



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 107 of 2010

SILAS MUTWIRI CLAIMANT

VERSUS

HAGGAI MULTI-CARGO HANDLING

SERVICES LIMITED RESPONDENT

JUDGEMENT

1. On 10TH February 2010, the claimant, Silas Mutwiri filed this claim for wrongful termination and non-payment of his terminal dues by the respondent, Haggai Multi-Cargo Handling Services Limited. On 19th May 2010, the respondent filed their defence where they admitted the claimant was their employee and was terminated procedurally following his gross misconduct and hence denied the claims for unfair termination. At the hearing the claimant gave his sworn evidence while the respondent called Patrick Mukalani in support of their case. After the hearing, both parties agreed to file their written submission on 15th November 2013 and 9th September 2013 for the claimant and respondent respectively.

2. In the claim, the claimant stated that he was employed by the respondent as a General Worker and on 6th March 2009 he was wrongfully dismissed from his employment. That this was contrary to the law and hence wrongful. He was not paid any terminal dues of given notice or payment in lieu of notice and despite making a demand on the respondent; they have failed to make good his claim. He now claims for;

1. One month's pay
2. One month's due pay
3. Unpaid leave for 84 days
4. Overtime pay for the extra hour worked each day he reported to work for four years
5. Service pay for the period worked

3. The claimant further is seeking damages for wrongful dismissal together with costs of the suit.

4. In evidence the claimant stated that since 2005, he was the employee of the respondent as a loader. There was an accident on 6th March 2009. He was in a lorry together with others waiting to load goods. While on board with others He developed a had stomach and had a good fart, he apologies to the conductor who was also aboard and asked if he could alight and as he alighted, the driver pushed him out and together with the conductor, they fell down where the conductor was hit on his head and had a bad cut. They went to the office for first aid but management decided to report the incident to the police accusing the claimant of injuring the conductor. At the station, the conductor brought the object that was alleged to have been used in hitting him on his head, he recorded a statement and the claimant was booked in and remained in custody until the following day when the wife paid the police bond and he was

released. The conductor followed him home, the claimant apologized they went to the police station when they agreed to resolve the matter.

5. When the claimant reported back to work, he was not allowed in and was told he had committed a criminal act, that he had injured Peterlis Odoyo Nyalombo and thus was summarily dismissed.

6. In defence, the respondent stated that on 6th March 2009, the claimant while in its employment, attacked a fellow worker, Peterlis Odoyo Nyalombo and hit him with a wheel spanner causing him serious injuries which was reported to the police and then taken to health facility for treatment. That this was in flagrant breach of the respondent's policy and hence the claimant was summarily dismissed. That there is nothing outstanding unpaid to the claimant.

7. In evidence, Patrick Makalani the respondent's Administration Manager stated that he also runs the human resource function for the respondent. On 6th March 2009 at around 7.30 am, the claimant was at Kapa Oil Refineries while the witness was in his office overlooking the loading zone at a window outlet where cards are issued. The claimant was in the lorry waiting to load good to go a client. At 10.30 am, the witness got a report that the claimant had beaten a fellow worker using a wheel spanner and the worker was bleeding. There was the claimant, the driver of the lorry and the injured worker. The incident was reported to the police and the injured worker taken to the clinic for treatment. That it was necessary to report the matter to the police as an employee had been injured while at the respondent's workplace.

8. Following this incident, the respondent terminated the claimant from their employment on the same day on the reason of gross misconduct. That this action was justified in the circumstances of this case and no notice was required or any pay thereof. That the claimant as a general labourer had a daily wage which he received every evening but due to time constraints, all was paid at the end of each week. The claimant received Kshs.242.00 which included Kshs.16.00 all being kshs.258.00 as per Mavoko Council rates. All his leave days were paid and overtime of Kshs.24.00 was paid all being Kshs.275.00 per day and thus nothing was due as the sum of Kshs.275.00 was all inclusive. That the claimant was not entitled to service pay as he was dismissed summarily for gross misconduct. The claim should be dismissed with costs to the respondent.

910..The witness confirmed that they never gave their employees pay slip, in the morning all employees would log in and the respondent kept the record and this would be used to make daily payments.

11.In submissions the claimant stated that in this case the claimant was never given a hearing before termination and the reasons for termination was false as held in *Joseph Omwenga versus Kenya Revenue Authority [2012] eKLR* and therefore the claimant should be paid damages equivalent to 36 months gross salary.

12. He respondent submitted that the claimant was a casual worker and was never made a permanent employee and thus the weekly wages that he received were as per normal rates which totaled to kshs.285 which was inclusive of salary, leave and overtime. That nothing owed at the time of termination. Since 23rd May 2005 to 6th March 2009, the claimant remained a casual employee.

13. That the claimant was summarily terminated and there was no notice due a under section 35 of the Employment Act. He assaulted a fellow worker, the matter was reported to the police and the injured employee was treated and issued with a medical card and thus section 44(4)(g) of the Employment Act applied. The claimant was not entitled to any notice.

14. On the claim for one month pay in lieu of notice, this is not due as this was a case of gross misconduct. The claim for the due one month pay is not payable as the claimant received his daily wages and had been paid in full the last pay being on the 5th of March 2009. Claim for unpaid leave is not due as the claimant received his leave pay together with his daily wages at Kshs.17.00 and thus cannot claim it. That service pay was not due as the claimant was a casual worker. The respondent relied on the case of *Cynthia Kuvochi Luyegu and others versus Tourism Promotion Services Ltd and others [2006] eKLR*.

Analysis of the case

Key questions emerge in this case that must be addressed;

Whether the claimant remained a casual employee

Whether the claimant had rights if any once the above is resolved

Whether there are any remedies available to the claimant in this case

15. The Employment Act, 2007 has now created a fundamental shift from the previous Employment Act, Cap 226 with regard to who a *casual employee* is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as *casual workers* or *casual labourers*. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and converts such casual employment into term contract status. Under section 2 of the employment Act, the definition of a *casual employee* is thus

“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;

16. Whereas under section 37;

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 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.

17. This kind of the employment where the casual employee is not terminated at the end of the day and continues to work continuously for over a month up to and until over three months, then the law converts the same into a contract term employment.

18. The respondent witness, Patrick Mukalani confirmed that the claimant commenced work with them from May 2005 and continued to serve until March 2009. There is no indication of an interruption or stoppage for any reason until the summary dismissal. In any event the claimant continued as a load or general worker of the respondent, a job that was continuous and was not expected to end as the nature of the respondent's business was essentially that of cargo handling.

19. In this case, the claimant ceased being a casual employee by operation of the law. He cannot thus be said that for the 4 years that he served the respondent, he was nothing else but a casual employee.

20. Under section 20 of The Employment Act, it makes it mandatory to all employers to provide an itemized pay statement to the employees;

20. (1) an employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

(2) The statement specified in subsection (1) shall contain particulars of?

(a) The gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) Where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

(3) This section shall not apply to a casual employee or an employee engaged on piece rate or task rate terms or for any period not exceeding six months.

[Emphasis mine].

21. These provisions are stated in mandatory terms. That an employee should receive this pay statement to help such an employee know the *gross salary*, *statutory deductions* and *other deductions*. This is a useful document to all employees as they are able to understand what kind of pay they are receiving and the purpose of each pay.

22. In this case, the respondent witness, Patrick Mukalani admitted that the claimant was given an all-inclusive pay package of Kshs.297 which included his overtime, salary, housing and leave. This is the kind of pay breakdown for a permanent, contract or employee who is not a casual employee. However, there was no pay slip issued to the claimant to confirm these benefits, deductions or dues. The record stated by the respondent witness as the record for such payments was never produced together with the respondent's pleadings, not was it submitted as evidence. As much as this court is aware of the Wage Guideline for Mavoko council, the rates from 2005 to 2009 were different, and there was no evidence from the respondent to indicate compliance. Section 74 of the Employment Act requires all employers to keep employee and employment records and to produce them in court in evidence. This is not the responsibility of an employer. The duty is vested upon an employer at all times as they have an upper hand in an employment relationship. These records were never produced in this case.

23. With the respondent omissions as required under section 20 and 74 of the Employment Act, the benefit of it must go to the employee, the claimant. Where there is no record that leave, overtime, dues as under section 35(6) are made, then the employee account must be taken in good faith. At the time of termination, that which was legally due to the claimant, whatever the reason or reasons for his termination, that should have been paid as of rights. If there were leave days due, overtime and other dues, this should have been paid.

24. Under the Employment Act, there are few instances where the law allows summary dismissal. These are as stated under section 44 or for any other justifiable good reasons which in the assessment of an employer, there is a valid reason that necessitate summary dismissal. Section 44(4) (g) states;

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

25. In this case, the claimant is said to have assaulted a fellow employee while at a place of work. The matter was reported to the police station and the assaulted employee treated at a health center. This far the only disputed facts were the motive or reasons for the injury where the claimant stated that the assault was as a result of an accident whereas the respondent stated that it was as a result of a fight. Without going into the circumstance of the criminal elements of the facts as stated, none of the parties herein brought any independent evidence to confirm the exact nature of events on the issue. This is the

claimant's case and for him to rely on evidence that the incident that resulted in his summary dismissal was an accident, the burden was on him to bring such evidence that it was an accident. He did not call Pererlis Odoyo or the fellow driver who is said to have pushed him out of the lorry due to what he stated as having had a good fart while inside the lorry. The matter was reported to the police, there was an amicable resolution to the dispute but the fact remains that the respondent caused a report to be filed with the police since the assault incident happened at their work place. This far, the respondent acted prudently as required of them by law.

25. Thus, on the basis of section 44, where an employee commits acts which are tantamount to criminal behavior, there shall be summary dismissal. There is no notice due in such case. Where the reason for termination is valid, justified and reasonable in the circumstances of the case, this cannot be termed as an unfair termination. No damages or compensation can arise in a valid termination. This does not arise in this case and nothing is payable in this regard to the claimant.

26. On the remedies due to the claimant, on the finding that the claimant was not a casual employee and that the respondent violated section 20 and 37 of the employment Act, the claimant will be awarded 84 leave days as he was entitled to 21 days of leave for each of the 4 years he worked. This amounts to Kshs. 275 daily rate x 84 days = Kshs.23, 100.00.

27. Overtime is due as claimed at one (1) hour per day which was kshs.25.00 per hour for the 4 years served amounting to kshs.26, 400?

28. Service pay is due as under section 35(6) where there is no evidence of payments to NSSF and NHIF or to any pension scheme. Service will be awarded at 15 days' pay per year completed that is three (3) full years amounting to Kshs.12, 375.00.

In conclusion therefore, judgment is entered for the claimant in the following terms;

- a. Leave days awarded amounting to kshs.23,100.00;**
- b. Overtime awarded at kshs.26,400.00;**
- c. Service pay awarded at kshs.12,375.00; and**
- d. Each party to bear their own costs**

Dated at Nairobi this 17th day of December 2013.

M. MBARU

JUDGE

In the presence of

Lillian Njenga: Court Assistant

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