2010 thus his contract of service is deemed to be a monthly contract in terms of Section 37(1)(b) of the Employment Act. He was thus entitled to the provisions safeguarding a formal contract of service under the Act.

12. Regarding the termination of contract, did the Claimant jump or was he pushed? In the pleadings he was categorical he was dismissed. In the defence the Respondent averred that the Claimant absconded duty. He testified that he was sent packing by the Respondent's supervisor and the Claimant was not permitted on the premises the following day. In the pleadings the Respondent adverted to the theft of a mobile phone. However, the Respondent did not call any evidence and did not avail employment records. The Respondent had a duty to prove the termination was fair. Under Section 43 of the Employment Act the burden of proving fairness was on the Respondent. Section 43 provides:-

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

13. The Respondent failed to prove the desertion it claimed. The Claimant was on balance of probability able to prove his contract of service was terminated in the manner he pleaded and testified on. The Claimant was therefore not properly terminated and is entitled to remedies for the termination. He will be entitled to one month's salary in lieu of notice, service pay for the 12 years of service at the rate of 15 days for each year worked, leave days not taken and costs and interest on the sums herein. In relation to the compensation sought, manner of termination was crass and not in keeping with the law and the much-vaunted ISO certification of the Respondent and additionally, there was no valid reason advanced for the termination. The Respondent will thus pay to the Claimant 3 months salary as compensation for the unfair termination.

Orders accordingly.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of June 2014**

**Nzioki wa Makau**

**JUDGE**