



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAKURU**  
**CAUSE NO. 423 OF 2013**

**(Originally Nairobi Cause No. 2545 of 2012)**

**AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT**

**v**

**SETTLERS ENGINEERING LIMITED.....RESPONDENT**

**JUDGMENT**

1. In a Memorandum of Claim lodged in Court on 20 December 2012, the Amalgamated Union of Kenya Metal Workers (Union) stated the issue in dispute as Unlawful and unfair lock out of Mr. Alexander George Chilain (*Grievant*).
2. Settlers Engineering Limited (Respondent) filed a Response on 3 July 2013 and asserted that the Grievant was on 6 month contracts and that he was summarily dismissed for gross misconduct (because on or around 19 June 2011 the Grievant returned to his residential quarters drunk and disorderly and left when questioned never to return again).
3. The Respondent also pleaded that the Cause was premature because it was still pending before the Labour Office.
4. The Cause was heard on 8 November 2016 and 7 December 2016. The Union filed its submissions on 19 January 2017 while the Respondent filed its submissions on 23 January 2017 (in the Court's view the submissions did not identify the real issues in dispute).
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *locus of the Union, whether the Cause is premature, whether the Grievant was on fixed term contracts, whether Grievant deserted or was dismissed, if dismissal, whether dismissal was unfair and appropriate remedies.*

**Locus of the Union**

6. The Respondent dealt with the question of the locus of the Union to sue in its written submissions.
7. Unfortunately, this question was not raised in the pleadings and therefore the Union did not address it. Considering the status of the pleadings and evidence led, the Court is of the view that it should not determine the question.

## **Whether Cause premature**

8. The prematurity of the Cause was one of the defences advanced by the Respondent in the pleadings. According to the Respondent, the prematurity arose from the fact that a dispute had been reported to the Labour Office but had not been heard and concluded.

9. The Respondent produced an undated letter it wrote to the District Labour Officer (Respondent's exh. 2) and which letter was received by the Labour office on 21 June 2011. The letter was referenced *Gross Insolence and Desertion of Work by Alexander George Chilain*.

10. It is not clear what action the Labour Office took upon receipt of the complaint by the Respondent.

11. The Grievant also appears to have reported a dispute to the Labour Office (25 June 2011), for the Respondent produced a letter dated 25 July 2011 from the Labour Officer informing it of a complaint by the Grievant and inviting it to attend a meeting on 3 August 2011 to deliberate on the Grievant's terminal benefits.

12. The Union attached to the Memorandum of Claim a letter dated 25 June 2011 from the Grievant reporting a dispute to the District Labour Officer referenced *Trade Dispute (in the meaning of section 47 of the Employment Act, 2007)*.

13. The District Labour Officer through her letter of 4 August 2011 stated that the effort to resolve the dispute failed because of issues regarding representation, and therefore he kept the dispute in abeyance.

14. The question which arises is therefore whether the dispute reported to the Labour Officer was made under section 47 of the Employment Act, 2007 or pursuant to section 62 of the Labour Relations Act.

15. Disputes under section 62 of the Labour Relations Act are made to the Cabinet Secretary by a Union and not to the Labour Office. The Cabinet Secretary then appoints a conciliator.

16. There is no suggestion that the dispute herein was reported to the Cabinet Secretary or that the District Labour Officer, Nakuru was appointed as conciliator by the Cabinet Secretary.

17. The Court would therefore reach a conclusion that the Grievant and not a Union reported a complaint by dint of section 47 of the Employment Act, 2007 and that by dint of section 47(3) of the Act, the Grievant was not barred from approaching Court at the same time.

18. Prematurity in the circumstances does not arise.

## **Nature of contract**

19. According to the Respondent, the Grievant was on 6 month fixed term contract which commenced on 2 January 2011 and was to run up to 30 June 2011.

20. The Union on the other hand contended that the Grievant was engaged on 1 October 1998.

21. A director of the Respondent who testified contradicted himself as to the date of commencement and nature of relationship. In one breathe, he stated that the Grievant was employed in 2011 and at the same time stated that the Grievant was employed by his (director's) father and was housed from 2007.

22. In cross examination, the director stated that he could not recall exactly when the Grievant was employed.

23. There is no way the Grievant would have been housed by the Respondent from 2007 but got employed in 2011.

24. It is also an obligation upon an employer to issue a written contract of employment in terms of sections 9 and 10 of the Employment Act, 2007 and because none was produced (witness stated contracts were available but did not file or produce any in Court), the Court reaches a conclusion that the Grievant was employed in 1998 on a contract of an indefinite duration.

### **Desertion or dismissal**

25. The Respondent's pleaded case advanced contradictory positions as regards the manner of separation. On the one hand it was pleaded that the Grievant deserted and on the other it was contended that the Grievant was summarily dismissed for gross misconduct.

26. Desertion amounts to a repudiation of contract and in such a case, the innocent party ought to accept it.

27. A party asserting desertion ought also to demonstrate that the employee had formed an intention not to return to work (see my decision in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166 and also *Geys v Societe Generale, London Branch* (2012) UKSC 63).

28. The Respondent did not suggest or demonstrate that the Grievant had an intention not to return to work, and indeed the evidence before Court is that a report was made to Police and they assisted in having the Grievant evicted from his residential quarters. The eviction can only demonstrate it is the Respondent who had taken a decision not to continue with the relationship.

29. In any case, desertion would also amount to a misconduct and or breach of a fundamental obligation arising out of a contract of service to which section 41(1) and (2) of the Employment Act, 2007 would apply.

30. The Respondent did not show that it granted the Grievant an opportunity to be heard on the allegation of desertion.

31. The Court therefore concludes that the Grievant did not desert but was dismissed.

### **Whether dismissal was unfair**

32. In terms of section 41(1) and (2) of the Employment Act, 2007, the Respondent was under an obligation to afford the Grievant an opportunity to be heard on the allegation of desertion (misconduct).

33. Because the Grievant was not afforded such an opportunity, the Court finds that the dismissal was unfair.

34. Before examining appropriate remedies, the Court wishes to observe that though poorly drafted, the substance of the Union's case is one of unfair termination of employment and not unlawful or unfair lock-out.

### **Appropriate remedies**

#### **Pay in lieu of notice**

35. With the finding that there was unfair dismissal, the Grievant is entitled to 1 month pay in lieu of notice. It was not disputed the Grievant was on a monthly pay of Kshs 6,500/-.

#### **21 days worked June 2011**

36. The Grievant is entitled as of right to wages up to date of separation and the Court would award the sum of Kshs 4,530/- as pleaded.

## **Gratuity**

37. No evidential, contractual or legal basis for gratuity was placed before Court.

## **Accrued leave for 8 years**

38. No evidential foundation for this head of claim was led during testimony and it is for dismissal.

## **Compensation**

39. The Grievant served the Respondent from 1998 to 2011 and considering the length of service, the Court is of the view that the equivalent of 12 months gross wages would be appropriate and fair.

## **Damages**

40. The legal propriety of damages as opposed to compensation by virtue of section 49 of the Employment Act, 2007 was not addressed and in the view of the Court damages as a remedy in the circumstances of this case is incompetent.

## **Certificate of Service**

41. A certificate of service is a statutory right and the Respondent should issue one to the Grievant within 14 days.

## **Conclusion and Orders**

42. The Court finds and holds that the Grievant's employment was unfairly terminated and orders the Respondent to pay him

(a) 1 month pay in lieu of notice Kshs 6,500/-

(b) June 2011 wages Kshs 4,530/-

(c) Compensation Kshs 78,000/-

**TOTAL Kshs 89,030/-**

43. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 3<sup>rd</sup> day of March 2017.**

**Radido Stephen**

**Judge**

## **Appearances**

For Union Mr. Makale, Industrial Relations Officer, Amalgamated Union of Kenya Metal Workers

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates

Court Assistants Nixon/Daisy