IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Before: Charles P. Chemmuttut, J.,

A.K. Kerich & P.P. Ooko, Members.)

CAUSE NO. 36 OF 1998.

KENYA ENGINEERING WORKERS' UNION.....Claimants.

v.

ELDORET STEEL MIILS LTD.....Respondents.

Issue in Dispute:-

Dismissal of:-

1. **Patrick Siakora Wekesa.**
2. **David Masika Wekesa.**
3. **Patrick Wekesa Nakumo.**
4. **Enock Wafula.**

S.D.O. Mutambi, Industrial Relations Officer, for the Claimants (hereinafter called the Union).

L.W. Kariuki, Senior Executive Officer, F.K.E., for the Respondents (hereinafter called the Company).

A W A R D.

On 13th December, 1996, the parties raised a Notification of Dispute, Form 'A', under Section 14(7) of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act); and the same, together with the statutory certificates from the Labour Commissioner and the Minister for Labour pursuant to sub-section (9)(e) and (f) of the said Section, were received by the Court on 28th April, 1998. Mr. Mutambi for the Union submitted his memorandum on 21st July, 1998, while

Mr. Kariuki for the Company belatedly filed his reply statement thereto on 15th February, 1999, and the dispute was heard on 18th February, 1999.

At the commencement of the hearing of this dispute, Mr. Mutambi withdrew the cases in respect of Messrs. Patrick Wekesa Nakumo and Enock Wafula; and in the circumstances, their cases are dismissed as withdrawn.

When this dispute arose, the parties had neither a recognition agreement nor a collective agreement; and for this reason the Company declined to meet the Union to resolve the dispute. But Mr. Mutambi alleged that Messrs. Patrick Siakora Wekesa and David Masika Wekesa (who are henceforth called the grievants) were Union members; and accordingly the Union prayed that the grievants be paid the following terminal benefits each for wrongful dismissal:-

(a) One month's pay in lieu of notice.

(b) Leave, if any, for days worked.

(c) Maximum compensation, i.e. 12 months' wages or salary.

The first grievant was employed in February, 1995 as a furnace helper at a salary of Kshs.2,175/= per month, while the second grievant was according to the Union initially engaged as a casual worker in May, 1994 on a daily rate of Kshs.100/=, but he was employed on a permanent basis in February, 1995 as a plate mason supervisor at a salary of Kshs.2,350/= per month. They were allegedly verbally dismissed on 29th July, 1995 for refusing to renounce their union membership. As stated hereinabove, the Company declined to meet the Union to settle the matter.

Therefore, on 17th August, 1995, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. A.R.O. Ogonda of Eldoret Labour Office to act as the Investigator; and on the basis of the investigation report, which was released to the parties on 3rd December, 1996, the Minister found that there was no evidence whatsoever to support the union's claim that the grievants' dismissal was in any way connected with their joining the Union; that the first grievant admitted in writing that he had connived with the supervisor to have his name marked present in the register while he actually remained absent for a whole week; that the second grievant was absent from duty for ten consecutive days and also behaved very rudely to the management when he was asked to give an explanation of his absence; that the various incidences of misconduct on the part of the grievants as cited by the management were true, and finally that the grievants intentionally engaged in acts of gross misconduct believing that they would get some protection from the Union and they, therefore, did not deserve any sympathy at all. In the circumstances, the Minister recommended "that the management's decision to dismiss the….
grievants be upheld as it was found to have been in order. They shall therefore be paid only their wages and leave due and any other finances that may have been due to them, if any".

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Company accepted the recommendation but the Union rejected it on the ground that it was fake. Hence this dispute for consideration and recommendation (see Union Apps.I(a), (b), (c), (d) & (e) and 2(a) & (b).)

Briefly, Mr. Mutambi submitted that the grievants were summoned to the Company's office on 29th July, 1995, and asked to sign some documents renouncing their Union membership; but when they refused to sign the said documents they were summarily dismissed on 1st August, 1995. It was, therefore, the case of the Union that the summary dismissal of the grievants amounted to victimisation for their trade union activities.

On the other hand, Mr. Kariuki vehemently denied that the grievants were dismissed on account of trade union activities as alleged. He stated that the first grievant adamantly resisted being searched by the security guards at the gate and instead he became violent and fought them, while the second grievant intentionally absented himself from duty for 7 days; and when both the grievants were served with warning letters for fighting the security guards and absenting themselves, they arrogantly refused to accept and sign the warning letters. They were, therefore, summarily dismissed for being disobedient and rude (see Company Anns. I, II, IIIA & B and IV).

In the circumstances, Mr. Kariuki urged the Court to find that the summary dismissal of the grievants was justified, and prayed that the demands by the Union be rejected for lack of merit.

In this case, the misconducts alleged against the grievants were absence from duty without leave, using an abusive or insulting language to a person placed in authority over them and disobedience of a lawful order or command, contrary to Section 17 (a),

(d) and (e) of the Employment Act, Cap.226, Laws of Kenya. This Section enumerates the acts and omissions which the law treats as misconduct, and the relevant sub-clauses are as follows:-

"17……

(a) if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;

(b) ……..;

(c) ……..;

(d) if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) ……..;

(g) ……."

It was alleged that the first grievant engaged in a fight against a security guard, rudely refused to receive a warning letter and behaved in an insulting manner to a person placed in authority over him. He was, therefore, summarily dismissed as aforestated under sub-clauses (d) and (e) of the said Section 17, hereinabove. As regards the second grievant, it was alleged that he absented himself from work without permission or lawful cause from 3rd to 10th July, 1995, refused to receive a warning letter and to obey lawful order. He was similarly summarily dismissed under sub-clauses (a) and (e) thereof.

It will be seen from the enumeration of the acts and omissions treated as misconduct that wherever the Legislature intended that a particular state of mind should be an ingredient of misconduct it has so specifically provided; and the omission, therefore, of ingredients of a state of mind in relation to certain acts or omissions which are treated as misconduct assume importance and give us an indication of the mind of the Legislature. The Legislature has not qualified the words "without leave or lawful cause" and "abusive or insulting language" in sub-clauses (a) and (d) above by the expressions "willful" or "intentional" or "knowingly", thus making these misconducts, misconducts without reference to the mind of the person committing the act or omission. A further indication of the mind of the Legislature is clearly discernable when we examine, for example, sub-clause (e), which makes the state of mind of the wrong-doer a positive ingredient of a misconduct because disobedience of a lawful order must be intentional so as to amount to misconduct. The Legislature was, therefore, not unaware of the distinction that it was making in treating certain acts and omissions as misconduct irrespective of the state of mind of the wrong-doer. Therefore, in order to constitute misconduct in the latter case, it is necessary that the act should be deliberate and intentional so that the mind of the person goes with the act of disobedience and/or insubordination of a lawful order or command of the superior.

In the present case, the grievants were allegedly served with warning letters for the alleged offences on 29th July, 1995, but they refused to accept them. Two days later, i.e. on 31st July, 1995, the Company summarily dismissed the grievants from service without affording them an opportunity to defend themselves. The action was, therefore, against the principle of natural justice embodied in the maxim: *audi alteram partem* (no man shall be condemned unheard); and in my view, this was a fit case of termination of service. The grievants had each worked for the Company for about 5½ months; and in my considered opinion, they are only entitled to the following nominal benefits:-

(a) That the grievants be paid one month's wages each in lieu of notice.

(b) That the grievants be paid a further one month's wages for loss of employment.

I so award and order accordingly.

Both members of the Court were consulted and concurred with this decision.

DATED and delivered at Nairobi this 11th day of December, 2003.

Charles P. Chemmuttut,

JUDGE.