



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 516 OF 2014

BETWEEN

JOHN OKUKU OLELE.....CLAIMANT

VERSUS

TEA WAREHOUSES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Muturi Gakuo & Kibara Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 22nd October 2014. He states he was employed by the Respondent Company on 25th June 2006, in the position of a Forklift Operator. He received a short text message from his Supervisor Titus Khaemba on the 26th February 2014, advising him not to report to work on the following day. He was not told why he should not report to work. He was advised, on further enquiry, that his services were no longer needed. His salary was Kshs. 18,470 as of the date of termination. He feels he was treated unfairly and unlawfully and seeks the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 18,470.
 - b. Annual leave for 8 years at Kshs. 147,760.
 - c. Service pay at Kshs. 95,901.
 - d. 12 months' salary in compensation for unfair termination at Kshs. 221, 640
- Total..... Kshs. 483,772

e. A declaration that termination was unfair.

f. Certificate of Service to issue.

g. Costs and Interest.

2. The Respondent filed its Statement of Response on the 28th November 2014. It is conceded the Claimant was employed by the Respondent as stated in the Claim. He was employed on casual terms, receiving wages weekly. He failed to show up at his workstation at Changamwe Mombasa, on the 26th February 2014. His Supervisor Titus Khaemba attempted to reach the Claimant on the phone, to no avail. It was decided after 2 weeks of the Claimant's absence, that another Forklift Operator be recruited. The Respondent further states the Claimant's Trade Union [Shipping Union] and the Respondent, held a consultative meeting on the 4th June 2014, where it was agreed the Claimant is reinstated. The Claimant initially refused to go back to work, but agreed to go back upon advice by the Union. He did not disclose this to the Court; neither did he disclose he sought employment elsewhere in the 2 weeks leading to termination. His Claim has no merit. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. Both Parties gave evidence, and closed their respective cases, on the 5th September 2016. The Claimant gave evidence, as did Respondent's Warehouse Supervisor Titus Khaemba. Hearing closed on 5th September 2016, while the dispute was last mentioned in Court on 5th October 2017 when Parties confirmed the filing of their Closing Submissions.

Claimant's Case

4. He reaffirmed the contents of his Statement of Claim, as summarized at paragraph 1 above. His duty comprised loading and offloading tea leaves at the Respondent Warehouse. He was paid Kshs. 619 per day, paid weekly, by the time of termination. He was paid through a voucher. He was issued pay slips between June 2007 and May 2008 which are attached to his Statement of Claim. He was paid through his National Bank Account, from May 2008.

5. He found another Forklift Operator working on his Machine on 26th February 2014. The new man, Benedict Kazungu, told the Claimant the Supervisor Khaemba, had advised the Claimant should rest for a week. The Claimant turned his phone on, and found messages from Khaemba, saying the Claimant should take a rest. The Claimant consulted Khaemba. He was advised by Khaemba work had diminished, but would be recalled when there was sufficient work. He wrote to the Managing Director for further advice; there was no response. He reverted to Khaemba. Khaemba told him to go and look for a job elsewhere. He was told he would be paid his terminal benefits and was paid Kshs. 7,724 for days worked in February 2014.

6. He sought the assistance of his Trade Union, the Shipping Union. A consultative meeting between the Union and Management was held. It was agreed the Claimant returns to work. He did not do so, because there was another Employee doing his work. He was told he would be recalled, when the other Employee went on annual leave. He was never recalled. He was not taken through any disciplinary process. He prays the Court to allow the Claim.

7. Cross-examined, he testified he was employed as a weekly Casual. He operated Forklift. Tea Leaves are seasonal. He did not agree his role was seasonal. The message from Khaemba said the Claimant should rest for a week. Redirected, the Claimant told the Court he wrote to Khaemba, asking to be informed when he would report back. There was no response. The Claimant worked daily, in continuity, to the date he was asked not to report back. There was no time the Warehouse closed. There was no off-season.

Respondent's Case

8. Khaemba told the Court the Claimant failed to report to work for 2 weeks. The Claimant could not be reached on the phone. His friends told Khaemba they saw the Claimant working at other Warehouses. The Claimant went to the Respondent Warehouse and collected salary for days worked. He informed Khaemba he would return the following week. He did not return. The Respondent employed a replacement.

9. Khaemba testified work at the Warehouse is done throughout. Some of the old Forklift Operators, employed about 15 years ago, worked on permanent basis. Khaemba sent the Claimant SMS asking the Claimant to rest for a week. The Claimant did not return after a week. A meeting between Management and Claimant's Trade Union followed. It was agreed the Claimant reports back to work. He did not report back. He would promise the Respondent he was going to return, but never did so. He, instead, filed this Claim.

10. Khaemba conceded on cross-examination that the Claimant wrote to him asking to be told when he would return. Khaemba responded on the phone. The Claimant absconded. The minutes of the meeting between the Respondent and the Trade Union referred to diminished work at the Respondent. The Claimant was among those affected by reduced work. The Respondent did not send him a message to return. The Respondent employed another Forklift Operator to do Claimant's work. The Witness was not able to say if the Claimant took annual leave. The Respondent prays for dismissal of the Claim.

The Court Finds:-

11. There is no dispute the Claimant was employed by the Respondent as a Forklift Operator, on 25th June 2006. He earned a monthly salary of Kshs. 18,470 which was staggered and paid weekly. He worked up to 26th February 2014. The Claimant states he was asked by his Supervisor to take a week's rest, and on going back, was advised there was no more work. He was told he would be recalled when there was enough work. He was not recalled. Another Forklift Operator was employed in his place.

12. The Respondent's version with respect to the Claimant's departure amounted to a mixture of redundancy and desertion. It is agreed, as shown in the minutes of the meeting between the Respondent and the Claimant's Union, that the Claimant was told work had diminished. The Respondent also told the Court that the Claimant vanished and after 2 weeks of absence, the Respondent engaged another Forklift Operator.

13. The Court is not able to agree with the Respondent on either count. It was not shown that there was a genuine redundancy. If there was, the Respondent would not have engaged another Forklift Operator to perform the same role the Claimant had been performing from the year 2006. It is similarly not convincing that the Claimant abandoned his job. Khaemba conceded he told the Claimant to take a week's rest. He did not attempt to explain to the Court why in the first place, it was necessary to have the Claimant take a week's rest. There is evidence the Claimant asked for a return date. It was not given to him. Deserters do not go about asking their Employers when they should return to work.

14. One would presume with the agreement between the Respondent and the Claimant's Union that the Claimant returns to work, the dispute should have been resolved and conclusively dissolved. The Respondent continued to employ the gentleman who was recruited to fill the Claimant's shoes. The Claimant on his part was at first unwilling to return, and only agreed to return upon the counsel of his Union.

15. Ordinarily, the Court would enforce what was agreed to between the Parties, but given the passage of time, and the Claimant's lack of desire to return to work, enforcement of the agreement between the Parties is not practicable and reasonable.

16. There is evidence however that preceding that agreement, the Respondent unfairly and unlawfully terminated the Claimant's contract of employment. The reasons given for the decision were inconsistent and somehow conflictual. It was said the Claimant was sent away because of diminished work. Secondly, he was said to have abandoned his position. These were not valid reasons. If the Claimant deserted, he

should have been taken through a disciplinary process. He was available. Khaemba told the Court the Claimant went to the Respondent's premises demanding to be paid his dues. He was still in an employment relationship with the Respondent, and accessible. He should have been heard, on the offence of desertion. Termination was unfair for want of valid reasons and fair procedure under Sections 43, 45 and 41 of the Employment Act 2007.

17. He is granted the equivalent of 7 months' salary in compensation for unfair termination at Kshs. 129,290.

18. He is allowed 1 month salary in lieu of notice at Kshs. 18,470.

19. The Respondent could not confirm or deny that the Claimant did not go on annual leave throughout employment. There were no records availed to the Court that would disavow the Claimant's complaint that he was denied annual leave entitlement. **He is granted a minimum of 21 days for every year worked, as annual leave, at Kshs. 119,344.**

20. The Claimant testified his N.S.S.F contributions were remitted. He testified he did not wish to withdraw the prayer for service pay. He has no reason to claim service pay. He is not eligible for service pay under Section 35 [6] of the Employment Act 2007.

21. The Respondent shall release to the Claimant his Certificate of Service forthwith.

22. Parties to meet their costs of the Claim.

IN SUM, IT IS ORDERED:-

a. Termination was unfair for want of valid reasons and fair procedure.

b. The Respondent shall pay to the Claimant: the equivalent of 7 months' salary in compensation for unfair termination at Kshs. 129,290; 1 month salary in lieu of notice at Kshs. 18,470; and annual leave pay at Kshs. 119, 344- total Kshs. 267,104.

c. Certificate of Service to issue.

d. No order on the costs and interest.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge