



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 138 OF 2014

HILLARY KIPKORIR ROP

CLAIMANT

v

MENENGAI OIL REFINERIES LTD

RESPONDENT

JUDGMENT

1. Hillary Kipkorir Rop (Claimant) was dismissed by Menengai Oil Refineries Ltd (Respondent) on 24 June 2013.

2. On 6 May 2014, the Claimant commenced legal proceedings against the Respondent and he stated the issues in dispute as

1. Unfair termination and or wrongful dismissal

2. Notice.

3. Underpayments.

3. The Claimant sought a whopping Kshs 3,809,140/- in total.

4. The Respondent filed a Response on 26 June 2014 and the Claimant filed a Reply to Response on 1 July 2014. The Cause was heard on 9 December 2014 and 16 February 2015. The Claimant testified on his behalf while the Respondent called 2 witnesses.

5. The Claimant filed written submissions on 23 February 2015, while the Respondent filed its submissions on 19 March 2015.

6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *Claimant's occupation for purposes of wages, whether the dismissal of the Claimant was unfair, whether the Claimant was underpaid and appropriate remedies.*

Claimant's occupation for purposes of wages

7. Although underpayments formed the bulk of the Claimant's quantified claim, he did not plead his occupation in the Memorandum of Claim.

8. The Respondent in paragraph 2 of the Response pleaded that the Claimant was a general labourer and in paragraph 2 of the Reply to Response, the Claimant admitted that he was employed as a general worker.

9. In testimony, the Claimant stated that he was engaged as a general labourer, worked as a conductor and then worked in the stores.

10. With the material placed before Court, the Court finds that the occupation of the Claimant for purposes of wages was general labourer (worker).

Whether dismissal of Claimant was unfair

Procedural fairness

11. The Claimant pleaded that he was not given a termination notice contrary to section 35 of the Employment Act, 2007 and further that he was not given a hearing/afforded an opportunity to be heard before the decision to dismiss him was taken contrary to section 41 of the Employment Act, 2007.

12. In testimony, the Claimant stated that on 24 June 2013, he was summoned to a Manager's office and was given a letter to sign by the Manager's clerk. He said he did not take the letter nor sign it. He also stated that he was not summoned before a Board.

13. In cross examination, the Claimant denied that he was drunk on 24 June 2013 or that he was dismissed by the Transport Manager. He also denied that he was called to the Human Resources Office (in re-examination the Claimant admitted he was dismissed by the Transport Manager).

14. He further clarified that he was shown the dismissal letter by a clerk called Peter and that he was not given notice of dismissal.

15. The Respondent on its part pleaded that when the Claimant was found drunk, he was summoned to the Transport Manager's office to explain himself but he got out of control and started shouting and insulting everybody and his workmates. He was referred to the Human Resources Manager's office.

16. At the Human Resources Manager's office he was asked to explain the intoxication and insults but had no answers and was therefore directed to report the next day to exonerate himself but he never reported hence the dismissal.

17. The Respondent's first witness Ramzan Ahammed Ahamed stated that the Claimant was drunk on the material day and was chewing kuber (tobacco) and that together with another Supervisor they took the Claimant to the Transport Manager and left him there.

18. The second witness was Peter Kanenje from the Human Resources Office, and he stated that the Transport Manager sent the Claimant to him on 24 June 2013 because he was drunk and had insulted him and a Supervisor.

19. The witness also stated that he tried to talk with the Claimant, but he was uncooperative and he stated he could leave employment. The witness stated that he asked the Claimant to go home and report back in the afternoon when he requested him to write a statement but he refused. He stated he took statements from the supervisor and Ramzan.

20. The witness further stated that he was not present during the meeting in the Transport Manager's office and that the dismissal letter was written when the Claimant insisted on leaving employment.

21. Pursuant to section 35(1)(c) of the Employment Act, 2007 the Claimant was entitled to a written notice of termination of employment because he was on a monthly wage.

22. There was no suggestion that he was given a written notice.

23. Section 35(4)(b) of the Act recognises termination of employment without notice for lawful cause. The statutory lawful causes (summary dismissal) have been outlined in section 44(4) of the Employment Act, 2007 and include intoxication at work rendering one incapable of performing one's work properly.

24. However, termination of employment without notice or summary dismissal, as it is commonly known, is subject to the procedural fairness protections in section 41(1) and (2) of the Employment Act, 2007.

25. In fact by dint of section 41(2) of the Act, an employer who intends to summarily dismiss an employee has a more onerous burden as far as hearing is concerned in that he is legally obligated to hear and consider any representations made by the employee.

26. The process carried out by the Respondent must now be evaluated against the requirements in both section 41(1) and (2) of the Employment Act, 2007.

27. It was the responsibility of the Respondent to satisfy the Court that it complied with the procedural fairness requirements. The Respondent's witnesses did not disclose who of the myriad players, Transport Manager, Human Resources Officer (Peter Kanenje did not even disclose his designation) or Supervisor informed the Claimant that his dismissal was under contemplation or the reasons thereof.

28. The Court was not informed of *when* and *how* the Claimant was informed of the allegations. Neither did the Respondent disclose who chaired or heard the Claimant's representations before the decision to dismiss was taken.

29. The dismissal letter was signed by the Respondent's Managing Director. No explanation was tendered as to how he became involved in the matter. Was he acting on information from the Transport Manager, Supervisor or Human Resources Office.

30. The Court finds that the Respondent has failed to show that it complied with the procedural fairness requirements of section 41 of the Employment Act, 2007 and therefore the summary dismissal was procedurally unfair.

31. With the conclusion reached, it is not necessary to discuss whether the Respondent has met the test in sections 43 and 45 of the Employment Act, 2007.

Whether Claimant was underpaid

32. The Court has found that the Claimant was a general labourer. In the Memorandum of Claim, the Claimant outlined underpayments running from 1 May 2009 to June 2013 and quantified the same as

Kshs 64,334/10.

33. In the course of the hearing, the Claimant's Advocate informed the Court, that the underpayments related to 2007/2010.

34. In examination in chief, the Claimant testified and produced his pay slips for September 2009, April 2010, May 2011, October 2011, November 2011, April 2012, June 2012, November 2012 and April 2013.

35. With the clarification that the claim for underpayments related to the period 2007 to 2010, the Court has only 2 pay slips in respect to the relevant period, for September 2009 and April 2010.

36. In September 2009, the Claimant's basic pay was Kshs 5,700/- while the prescribed minimum wage pursuant to Legal Notice No. 70 of 2009 was Kshs 5,655/- for Nakuru.

37. In April 2010, the Claimant's basic wage was Kshs 5,700/- while the prescribed minimum wage pursuant to Legal Notice No. 70 of 2009 (which was still applicable) was still Kshs 5,655/-.

38. It is obvious that the Claimant was not underpaid during the currency of Legal Notice No. 70 of 2009.

39. The Claimant did not prove his wages for 2007 to 2008 to demonstrate that he was underpaid.

Appropriate remedies

One month pay in lieu of notice

40. The Claimant sought Kshs 10,377/75 as one month wages in lieu of notice. The Court has found his dismissal unfair and therefore he is entitled to one month wage as pay in lieu of notice.

41. At time of dismissal, the Claimant's basic wage was Kshs 7,917/- and he is awarded an equivalent.

Underpayments

42. Under this head of claim the Claimant sought Kshs 64,334/10. However, he has failed to prove he was underpaid.

Compensation

43. The Claimant sought the maximum 12 months gross wages as compensation which he quantified as Kshs 124,533/-. The Court has found his dismissal was unfair.

44. Compensation under section 49(1)(c) of the Employment Act, 2007 is a primary though discretionary remedy. The Court is enjoined to consider any, some or all of the factors outlined in section 49(4) of the Act.

45. The Claimant had served the Respondent for about 5 years. Considering the length of service, the Court would award him the equivalent of 6 months gross wages as compensation assessed as Kshs 55,560/-.

Loss of prospective future earnings

46. Under this head the Claimant sought Kshs 3,611,457/-.

47. Premature dismissal or termination of employment does not entitle one to an award of loss of prospective earnings by and of itself. A party seeking such an award must make out a case for it.

48. No contractual or statutory basis for this relief was shown and it is declined.

Conclusion and Orders

49. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

(a) 1 month wage in lieu of Notice Kshs 7,917/-

(b) 6 months gross wages as compensation Kshs 55,560/-

TOTAL **Kshs 63,477/-**

50. The claims for underpayments and loss of prospective future earnings are dismissed.

51. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 17th day of April 2015.

Radido Stephen

Judge

Appearances

Mr. Ngamate instructed by M. Korongo & Co. Advocates for the Claimant

Mr. Masese, Senior Legal Officer, Federation of Kenya Employers for the Respondent

Nixon Raiback

Court Assistant



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