



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 374 OF 2017

JULIUS MUTURE KEBEYA.....CLAIMANT

VERSUS

TONONOKA STEELS LIMITED.....RESPONDENT

JUDGMENT

1. This Cause was heard on 17 September 2019. Julius Muture Kebaya (Claimant) and Kassim Shee Nyangusi, a Works Manager with Tononoka Steels Ltd (Respondent) testified.

2. The Claimant filed his submissions on 1 October 2019 while the Respondent filed its submissions on 8 October 2019.

3. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as discussed hereunder.

Unfair termination of employment

4. The Claimant was issued with a suspension letter dated 29 August 2016. The suspension was for an indefinite period and was meant to facilitate investigations by the Police into allegations of theft in which the Claimant was a suspect.

5. The Claimant testified that on 5 September 2016, the Police informed him that there was no evidence he was involved in the theft and therefore he reported to the workplace whereupon the in-charge of human resources Mr Ochido informed him that he was yet to receive an update from the Police and he would be contacted later.

6. According to the Claimant, he considered that his employment was terminated in August 2016 when he was suspended because he was never requested to report back to work after the suspension.

7. The Respondent's witness confirmed that the Claimant was suspended, but went ahead to testify that he failed to report back to work when requested to do so, and was therefore issued with a *show cause* dated 4 October 2016 followed with a dismissal letter dated 10 October 2016 because he never bothered to show cause.

8. The Claimant denied that he received a copy of the *show cause* dated 4 October 2016.

9. The Court has keenly considered the Claimant's pleadings and evidence. There were a lot of inconsistencies.

10. In the *Memorandum of Claim*, the Claimant pleaded that his employment was terminated in August 2016. He did not disclose the exact date of termination.

11. In the filed *witness statement*, the Claimant stated that he was told by the Respondent's in-charge of human resources on 29 August 2016 that he should not be seen in the premises and that on 1 September 2016, he was called to go and collect the suspension letter. He did not state the exact date of separation in the witness statement.

12. In the Claimant's advocate demand letter of 14 December 2016, the date of termination of employment was stated as 24 August 2016.

13. During cross-examination, the Claimant gave the date of dismissal as 27 August 2016.

14. The Respondent's witness on his part testified that there was a theft on the night of 26 August 2016 which necessitated the suspension of the Claimant through the letter of 29 August 2016 to facilitate investigations.

15. The witness also testified that the Claimant was recalled after the end of investigations but failed to report and was therefore issued with a *show cause* dated 4 October 2016 (he could not tell whether the *show cause* was delivered to the Claimant). The Claimant was eventually dismissed on 10 October 2016.

16. The Court has two inconsistent versions as to the circumstances leading to the separation.

17. The Claimant gave inconsistent dates on the milestones leading to the separation. He could not even pinpoint the exact date of dismissal. The pleadings, witness statement and demand were all inconsistent as to the dates of separation.

18. It was incumbent upon the Claimant to demonstrate at the first instance that an unfair termination of employment occurred. Section 47(5) of the Employment Act, 2007 placed that obligation on him. He did not discharge the burden.

19. The Court carefully observed the Claimant. He did not appear credible. The Court is wont to believe the narration of events by the Respondent's witness.

20. The Court finds that the Claimant failed to show that there was unfair termination of employment.

21. *Compensation and pay in lieu of notice* are therefore not available as remedies.

22. However, since the Respondent admitted in its submissions that the Claimant is entitled to wages for August to October 2016, it should pay him the same.

Gratuity

23. Clause 4 of the Claimant's letter of appointment provided that the remuneration would be subject to statutory deductions.

24. The Claimant admitted that he was registered with and was making contributions towards the *National Social Security Fund*.

25. The Court can, therefore, conclude that the Claimant is not eligible for *service pay* in terms of section 35(5) & (6) of the Employment Act, 2007.

26. If there was a contractual basis for the claim for *gratuity* as opposed to *service pay*, the Claimant did not prove such eligibility or entitlement.

Leave days

27. The Claimant sought the cash equivalent of 12 unutilised leave days. He did not disclose the equivalent amount in money terms or disclose to which years the leave related.

28. The Court will decline to make an award under this head of the claim.

Certificate of Service

29. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

30. The Court finds and holds that the Claimant did not prove breach of contract and/or that there was unfair termination of employment as contemplated by section 47(5) of the Employment Act, 2007.

31. Save for an order that the Respondent issues a certificate and pay admitted wages to the Claimant within 21 days, the Court dismisses the Cause with no order as to costs.

Delivered, dated and signed in Nairobi on this 22nd day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Njoroge instructed by Eboso & Co. Advocates

For Respondent Mrs. Nyaencha instructed by Nyaencha Waichari & Co. Advocates

