



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAKURU**  
**CAUSE NO.58 OF 2019**  
**PETER NJUGUNA CHEGE.....CLAIMANT**  
**VERSUS**  
**TIMSALES LIMITED.....RESPONDENT**

**JUDGEMENT**

The claim is based on the facts that on 1<sup>st</sup> October, 1997 the claimant was employed by the respondent as a general worker. He was promoted to a machine operator in the plywood section a position he held until 1<sup>st</sup> July, 2019 when he retired from his employment with the respondent having worked for 22 years. his last wage was ksh.28,567 per month.

The claim is that in July, 2018 the employees of the respondent started demanding for payment of their wages which had been delayed and in response the respondent locked them out of the premises.

The union representing the claimant filed **Nairobi ELRC Cause No.1282 of 2018 – Kenya Building, Construction, Timber and Furniture Industries Employees Union versus Timsales Limited** to challenge the lockout and the suit was dismissed on 21<sup>st</sup> June, 2019.

The claimant aged 52 and not desirous of continuing his employment with the respondent opted to retire in accordance with clause 10 of the CBA which entitled him to retire at age 47.

On 30<sup>th</sup> June, 2019 the claimant went to the respondent's premises to deliver his notice of retirement but the watchman denied him access. He delivered the notice to the labour officer, Nakuru on 1<sup>st</sup> July, 2019. The claimant then sent the retirement notice through his advocates on 5<sup>th</sup> July, 2019 but the respondent declined to receive it.

The advocate sent the retirement notice via email and in response the respondent advocate indicated that they were in the process of completing disciplinary process and the claimant had to wait.

The claim is that upon retirement the claimant is entitled to payment of gratuity of 21 days for each completed year and in accordance with the CBA all at Ksh.484,657;

The claimant had accrued 29.25 leave days all at ksh.32,146;

That the respondent has refused to inform the NSSF that he has retired for the release of his dues and benefits;

The claim is also that the respondent has contravened the claimant's rights to fair labour practice, right to dignity, right to property and seek for a declaration that he served continuously from the year 1997 to 2019; he be deemed to have retired and be paid his retirement benefits and refusal to pay the same is unfair labour practice and a violation of the constitution and claim the following;

- a) Ksh.515,805 retirement benefits/gratuity;
- b) Compensation in terms of article 23(3)(e) of the constitution;
- c) Certificate of service; and

d) Costs.

The claimant testified in support of his case and that on 25<sup>th</sup> July, 2018 he reported to work but the security guards locked them out and was not allowed access since. Efforts to return to work were not allowed. He never resumed duty.

The claimant wrote to the respondent seeking to voluntarily retire at age 52 as allowed under the CBA which gave provision for retirement at age 47. He was denied access to serve his notice and submitted it with the labour officer and the advocate sent it via email on 5<sup>th</sup> August, 2019.

The claimant also testified that the respondent has refused to pay his retirement benefits in gratuity and leave days or to issue him with letter to NSSF so as to claim for his benefits.

The claimant also testified that he is aware his trade union filed suit at Nairobi over alleged unlawful strike/lockout and he has attached a ruling relating to the sit together with his Memorandum of Claim herein. He is also aware that the matter was dismissed.

The claimant was not keen to undergo the disciplinary process he opted to voluntary retirement and issued notice on 25<sup>th</sup> July, 2019. He is not aware that upon the dismissal of the suit at Nairobi the court directed the matter be heard by the labour officer, Nakuru. That the labour officer had filed a report with the court stating that there had been an unlawful strike and he is not aware the union was advised to have the employees return to work.

The court at Nairobi dismissed the suit on 21<sup>st</sup> June, 2019 and he issued notice to retire on 30<sup>th</sup> June, 2019.

Upon the court ruling he was issued with a notice to show cause on 1<sup>st</sup> July, 2019 but did not respond. The disciplinary hearing on 11<sup>th</sup> July, 2019 he did not attend. The second notice to attend disciplinary hearing on 29<sup>th</sup> July, 2019 he did not attend because he had sent his notice to retire. Before the court at Nairobi, he had been issued with disciplinary hearing notices and opted not to attend. His last day at work was on 25<sup>th</sup> July, 2018.

The defence is that the claimant was an employee of the respondent but on 25<sup>th</sup> July, 2018 he absented himself from work and engaged in unlawful and unprotected strike. The claimant and his colleagues were instructed to report to work but refused. In particular the claimant was issued with an ultimatum but he ignored.

The claimant was issued with a notice to show directing him to explain why he absented himself from work and also show cause why he engaged in destruction of company property but he refused to give an explanation. He was invited to a disciplinary hearing but he failed to attend.

As the disciplinary process was on-going, the claimant's trade union filed Nairobi Cause No.1282 of 2018 and on 21<sup>st</sup> June, 2019 the court delivered ruling and dismissed the application by the union and held that the employees were engaged in an unprotected strike and the respondent was at liberty to proceed with the disciplinary process.

The defence is also that the respondent did not receive the retirement notice by the claimant, and even where such was issued, such was meant to avoid the disciplinary process and thus unacceptable and an employee who commits gross misconduct cannot benefit thereof. The claimant had by then refused and failed to respond to the show cause notices issued to him or attend before the disciplinary hearing on 10<sup>th</sup> July, 2019 and 29<sup>th</sup> July, 2019.

A retirement notice was received via email from the firm of Konosi & Company Advocates and there was a response.

The claimant had committed gross misconduct and refused to be subjected to disciplinary hearing. He cannot run away from the disciplinary process through retirement.

The claims made have no basis and where the claimant has suffered any harm as alleged, he authored it in absenting himself from work and proceeded to damage the company property. He was allowed an opportunity for a hearing but he elected to waive his rights. He cannot therefore claim a violation of his rights. The claims made should be dismissed.

Moses Obura the human resource manager testified that on 25<sup>th</sup> July, 2018 he was called by security to his office followed all employees' assembly at the gate and refused to attend work. He called the shop steward to understand what the problem was and he learnt there was an industrial action relating to alleged unpaid wages which had been delayed. He had given notice before hand to this effect as the respondent would pay wages by the 22<sup>nd</sup> of each month but following he ban on logging by government the respondent had no cash and hence notified the employees to wait until this was secured. The employees demanded to see the union branch secretary.

Mr Obura also testified that he called the labour officer who arrived shortly and together with the shop steward and the union representative pleaded with the employees for 2 hours to resume duty and that was would be paid by 24<sup>th</sup> and due to payments through different banks by 25<sup>th</sup> this had not been reflected. The employee refused to resume work despite the labour officer and the union secretary general pleading with them.

Mr Obura also testified that The employees started chanting 'choma', 'choma' [burn, burn] and since the meeting was being held at the petrol section and there was timber in the yard he could not take the risk. Security also advised that the conduct of the employees was posing a security threat.

The claimant and other employees walked out of the company premises on the same day, 25<sup>th</sup> July, 2018. He was in the company of other employees. They were demonstrating, chanting, pulled down the perimeter wall and throwing stones to the respondent premises, residences and houses and this caused damage to the company.

He issued notice to the employee to resume duty and posted it at the gate. This was not adhered to. Three (3) notices issued and no response.

The union filed suit at Nairobi. There was no work resumption. The suit at Nairobi was dismissed and the respondent allowed to proceed with disciplinary action against the employees including the claimant.

The claimant was issued with a notice to show cause why he had deserted work and destroyed property but he failed to respond. He was invited to the disciplinary hearing twice but failed to attend.

The respondent was left with no option but to issue notice of summary dismissal. The claimant had engaged in gross misconduct. The issuance of the retirement notice is an afterthought and in bad faith and should be dismissed.

At the close of the hearing both parties filed written submissions and the issues which emerge herein to determination can be summarised as follows;

Whether the termination of employment was in violation of the constitution and the law; and Whether the claimant should be paid his retirement benefits.

The claimant at paragraph 6 of the Memorandum of Claim pleaded that his union filed **Nairobi Cause No.1282 of 2018 – Kenya Building, Construction, Timber and Furniture Industries Employees union Versus Timsales Limited** and he attached the ruling therefrom delivered on 21<sup>st</sup> June, 2019. The gist of this suit as can be discerned from the referenced ruling is that the claimant's union pleaded that there was a lockout of the employees including the claimant and were seeking for orders directed at the claimant to readmit the employee back and to pay the unpaid wages from July, 2018.

The court as cited above, in its ruling made a finding that the employees of the respondent had engaged in an unprotected strike. The employees who had engaged in the illegal strike should be subjected to a disciplinary process as this was the prerogative of the employer. The conclusion was that;

*... the respondent [Timsales Limited] is at liberty to proceed with the disciplinary process in accordance with the CBA and the Employment Act in respect of the workers who have not yet presented themselves for the same.*

The ruling above referenced was delivered on 21<sup>st</sup> June, 2019.

The claimant retirement notice is dated 30<sup>th</sup> June, 2019 taking effect on 1<sup>st</sup> July, 2019. The claimant sought to rely on the CBA between his trade union and the respondent.

It is therefore apparent that the claimant was last at work on 25<sup>th</sup> July, 2018. This arose out of the unprotected strike.

The court takes it that the claimant was hence aware of proceedings commenced by his trade union in filed **Nairobi Cause No.1282 of 2018 – Kenya Building, Construction, Timber and Furniture Industries Employees union Versus Timsales Limited**. With the finding that there was an illegal strike and the subject employees should be subjected to disciplinary action, the claimant having been absented from work from 25<sup>th</sup> July, 2018 without any lawful cause, a fact he does not deny, as directed by the court in filed **Nairobi Cause No.1282 of 2018 – Kenya Building, Construction, Timber and Furniture Industries Employees union Versus Timsales Limited** the claimant was required to subject himself to the disciplinary process.

The claimant testified to having received the notice to show cause dated 1<sup>st</sup> August, 2018 but declined to respond. He was issued with invitations to attend before the disciplinary hearing but declined to attend on the basis that there was an on-going suit in filed **Nairobi Cause No.1282 of 2018 – Kenya Building, Construction, Timber and Furniture Industries Employees union Versus Timsales Limited** and this had not concluded.

Effectively, the claimant by refusing to attend and show cause why his employment should not be terminated for being absent from work and for the destruction of company property placed himself up for summary dismissal. Upon invitation to attend disciplinary hearing, the claimant opted not to attend. He squandered the chance for a hearing.

In the case of **Jackson Butiya versus Eastern Produce Limited Cause No.335 of 2011**, the court held that an employee who squanders the internal grievance handling mechanisms provided for by the employer cannot claim to have been unfairly treated.

In the case of **Kenya Union of Commercial, Food and Allied Workers versus Menengai Oil Refineries Limited Cause No.476 of 2017 (Nakuru)** the court held that;

*... an employee who squanders the internal grievance handling mechanisms provided for by the employer cannot claim to have been unfairly treated. Well advised to be accompanied by a fellow employee of his choice but opted to bring a third party, the grievant lost his chance to a hearing at the shop floor. He cannot then turn around and assert his right to a hearing.*

As aptly captured in **Jackson Butiya v Eastern Produce Cause 335 of 2011** where the court held that;

*An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say ‘‘I refused to talk with those people and therefore I was not heard, order them to pay me.’’ It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.*

Equally in this case the claimant’s retirement notice cannot issue to sanitise gross misconduct. to allow the retirement notice to stand would be to sanction misconduct and proceed to reward it.

The court finds the claimant authored his own termination of employment with the respondent.

There is no violation of the constitution or any right under the Employment Act, 2007.

with the termination of employment, a Certificate of Service should issue in accordance with section 51 of the Employment Act, 2007 and where the claimant requires letter to the NSSF to access his work benefits, a request to the respondent ought to issue and the same addressed administratively.

**Accordingly, the claims made are found without merit and are hereby dismissed. The respondent is awarded costs.**

Dated and delivered electronically this 27 April, 2020 at 1200 hours.

**M. MBARU**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

Issued electronically this 27<sup>th</sup> April, 2020.

**M. MBARU**

**JUDGE**