



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1930 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 14<sup>th</sup> May, 2019)

SAMUEL ODIDA AGUTU.....CLAIMANT

-VERSUS-

METAL CROWNS LIMITED.....RESPONDENT

**JUDGEMENT**

1. The Claimant filed a Memorandum of Claim on 31<sup>st</sup> October 2014 alleging his unlawful and wrongful termination and the refusal of the Respondent to pay his terminal dues. The Claimant further contends that his termination was on account of his involvement in trade union activities.

2. The Claimant therefore seeks the following reliefs:-

**i. THAT the Court finds and orders that the Respondent's action of terminating the grievant was unfair, illegal, unlawful and unjustified in contravention with Section 49 and 50 of the Employment Act, 2007.**

**ii. THAT the Court orders for reinstatement from the date of the unlawful termination without loss of benefits, conditions and terms of service including the salary from the date of termination.**

**iii. THAT interest at the rate of 19% (rate of High Court) on the salaries, allowances from the date of unlawful termination to the date the judgment is fully complied with.**

Or in the alternative, the Respondent be ordered to pay full terminal benefits as calculated herein:-

**i. Day worked salary (8<sup>th</sup> February 2012) Kshs. 7,848.60**

**ii. Pay in lieu of notice – 70 days (Clause 19 of the CBA) Kshs. 20,208.00**

**iii. Accrued leave not taken 2011/2012 (26 days)**

**Clause 5 of CBA Kshs. 68,675.40**

**iv. Service pay (25 days x12 years)**

**(Clause 19.4 of the CBA) Kshs. 294,323.10**

**v. Service pay (45 days x 12 years)**

**(Clause 20.3 if the CBA) Kshs. 529,781.50**

**vi. 12 months' pay as damages for breach of contract,**

*CBA and the law*

*Kshs. 306,096.00*

**vii. 12 months gross salary pay due to wrongful**

**loss of employment**

**Kshs. 306,096.00**

**viii. Long service allowance pay Kshs.700 x 12 years**

**(Clause 23 of the CBA)**

**Kshs. 8,400.00**

**ix. Medical treatment cost**

**Kshs. 200,000.00**

**x. Compensation due to injury in the workplace**

**(WIBA & Clause 10.2 of the CBA)**

**Kshs. 500,000.00**

**xi. Overtime (195-180 hrs= 15 hrs/months 12 years) Kshs.22,074.00**

**Total**

**Kshs. 2,263,592.60**

**xii. Certificate of service to be issued**

**xiii. Costs be in the dispute**

**xiv. Interest at 19% p.a from the date of action (unlawful termination to the date the judgment is fully complied with)**

**xv. That fines and penalties be levelled against the Respondent for the offence committed as stated herein under:**

**Section 87 (1) of the Employment Act, 2007- Kshs. 50,000 and imprisonment for a term of three (3) months**

**Section 82 (2) of the Labour Relations Act 2007 – Kshs. 40,000**

**Section 61 of the Labour Institutions Act 2007 – Kshs. 50,000 and imprisonment of a term of there (3) months on Mr. S. Murithi, Mr. Rajiv Shah and Mr. Auko Moses.**

**xvi. That Managing Director Mr. Rajiv Shah's work Permit be revoked for racial abuse, offences committed herein, non-respect for Kenyan Labour Laws as an investor.**

**xvii. Such further order and reliefs the court shall deem fit and appropriate.**

3. The Respondent filed its Response to the Statement of Claim on 19<sup>th</sup> December 2014 and denied the Claimant allegations and averred that the termination was lawful and in accordance with the contract and collective bargaining agreement. It further avers that the Claimant was regularly warned to improve on his non-satisfactory performance but failed to do so forcing the Respondent to terminate his service.

#### **Claimant's Case**

4. The Claimant testified that he was employed by the Respondent in September 1999 as an Electrician for 12 years. He testified that he earned a salary of Kshs.9,700 and at the time of termination his salary was Kshs. 20,800 with a house allowance of Kshs.5,300. He testified that his dispute with the Respondent started on 8/10/2011 when the management wanted to start a 3 shift programme.

5. He stated that he was a Chief Shop Steward and was told to tell the workers of the shift programme. He testified that the workers informed him to try and organise before it was implemented as some workers were staying very far. He testified that he told this to the Human Resource (HR) Officer who told him to write a letter to the Director so as to have a sitting and discuss the issue. The Human Resource told him that the Director responded that they would have the meeting and when he met the Director he informed him to leave the work to them.

6. It is the Claimant's case that he told the workers that things did not look good and at that time one manager came and called the workers and told them to either work or go away. He testified that as he returned to work Mr. Murithi who was the Human Resource Manager, called him and they took him near the gate and told him to remove his overall and leave.

7. The Claimant testified that he left and went to report to the Union and the Union wrote a letter for him and he returned to the company. However, the following day he was given a letter of termination.

8. He further testified that he was not given any hearing or warning and he believed that he was terminated due to his union membership, as he had been a Shop Steward for 4 years. He testified that he was not paid his dues. In addition, he had been involved in an accident before

30/10/2010 and he was still on treatment at the time.

9. In cross-examination, he testified that the reason for his termination was not valid. He testified that on 21/6/2011 he never saw the letter written by the Respondent. According to him, he only saw the letter in Court and he never signed for the letter, which is referred to in the termination letter. He testified that he was issued with an appointment letter and he knew that in case of gross misconduct he was liable to dismissal.

10. He testified that he was to work for 45 hours per week and every time they worked overtime, they were paid. In respect of his terminal dues, he stated that he was never paid any terminal dues and he never collected a cheque from the Respondent. He stated that when he went to collect the cheque he was asked to sign an empty paper and he refused.

11. He testified that he seeks his treatment cost as NHIF only paid for his bed but not for medicine and treatment. He testified that he had been paid for over Kshs.100,000 at the Respondent but the Respondent deducted the same as the payslip shows he had a loan given to him for treatment. He stated that he was injured in the company but the Respondent deducted pay from him. He testified that he was owed 26 leave days for 2011/2012 and was entitled to 26 days in a year.

12. In re-examination, the Claimant testified that he was terminated on 8<sup>th</sup> February 2-12 at 8.45 am and was given a letter for termination on 9/2/2012.

### **Respondent's case**

13. RW1, Joseph Kithikwa testified that he works for the Respondent as a Human Resource Manager. He testified that the Claimant was employed by the Respondent on 12/9/1999 and he left the company on 8/2/2012. He testified that from the information he gathered from the Company, the Claimant being a Shop Steward spent a lot of his time on trade union activities and his performance was not good.

14. He stated that the Claimant was informed of these reasons through letters written to him. The letter dated 21/6/2011 shows that the Claimant was threatening the Manager and the letter dated 8/9/2012 was the termination letter.

15. He testified that the termination letter was served upon the Claimant and the reasons for termination were given to him. He further testified that the Claimant was paid his terminal dues through the Union.

16. He further testified that there were meetings between the Claimant and the Management before termination when they were discussing change over the shifts. It was RW1's testimony that the Claimant was underperforming and engaging in other activities.

17. In cross-examination, he confirmed that the Respondent had a valid CBA with Kenya Engineering Workers Union (KEWU). He testified that the letter dated 21/6/2011 was not signed by the Claimant and that he had no availed bank statements to show that the cheques issued to the Claimant were cashed. He further testified that he did not have any minutes of disciplinary hearing process undertaken prior to the termination.

### **Claimant's submissions**

18. The Claimant submitted that the Respondent's witness testimony has no evidentiary value since he admitted that he was not employed by the Respondent at the material time.

19. The Claimant submitted that he was dismissed from employment without being subjected to due process as stipulated under Section 41 of the Employment Act. The Claimant argued that he was not given any written termination notice prior to his dismissal under Section 35 of the Act.

20. He also submitted that he was not invited to any disciplinary hearing prior to his termination and the Respondent's Manager unilaterally terminated his employment and asked him to leave with immediate effect. Further, the precise charges/accusations against the Claimant were not levelled to him to enable him tender a response in the presence of a representative of his own choice.

21. The Claimant testified that the Respondent did not tender any evidence to show that the Claimant was paid his dues and that a cheque was issued to him. The Claimant argued that he is entitled to compensation for unfair/unlawful termination as he had worked for the Respondent for 12 years and he was not subjected to any process before dismissal.

22. He submitted that he was not paid his salary for the days worked in the last month of his termination and is therefore entitled to a sum of Kshs. 7,848,60. He submitted that Clause 19 of the CBA stipulated that a notice of 70 days was required for an employee who had been in employment for a period of between 9 -13 years.

23. In respect of accrued leave, he submitted that he had not proceeded on leave for the year 2011/2012 and in accordance with Clause 5 of the CBA he was therefore entitled to leave pay for 26 working days, which had been assessed at Kshs. 68,675.40.

24. In respect of service pay, he submitted that Clause 19.4 of the CBA provides that an employee of 9 -13 years would be entitled to 25 days for each completed year of service. Clause 23 of the CBA further provides that employees who served for the 9-13 years were entitled to salary increment of Kshs. 700 and therefore sought Kshs. 8,400.

25. The Claimant submitted that treatment of the suffered injuries stopped once he was terminated and therefore urged the Court to award

him a sum of Kshs.200,000 plus compensation of Kshs.500,000 pursuant to Clause 10.2 of the CBA.

26. He further submitted that he is entitled to overtime as he was working for 195 hours a month instead of 180 hours as required by law and therefore sought the sum of Kshs.22,074 as overtime for the 12 years worked and costs of the suit.

27. The Claimant relied on the cases of **Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers [Kudheihia] v Lenana Mount Hotel [2014] eKLR and Rift Valley Workers Union (K) Limited [2018] eKLR.**

### **Respondent's submissions**

28. The Respondent submitted that the Claimant was terminated for non-performance, gross misconduct and also claiming unauthorised overtime for hours he had not worked for the company. The Respondent argued that the Claimant was afforded a chance to be heard as required under the law.

29. The Respondent submitted that the Claimant was paid for the days worked, pay in lieu of notice and accrued leave as evidenced in the computation form and letter dated 8<sup>th</sup> February 2012.

30. The Respondent submitted that by virtue of Section 35 (6) of the Employment Act, the Claimant is precluded from claiming service pay as the company used to remit NSSF as evidenced by the payslip.

31. The Respondent submitted that the 12 months' pay as damages for breach of contract is unsubstantiated and uncalled for and the 12 months gross salary for wrongful loss of employment should fail.

32. In respect of long service allowance the Respondent submitted that this claim should fail as the same could only have arisen as provided in the CBA where one is entitled under the brackets of the years worked when they fell due and that the CBA produced in Court became effective on 1<sup>st</sup> August 2012 long after the Claimant ceased to be the Respondent's employee.

33. The Respondent submitted that the Claimant was enrolled to NHIF, which would cater for his medical treatment thus the claim for medical treatment cost should fail. Further that the Court has no jurisdiction to award the claim for compensation due to injury at the work place. The Respondent further submitted that the claim for overtime cannot stand as the Claimant admitted to having being paid overtime.

34. I have examined all the evidence and submissions filed by the parties herein. The issues herein for Court's determination are as follows:-

**1. Whether there were valid reasons to warrant termination of the Claimant.**

**2. Whether there was due process before the Claimant was terminated.**

**3. Whether the Claimant is entitled to remedies sought.**

35. On issue No. 1 above, the Claimant's services were terminated vide a letter dated 8/2/2012 which indicated that he was terminated because his output was extremely low and that he had committed gross misconduct under Section 44 (4) of Employment Act by his various aggressive acts against the Management on a number of occasions notably 21<sup>st</sup> June 2011, 23<sup>rd</sup> and 24<sup>th</sup> August 2011, 26<sup>th</sup> and 27<sup>th</sup> September 2011.

36. The aggressive acts complained of according to RW1 was threatening the Manager as per the letter of 21-6-2011. The Claimant denied ever seeing the letter in question dated 21.6.2011.

37. From the Statement of Defence, the Respondent never alluded to the said letter dated 21.6.2011.

38. Section 43 of Employment Act 2007 provide as follows:-

**“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.**

39. Indeed the burden of proving the alleged gross misconduct lies upon the Respondent. The Respondent also need to prove the non-performance or poor performance of the Claimant weighed in form of performance reviews. The Respondent failed to prove this and neither did they prove by way of evidence that the Claimant's performance was below standard.

40. Other than performance, the Respondent aver that the Claimant unauthorised overtime for hours not worked. The Respondent however did not adduce any evidence to substantiate their claim. The claim by the Respondent against the Claimant remains only a statement, which is not backed by facts. I therefore make a finding that there were no valid reasons to terminate the services of the Claimant.

41. The Claimant submitted that he was victimised for his union activities. Indeed the Claimant was a Shop Steward, a claim not disputed. As a Shop Steward, he mobilised others to engage in union activities. Without the Respondent showing any valid reasons to terminate the Claimant, it is more plausible than not to find that he was terminated for his engagement in union activities, which did not go well with the Respondent.

42. On the second issue, the Claimant averred that he was not given any hearing before the termination. Section 41 of Employment Act states as follows:-

**1. "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".**

43. There is indeed no indication that the Claimant was taken through any disciplinary process. This is against Section 41 of Employment Act 2007.

44. Section 45(2) of Employment Act 2007 states as follows:-

**2. "A termination of employment by an employer is unfair if the employer fails to prove:**

**a. that the reason for the termination is valid;**

**b. that the reason for the termination is a fair reason:-**

**i. related to the employee's conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c. that the employment was terminated in accordance with fair procedure.**

45. Having found that the Respondent had no valid reason to terminate the Claimant and having also found that there was no due process before his termination, I find his termination unfair and unjustified.

46. On the last issue of remedies, the Claimant having been terminated unfairly and given that his explanation was that it was due to his union affiliation, which goes against the spirit and letter of Article 41 of the Constitution, I find maximum compensation of 12 months will be the best remedy for which I exercise my discretion and award him. This is =  $12 \times 20,800 = 249,600/=$ .

47. I also award Claimant 1 months' salary in lieu of notice = 20,800/=

48. Other than this, the Claimant has sought to be paid medical treatment costs of 200,000/= for injuries sustained as he worked for Respondent but which he incurred after the termination. The Claimant failed to prove this limb of the claim in that there is no proof of the injury or any receipts for payments made for him to qualify for the award. I therefore decline to award him this prayer.

49. The Claimant also sought an award of service pay for which I also do not find he is entitled to as he was a member of NSSF and under Section 35(6) service pay is not payable for member of NSSF.

50. I also award Claimant salary for 8 days worked in February 2012 for which there is no proof that he was paid = 7,848.60/=.

51. The Claimant should also be issued with a Certificate of Service.

**The total award comes to Kshs.278,248.6**

52. I also award Claimant costs and interest at Court rates with effect from the date of this judgement.

**Dated and delivered in open Court this 14<sup>th</sup> day of May, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Sisule holding brief Omari for Claimant

Marugu for the Respondent