



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 158 OF 2013

BETWEEN

SAID NDEGECLAIMANT

VERSUS

STEEL MAKERS LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

M.L. Alwenya & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th June 2013. He was initially employed by the Respondent as a Crane Helper on 12th May 1986. He later on became a Crane Operator.

2. He was summarily dismissed by the Respondent on 18th June 2012. His last salary was Kshs. 19,912 monthly, all-inclusive.

3. The letter of summary dismissal states:

‘This is in reference to our letter of suspension dated 9th June 2012, and your subsequent letter of apology to the Management.

Hiding your Employer’s property [Production Materials] with the intention of stealing is a criminal offence under the Employment Act, Section 44 clause [g].

Further investigation showed that Security Guards were not even aware that you had kept misrolls behind their Office. Earlier you had indicated that you had taken 2 pieces of misrolls to the Security Guards away from the chui crane, which you use as a store.

Under the circumstances, the Management has no option but to summarily dismiss your services with immediate effect. You are requested to hand over all company property to your Head of Department.’

4. The reason justifying termination decision, as disclosed in the letter of summary dismissal, is that the Claimant was found attempting to steal 2 metal bars from his Employer. He hid the bars behind the Guardhouse next to the gate.

5. The letter of summary dismissal also states that the Claimant had written a letter of apology, conceding wrongdoing.

6. The Claimant avers termination was harsh, drastic, based on unfounded allegations, and in total disregard of fair procedure. The Claimant was not heard, and was not availed valid reasons for the decision. He prays for Judgment against the Respondent for:

- a) 1 month salary in lieu of notice at Kshs. 19,912.
- b) Outstanding annual leave for 2012 at Kshs. 19,912.
- c) Gratuity at a rate of 20 days' salary for 25 years worked, calculated at Kshs. 331,866.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 238,944.

Total...Kshs. 610,634.

- e) Declaration that failure to issue the Claimant Certificate of Service attracts penal consequences under Section 51 of the Employment Act 2007.
- f) Declaration that termination was unfair, unjust and unconstitutional.
- g) Costs.
- h) Interest.
- i) Any other relief the Court deems fair.

7. The Claimant testified, and rested his Claim, on 12th February 2018. He confirmed in his testimony, details of his employment history with the Respondent, and his terms and conditions of employment, as pleaded. His explanation with regard to movement of the 2 pieces of metal was that, he found the pieces placed at the wrong place. He took the pieces to the right place, behind the Guardhouse. The Respondent alleged Claimant's intention was to steal. He was not reported to the Police. He was not arrested or charged for any offence. He was dismissed without hearing, valid reason and/ or notice. He did not go on annual leave. He was not paid anything in lieu of leave. His contract incorporated terms and conditions of service of a CBA concluded between the Respondent and Claimant's Union, Kenya Engineering Workers Union. Clause 31 allowed him to have gratuity.

8. He disclosed on cross-examination that he does not know how to read. His letter of employment issued in the name of Steel Scrap Metal Limited. He conceded he took pieces of metal to the place behind the Guardhouse. The Guard was not Claimant's Supervisor. The Guard was not involved in production. There was no production going on at the gate. The Claimant had worked for long. The incident took place on 6th June 2012. The Claimant was suspended on 12th June 2012. The Claimant conceded before termination, he had received a last warning letter from the Respondent. There were other letters of warning spread over a period of 8 years.

9. The Respondent filed its Statement of Response on 19th August 2013. Its position is that the Claimant was fairly and lawfully dismissed after he was found attempting to steal Respondent's misrolls. He was suspended on 9th June 2012. He wrote to the Respondent conceding wrongdoing and asking for forgiveness. He was given ample opportunity to explain himself. The Respondent considered his explanation and his record. He had various warnings in his file. He was summarily dismissed.

10. The Respondent called 2 Witnesses, both with very long names. The 1st, Manthara Gangadharan Pillai Prasanna is Respondent's Chief Melter. The 2nd, Mathilakath Madathil Menon, is Respondent's Works Manager. They both testified on 3rd December 2018 when hearing closed.

11. Prasanna saw the Claimant carrying the 2 pieces of metal to the vicinity of the Guardhouse. The Guardhouse was not a production area. He alerted Head of the Rolling Department, Govin. Cross-examined, Prasanna told the Court he was not Claimant's Supervisor.

12. Menon was called in by Govin. The two Officers proceeded to the Guardhouse area. They found the Claimant and some Guards. They saw the metal pieces. The Claimant was not able to explain why he took the metal pieces to the Guardhouse area. The Respondent intended to call in the Police. The Claimant pleaded with the Respondent not to do so. The Respondent considered that the Claimant had served for 25 years, and thought it prudent to handle the matter internally. The Claimant was handed over to Human Resource Manager Kalama for disciplinary processing. The Claimant was suspended. His Union Shop Stewards were involved in the disciplinary process at every turn. The reasons for termination were clearly spelt out in the letter of suspension. The Claimant was suspended for 7 days. He returned to the Respondent on the same day of suspension with a letter of apology. He conceded wrongdoing. He was advised to leave and return after 7 days. He did not return. The Respondent issued the letter of summary dismissal on record. The Claimant had several warnings predating termination. He had been pardoned many times. He was a Member of Kenya Engineering Workers Union. CBA allowed the Respondent to summarily dismiss. The Claimant was not entitled to payment of terminal benefits on summary dismissal. Cross-examined, the Witness testified that the warning letters ranged from the year 1994. The last one issued in 2003. His signature and handwriting on the various letters do not resemble.

The Court Finds:-

13. The Claimant worked for the Respondent, first as a Crane Helper. He was employed on 12th May 1986. He later became a Crane Operator. He was in this position when his contract was terminated by the Respondent through a letter of summary dismissal, dated 18th June 2012. His last salary was Kshs. 19,912.

14. He was found moving 2 pieces of metal to the place behind the Guardhouse, on 9th June 2012. The Witness for the Respondent, Menon,

explained to the Court that the Claimant intended to steal the pieces. The perimeter wall around the Guardhouse is low. The Claimant's intention was to throw the pieces out of the compound, over the wall. He was seen carrying the pieces by Prasanna. Prasanna alerted Govin, who in turn alerted Menon. Menon and Govin visited the employment offence scene, and found the Claimant, the 2 metal pieces, and Security Guards. The Claimant was unable to explain why he had moved the pieces. The Guardhouse was not a production area.

15. The Claimant was suspended on the same date, for 7 days. Before 7 days were over, actually on the same date of suspension, he wrote a letter addressed to the Respondent's Manager. The letter is part of Respondent's exhibits. The Claimant states:

"... I took 2 misrolls from the chui crane, and kept them behind the Security Guards Office and this is when Mr. Prassana confronted me. I [am] very sorry and I will not repeat again [sic]. Please forgive for the wrongdoing."

16. The Claimant was dismissed on 18th June 2012. The Respondent took into account his confession.

17. The Claimant was correctly summarily dismissed, for an employment offence, which he owned up to having committed. Once an Employee has conceded to wrongdoing, latter-day complaints about lack of valid reason and fairness of procedure, in the process of termination, can only be of academic value. The Claimant was caught red-handed, in an act of gross misconduct. He accepted wrongdoing, and as he had done in the past, sought forgiveness. When forgiveness was not forthcoming, he turned around and alleged he was unfairly dismissed.

18. The Respondent had valid reason, based on Claimant's confession, to summarily dismiss the Claimant. The Claimant was guilty of an employment offence under Section 44 [4] [g] of the Employment Act, and clause 24 [b] [vii] of the applicable CBA. The Court is in no doubt that termination was substantively fair, as required under Section 43 and 45 of the Employment Act.

19. Procedure also, cannot be faulted. The Claimant was suspended and given 7 days to allow for further investigations. He wrote his letter admitting the employment offence, thus making it unnecessary for the Respondent to make further investigations. It would not make sense to call the Claimant to a disciplinary hearing, while he had answered to the charge facing him, with a no-contest. In moving the process of investigation and suspension forward, the Respondent involved the Claimant's Union, through the Shop Stewards, at every turn. Procedure was fair.

20. Termination was therefore substantively and procedurally fair.

21. The prayers for compensation and notice pay have no merit, and are dismissed.

22. The Respondent has not provided the Court with any documents showing that the Claimant was paid annual leave for the year 2012. He does not claim annual leave for any other year, of the 25 years worked. He claims annual leave for 2012 only. Pay slips on record, which relate to 2012 all indicate against 'leave encashment,' zero. Clause 17 of the CBA entitled the Claimant to 26 working days of annual leave with full pay. ***The prayer for annual leave pay for 2012 is persuasive and allowed at Kshs. 19,912.***

23. Gratuity is provided for under clause 31 of the CBA. It is available to all Unionisable Employees, on a graduated basis, dependent on the number of years worked. An Employee with 10 years and above of service, would be entitled to 16 days' salary for every complete year of service.

24. Clause 31 above does not exclude Employees who are summarily dismissed. There is no exclusion under clause 24 [b] on summary dismissal either.

25. Gratuity given under the CBA is not affected by the fact that the Claimant was subscribed to the N.S.S.F. It is a benefit freely negotiated and availed to all Unionisable Employees, under the CBA. Contractual employment benefits are given in addition to statutory benefits, not less statutory benefits.

26. Clause 31 of the CBA adheres to Section 18 [4] of the Employment Act, which states that where an Employee is summarily dismissed for lawful cause, the Employee shall on dismissal, be paid all moneys, allowances and benefits due to him up to the date of his dismissal.

27. In short, the Respondent was wrong in not paying to the Claimant gratuity under clause 31 of the CBA, after his 25 complete years of service. If the Respondent was persuaded not to escalate the attempted theft to the Criminal Court based on the number of years served by the Claimant, the Respondent ought not to have sent the Claimant away empty-handed, taking into account the number of years served by the Claimant. Attempted theft of 2 pieces of metal, should not undo 25 years of Claimant's labour investment in Steel Makers Limited. He was entitled to have his last dividend cheque, upon termination. Certainly, the law and the contract governing the Parties' relationship did not place any bar against the Claimant accessing gratuity.

28. The Respondent shall pay to the Claimant, gratuity under clause 31 of the CBA, computed at 16 days' salary for each complete year of service [Kshs. 19,912 divide by 26 working days = Kshs. 765.8 x 16 days = Kshs. 12,252.50 x 25 years= Kshs. 306,338].

29. There is no reason shown by the Claimant why the Court should declare that failure to issue him a Certificate of Service attracts penal consequences under Section 51 of the Employment Act. Section 51 [3] states such default is an offence, punishable upon conviction. Why does the Court have to re-declare what the law has declared with no ambiguity? What would be the benefit of such a declaration to the Claimant? If the Claimant has not received his Certificate of Service, he ought to simply ask for an order for release of his Certificate of Service under Section 51[1] and [2] of the Employment Act. If he desires the Court to find the Respondent guilty of an offence under Section 51 [3], he ought to make a complaint to the Police or an authorized Labour Officer, and instigate a criminal trial against the Respondent, at the right platform.

30. Clause 31 of the CBA states gratuity would be payable at the time of retirement or termination. Section 18 of the Employment Act similarly requires all moneys, allowances and benefits are paid to the Employee, upon dismissal. The Claimant was dismissed in 2012. An Employer should not wait for 8 years to pay what is due to an Employee. The Claimant's benefits, in law and contract, ought to have been paid 8 years ago. Annual leave pay fell due in 2012. These benefits were not paid when due. ***He merits interest from the date of termination, 18th June 2012.***

31. ***No order on the costs.***

IN SUM, IT IS ORDERED:-

- a) ***Termination of the Claimant's contract of employment was fair.***
- b) ***The Respondent shall pay to the Claimant: annual leave pay at Kshs. 19,912 and gratuity at Kshs. 306,338- total Kshs. 326,250.***
- c) ***Interest granted at 14% per annum from the date of termination, 18th June 2012.***
- d) ***No order on the costs.***

Dated and delivered at Mombasa this 21st day of December 2018.

James Rika

Judge