



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1225 OF 2012

BETWEEN

GEORGE WAMBUA MUTUKU.....CLAIMANT

VERSUS

CROWN INDUSTRIES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Atieno Opiyo & Company Advocates for the Claimant

Oraro & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 19th July 2012. He states he was employed by the Respondent Company, as a Machine Attendant, in June 2007. His last salary was at a rate of Kshs. 8,970 monthly.

2. He avers that on or about 17th September 2011, he was thrown down a staircase at the workplace, by Respondent's Director, one Sheitan Shah. The Director assaulted the Claimant, and went on to terminate Claimant's contract of employment.

3. The Claimant avers termination was unfair. He was not given any reason justifying termination. He was not issued notice. He was not paid terminal benefits. He prays for Judgment against the Respondent, in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 8,970.
- b) Severance pay for the period 2007 to 2011 at Kshs. 17,940
- c) 120 days of annual leave over the same period, at Kshs. 35,880
- d) Overtime pay at Kshs. 204,516.
- e) 12 months' salary in compensation for unfair termination at Kshs. 107,640.

Total...Kshs. 374,956.

f) Costs.

g) Interest.

h) Any other suitable relief.

4. The Respondent filed its Statement of Response on 12th September 2012. It is admitted that the Claimant was employed by the Respondent. He was found intoxicated and asleep at the workplace, by the Director, on 17th September 2011. He was asked to give a written

explanation. The Claimant wrote a letter [Respondent's exhibit 'A,'] conceding that he was found sleeping at work. The Director asked the Claimant to go home, and return the following day for a disciplinary hearing. The Claimant did not return. The Respondent was entitled to summarily dismiss the Claimant for absenteeism under Section 44 [4] of the Employment Act 2007. He was never assaulted at the workplace as alleged. He is not entitled to notice, having abandoned his post. His contract was not terminated by the Respondent, to warrant severance or service pay. He was paid for unutilized annual leave and overtime worked, as shown in his bundle of pay slips exhibited by the Respondent. He is not entitled to compensation. The Respondent prays the Court to dismiss the Claim with costs.

5. The Claimant gave evidence, and closed his case on 27th March 2013. The Claim was dismissed for want of prosecution, on 7th November 2017 in one of the several Service Weeks, during which matters are normally dismissed for want of prosecution in bulk. It was reinstated through a ruling of the Court delivered on 8th March 2018, the Court being of the view that as the Claimant had testified and closed his case way back in 2013, it was in error to dismiss his Claim for want of prosecution in 2017.

6. Respondent's Supervisor John Nguku Kioko, and Human Resource Manager James Mwangi Ndiki, gave evidence for the Respondent on 16th October 2018, bringing the hearing to an end.

7. The Claimant, in his evidence, restated his terms and conditions of employment, and his employment history with the Respondent, as outlined in his Pleadings.

8. He reiterated that he was assaulted by the Director. He exhibited a P3 Form issued following this assault. The Director then asked Security Guards to eject the Claimant. The Claimant was only paid salary for days worked for the month of September 2011. He was paid nothing else. He was not given any reason for his forcible removal. He worked excess hours without compensation. He did not go on annual leave.

9. Cross-examined, the Claimant told the Court he worked for about 4 years. He was issued a written contract, which is exhibit 'B,' of Respondent's documents. He was paid overtime as shown in his pay slips. It is true, that the Claimant authored exhibit 'A' of Respondent's documents. It is true he was found sleeping. It is not true that the Claimant was told to go home and return the following day. He did not return. The Claimant's Co-Employees refused to record statements with the Police after witnessing assault. The Claimant was paid salary for September 2011.

10. Kioko told the Court that the Claimant did general work in the packing section. On 17th November 2011, the Managing Director informed Kioko he found an Employee sleeping upstairs. As the Supervisor, Kioko went upstairs, and found the Claimant sitting on the staircase. The Claimant confirmed he was found sleeping by the Managing Director. The Claimant was not known to have any medical problem which would warrant his sleeping at work. He wrote a letter explaining he slept because he felt dizzy. He did not state he was assaulted. No one was called by the Police to assist with any investigation on the alleged assault. The Claimant was advised to present himself before the Disciplinary Committee for hearing the following day. He disappeared, and never reported back.

11. On cross-examination, Kioko told the Court he did not witness the Claimant sleeping. He was told by the Managing Director that the Claimant was found asleep. The Claimant was not summoned by the Disciplinary Committee; he was asked by the Personnel Manager to present himself before the Disciplinary Committee. He was not invited in writing. Kioko did not know if any letter issued upon the Claimant after he deserted.

12. Ndiki corroborated the account of events, as narrated by Kioko above. The alleged assault, Ndiki added, did not have any relation with the Claimant leaving employment. He was called to a disciplinary hearing and deserted. Cross-examined, Ndiki told the Court he did not issue the Claimant with any letter after the alleged desertion.

The Court Finds:-

13. The Claimant was employed by the Respondent between June 2007 and September 2011, as a Machine Attendant.

14. He alleges he was beaten up by the Managing Director, and dismissed, on 17th September 2011. Security Guards forcibly ejected him from the workplace.

15. The Respondent denies this. Its version is that the Claimant was found sleeping upstairs by the Managing Director. He was asked to give a written explanation. He did so, and did not state that he was assaulted. He was required to submit himself to a disciplinary hearing the following day, 18th September 2011. He abandoned his post and fled. He deserted. He did not report back.

16. Exhibit 'A' of Respondent's documents confirms Respondent's narrative. The Claimant concedes he wrote the letter, confirming he was found sleeping upstairs by the Managing Director. He states in the letter, that he felt dizzy and short of breath, and decided to rest upstairs.

17. He did not communicate to his Supervisor that he was feeling unwell. He did not ask to be allowed to rest or sleep upstairs. He just left others working and went to sleep. In the view of the Court, the Claimant ought to have sought the leave of his Supervisor to take a break.

18. It may well be that he was unwell, compelling him to sleep. His failure was in not communicating with his Supervisor, before he took the break. The Respondent alleges that the Claimant was drunk and asleep. While there is no evidence of being drunk at work and unable to discharge his role as a result of his drunkenness, the Court is satisfied that the Claimant was found asleep at work, without the leave of his Supervisor.

19. The Respondent alleges the Claimant was advised he goes home, and returns the following day for a disciplinary hearing. He instead fled, and never returned to work.

20. There is nothing in writing from the Respondent to the Claimant, requiring him to attend a disciplinary hearing the following day. There were no charges communicated to the Claimant. He was not summoned by the Disciplinary Committee. It is not suggested why the Employee would abandon his job, simply because he has been called to answer an allegation of sleeping at work. He had already answered this allegation upon inquiry. Why would he desert when called upon to attend a disciplinary hearing? Why did not the Respondent write to the Claimant after desertion, and invite him to a disciplinary hearing?

21. Termination was based on valid reason, but flawed on fairness of procedure.

22. ***The Respondent shall pay to the Claimant equivalent of 3 ½ months' salary in compensation for unfair termination at Kshs. 31,395.***

23. ***The Respondent has not shown that the Claimant deserted. The prayer for notice pay is allowed to the Claimant at Kshs. 8,970.***

24. Claimant's pay slips repeatedly capture an item described as 'OT' which the Court understood to mean overtime pay. The Claimant said nothing of these entries. He claims overtime over the entire period worked. This prayer has not been established and is declined.

25. The prayer for severance pay was withdrawn in Claimant's Closing Submissions, and shall be treated as withdrawn.

26. The Respondent states annual leave pay was availed to the Claimant as shown in the pay slips. The pay slips exhibited by the Respondent as exhibit 'C,' include 2 items in December 2009 and December 2010, described as 'Leave Salary.' There is no item described as 'Annual Leave Pay.' The Respondent does not have any records of the Claimant having taken annual leave. The pay slips show that perhaps, the Claimant twice received the amounts shown, as annual leave pay. He was entitled to 21 days of paid annual leave each year. Over a period 4 years, the Court allows him annual leave of 84 days, translating into leave pay of Kshs. 28,980. ***Less the amount of Kshs. 10,904, shown as 'Leave Salary' in the pay slips, he is granted annual leave pay at Kshs. 18,076.***

27. ***Certificate of Service to issue.***

28. No order on the costs.

29. Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

IN SUM, IT IS ORDERED:-

a) Termination was unfair on account of procedure.

b) The Respondent shall pay to the Claimant: equivalent of 3 ½ months' salary in compensation for unfair termination at Kshs. 31,395; notice pay at Kshs. 8,970; and annual leave pay at Kshs. 18,076- total Kshs. 58,441.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and signed at Mombasa this 4th day of December 2018.

James Rika

Judge

Dated and delivered at Mombasa this 18th day of January 2019.

Joram Nelson Abuodha

Judge