

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 103 OF 2018

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

GATATHA FARMERS COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant Nicolas Kisia Warui. It was alleged that he was victimized, wrongfully, unlawfully and unfairly locked out. The Grievant had been employed as a security guard at the Respondent from 21st September 2009 till the outsourcing of the security services on 17th June 2015. The Grievant was notified to return to the position he held prior to the engagement as a guard and because he was not a guard he had no position to return to. He thus sought to be redeployed elsewhere but he was not reassigned to any other job and instead was locked out. The matter was reported to Cabinet Secretary for Labour and the conciliator appointed after the parties met, they were unable to agree prompting the conciliator to issue a certificate of disagreement. The conciliator also issued a report. The Claimant sought the unconditional reinstatement of the Grievant, payment to the Grievant for the entire period of his lockout, leave days due and leave travelling allowance. In the alternative to these prayers, the Claimant sought that the Respondent pays the Grievant gratuity for the years worked, off duty not paid, monthly salary for 12 month's, payment in lieu of leave, tool allowance, leave travelling allowance, 2 month's salary in lieu of notice, overtime worked but not paid, damages for the unlawful lockout, costs of the suit, interest and any other relief the court may deem just and fit to grant.

2. The Respondent averred in its defence that the Grievant was notified of the option of either being redeployed to the coffee or tea farms or being paid their dues in case they opted to leave the employment of the Respondent. The Respondent averred that no security guard including the Grievant was victimized or dismissed or locked out as a result of the outsourcing of the security services as alleged by the Claimant. The Respondent stated that it calculated the terminal dues as advised by the conciliator but the Grievant failed to collect the said dues. The Respondent thus urged the dismissal of the claim with costs.

3. The Grievant and the Respondent's witness Edward Githinji testified. The Grievant stated that he was called for a meeting on the material morning and that he did not want to work in the tea or coffee farm. He stated that he joined the union and there were problems as a result. He testified that he sought work but was chased away.

4. The Respondent's witness stated that the Claimant would go on leave and obtain leave travelling allowance as shown in the leave schedules. He denied that the Claimant was dismissed from employment. He stated that the Grievant absconded from work.

5. The parties filed submissions in which the Claimant submitted that the Grievant was locked out from employment and that the Respondent did not prove that the Grievant absconded from work. The case of **Kenya Union of Domestic, Hotels, Educational Institution & Hospital Workers Union v Cool Rivers Hotel Limited [2017] eKLR** and **Amalgamated Union of Kenya Metal Workers v Settlers Engineering Limited [2017] eKLR** were cited for the proposition that desertion must be proved by an employer. The Claimant submitted that the Grievant was entitled to the prayers sought in his claim.

6. The Respondent submitted that the Grievant deserted work and he failed to show that he was keen to continue working for the Respondent as alleged. The Respondent submitted that the Grievant did not come to court until over one year later. The Respondent submitted that the authorities cited by the Claimant in support of the Grievant's case were distinguishable as the facts were different in both cases. The Respondent cited the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** where the Court of Appeal held that there was no immediate protest of the alleged termination in that case and the conduct of the appellant was not one of an employee who had been dismissed.

7. The Claimant asserts that the Grievant was locked out. A lock out in industrial action parlance is, generally speaking, a temporary work stoppage or denial of employment initiated by the employer during a labour dispute. That is the converse of a strike. It is industrial action by the employer. In his own words, the Grievant was called to a meeting and together with others was informed that the security services would be outsourced. He decided to seek redeployment and refused to work in either the tea or coffee farms. He later sought conciliation and in reporting the labour dispute stated it as unfair lockout of the Grievant. The Conciliator Mrs. E. Mukanga found that the Grievant terminated his services. The conciliator ruled that the Grievant should be paid all claims agreed on verbally. These were never clarified in court. In any event, there was no reference to court in terms of Section 73 of the Labour Relations Act. As such, the dispute was not one that remained unresolved after conciliation, the conciliator gave her report which dismissed the allegations of lock out. The cases cited by the Claimant were not on all fours as the case before me. In my view, there was no lock out as the Grievant declined to work either in the tea or coffee farm. There was no dismissal either as the Grievant was not dismissed at all. The suit is therefore only fit for dismissal as I hereby do. Suit is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 7th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar