



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 66 OF 2014

BETWEEN

DAVID MUSYOKI WATUKU.....CLAIMANT

VERSUS

1. MABATI ROLLING MILLS

2. KENYA ENGINEERING WORKERS UNION.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company, Advocates for the Claimant

Njeru & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 6th March 2014. He states he was employed by the 1st Respondent as a Messenger, on casual basis, on 14th August 2008. He was placed on a formal contract on 1st October 2009. He was summarily dismissed on 17th December 2013. His monthly salary, at the time of dismissal, was Kshs. 16,461. He was a paid-up Member of the 2nd Respondent.

2. He avers termination was not in accordance with Section 41 of the Employment Act 2007. He was alleged to have sneaked some of the 1st Respondent's goods from the workplace without the approval of the 1st Respondent. He was not heard. The 2nd Respondent refused and/or neglected to take over the dispute after the Claimant brought his complaint against the 1st Respondent, to the 2nd Respondent. The 2nd Respondent acted contrary to its Constitution, which requires the 2nd Respondent to protect and promote the welfare of its Members.

3. The Claimant prays for Judgment against the 1st Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 16,462.
- b) Balance of contract period at Kshs. 24,693.
- c) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 197,544.
- d) Gratuity at 17 days' salary for 5 years of service at Kshs. 41,398.

Total... Kshs. 280,097

- e) Costs.
- f) Interest.
- g) Declaration that termination was unfair.

h) Any other suitable relief.

4. Against the 2nd Respondent, the Claimant prays for the following orders:-

a) A declaration that failure by the 2nd Respondent to pursue the matter on behalf of the Claimant is unlawful and contrary to the Union's Constitution.

5. The 1st Respondent filed its Statement of Response on 4th June 2014. It is conceded that the Claimant was employed by the 1st Respondent, on terms and conditions shown in his contract. He was summarily dismissed by the 1st Respondent on 17th December 2013. He colluded with a Driver from Bahari Forwarders, and sneaked out 1st Respondent's 3 cans of morime doom and 1 litre of dettol antiseptic from the workplace. The 1st Respondent carried out investigations. The Bahari Driver confessed that the items were handed to him by the Claimant.

6. The Claimant was availed a fair disciplinary process. He was required to show cause why, he should not be sanctioned. The allegations were disclosed in the letter to show cause. Details of the allegations were communicated to the Claimant. The Claimant was informed of the possible consequences of his actions. He was advised of his procedural rights under Section 41 of the Employment Act. He was heard. He was found guilty of an employment offence, and relieved of his job. Dismissal was in accordance with the law. He was paid terminal dues and discharged the 1st Respondent from future liabilities. The 1st Respondent prays the Court to dismiss the Claim with costs.

7. The 2nd Respondent filed its Statement of Response on 4th July 2014. It denies failing to pursue the Claim on behalf of the Claimant. The Claim against the 2nd Respondent is ill-advised and non-existent, states the 2nd Respondent.

8. The Claimant gave evidence and rested his case, on 29th September 2016. The 1st Respondent's Employee Relations Manager, Elizabeth Theodora, gave evidence and rested 1st Respondent's case on 31st July 2018. The 2nd Respondent did not call any Witness and closed its case, on the same date, 31st July 2018. Parties confirmed filing of their Closing Submissions on 24th October 2018.

9. The Claimant restated the contents of his Statement of Claim, in his oral evidence. He exhibited various contracts issued to him by the 1st Respondent. He exhibited his pay slips showing he paid union dues to the 2nd Respondent. He confirmed that he was a Messenger, and was confronted with allegations of stealing certain items from the 1st Respondent. He conceded he was issued letter to show cause. He did not agree that he gave any items to Bahari Driver. He was not heard. He was summarily dismissed on 17th December 2013. He informed his Trade Union, the 2nd Respondent herein, about dismissal. He did not read the discharge voucher before signing.

10. Cross-examined by 1st Respondent's Advocate, the Claimant told the Court his last contract was for the period 1st October 2013 to 31st January 2014. Dismissal was on 17th December 2013, about 1.5 months to the end of the contract. He did not understand why he was dismissed. He signed discharge voucher voluntarily. Cross-examined by the Advocate for the 2nd Respondent, the Claimant told the Court he studied up to class 8. He informed the 2nd Respondent about his grievance. He did not have a letter communicating his grievance to the 2nd Respondent. Mkalla, the Shop Steward was aware about everything which happened to the Claimant. The 2nd Respondent was bound to defend the Claimant. It was not bound to defend theft. Redirected the Claimant told the Court he was not given the chance to read the discharge voucher. He was not charged with any criminal offence.

11. Theodora told the Court that the Claimant was accorded due process. The reason for termination was attempted theft. The incident was investigated. The Claimant was asked to show cause. He responded. Disciplinary hearing took place in the presence of the Claimant. He was given the opportunity to ask any question. He was accompanied by 2 Employees of his choice. Theodora referred the Court to minutes of the disciplinary hearing. Termination was fair.

12. On cross-examination by Claimant's Advocate, Theodora told the Court she did not recall if the Claimant was issued a notice of the disciplinary hearing. The minutes are signed, by other attendees but not the Claimant. Employees who accompanied the Claimant were Shop Stewards. Attempted theft was not reported to the Police. Theodora told the Court on cross-examination by 2nd Respondent's Advocate, that the 2 Employees represented the 2nd Respondent. There was a CBA and Recognition Agreement between the Respondents. The letter to show cause was copied to the Trade Union. Redirected, the Witness affirmed that the Claimant was represented by Shop Stewards during the disciplinary hearing. The minutes show he asked questions. He was part of the meeting.

The Court Finds:-

13. It is commonly accepted that the Claimant was employed by the 1st Respondent as a Messenger between 2008 and 2013. It is similarly accepted that he was summarily dismissed by the 1st Respondent for attempted theft, on 17th December 2013. He was a Member of the 2nd Respondent, which had a CBA and Recognition Agreement with the 1st Respondent.

14. There are 2 main questions to this dispute. Was the Claimant dismissed fairly by the 1st Respondent, in accordance with Sections 41, 43 and 45 of the Employment Act? Did the 2nd Respondent have an obligation to represent the Claimant, and did the 2nd Respondent fail to represent the Claimant?

15. There is evidence that the Claimant was implicated in theft of 1st Respondent's items. The 1st Respondent has shown it investigated the incident. The Claimant concedes he was issued letter to show cause. He replied to this letter. There are minutes of a disciplinary hearing in which the Claimant is shown to have been an active participant. He was in the presence of 2 Shop Stewards. He was allowed to ask any

question. At the end of the disciplinary process, he was found guilty of an employment offence. It was not necessary that the 1st Respondent preferred criminal charges against the Claimant. It is sufficient that the Claimant was found guilty of an employment offence.

16. On 27th December 2013, the Claimant signed discharge voucher, acknowledging receipt of the amount of Kshs. 15,211, in full and final settlement. He acknowledged that he did not have further/future claims against the 1st Respondent. He does not deny signing the discharge voucher, but alleges he did not have time to read. This excuse is not acceptable. The discharge states the Claimant was not coerced or forced to sign. He signed voluntarily, in the presence of a Witness.

17. This chain of events, starting with investigation of attempted theft, through to the disciplinary hearing, and eventual signing of discharge voucher, convinces the Court that the 1st Respondent fulfilled its obligation under Sections 41, 43, 45 and 47[5] of the Employment Act 2007. Termination was fair. The Claimant is not entitled to the prayers sought. He discharged the 1st Respondent against further/ future claims. He ought to respect the terms of discharge.

18. In *Seth Panyako v. Kenya Union of Domestic, Hotels, Education Institutions, Hospitals and Allied Workers [2013] e-KLR*, the Court held that the law does not intend Trade Unions to recruit Members, collect subscription fees, and act below the best professional standards, when it comes to representation of Members. Trade Unions do not collect membership fees to merely increase the wealth of Trade Union Nabobs, the Court ruled. They are paid subscription fees to ensure Members are effectively represented at various industrial relations platforms. In the case of Seth Panyako, the Court granted general damages in favour of the Employee, against his Trade Union, for failing to represent the Employee in a workplace dispute.

19. The Claimant, in the present dispute, has not shown that he communicated to the 2nd Respondent, about his dispute with the 1st Respondent. There is no letter by him, addressed to the 2nd Respondent, calling for legal or financial assistance. He does not say at what point he sought the legal assistance of his Union. Unlike *Panyako*, the Claimant is not shown to have expressly called for legal assistance, and there is no reply from the Union, categorically rejecting the plea for legal assistance.

20. Furthermore he was accompanied to the disciplinary hearing by 2 Shop Stewards. They represented the 2nd Respondent. Shop Stewards are the eyes and ears of the Trade Union at the shop-floor level. It has not been shown by the Claimant what additional legal assistance the 2nd Respondent should have availed to the Claimant. The Shop Stewards were involved in the disciplinary hearing. The Court does not think that the 2nd Respondent failed in its representation of the Claimant, to warrant the declaratory order sought.

IT IS ORDERED:-

[a] The Claim is rejected in its entirety.

[b] No order on the costs.

Dated and delivered at Mombasa this 25th day of January 2019.

James Rika

Judge