



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 373 OF 2015
BETWEE
ABDULLAHI HAJI SALIM
CLAIMANT
VERSUS
NARCOL ALUMINIUM ROLLING MILLS LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Mburu Kariuki & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 5th June 2015. He states he was employed by the Respondent in early 2006, as a Back Roller/ General Worker. He was initially employed as Casual Worker but worked for 9 uninterrupted years. He earned Kshs. 471 per day, as at the time of termination.
2. He states he was involved in a workplace accident and injured on 15th October 2014. He instructed Advocates to make demand for compensation. The Advocates wrote a letter of demand. The Respondent's Personnel Manager Gabriel, summoned the Claimant to his Office on receiving the letter, and suspended the Claimant from duty, effective 11th February 2015 to 4th March 2015. Termination was on the latter date.
3. The Claimant states termination was unfair and unlawful. He was not heard. The Respondent did not enlist the Claimant to any Pension Plan. He was not paid his years of service. He prays the Court to grant him Judgment against the Respondent as follows:-
 - a) 1 month salary in lieu of notice at Kshs. 12,246.

- b) Annual leave for the period of 9 years at Kshs. 89,019.
- c) Service pay at 15 days' salary for every completed year of service at Kshs. 63,585.
- d) Salary for the period under suspension at Kshs. 10,362.
- e) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 156,942.
- f) Punitive damages.
- g) Certificate of Service to issue.

4. The Respondent filed its Statement of Response on 10th August 2015. It agrees the Claimant was its Employee. He suffered some minor injuries at work, over which his Advocates made demand upon the Respondent for compensation. He never returned to work on sustaining injuries. The Respondent did not terminate his contract. The Claim is misconceived. The Respondent prays it is dismissed with costs to the Respondent.

5. The Claimant, and Respondent's Production Engineer/ Supervisor Fred Ongweno Amollo, testified on 8th November 2016 when hearing closed. The dispute was last mentioned on 13th December 2016 when Parties confirmed the filing of their Closing Submissions, and Judgment scheduled for delivery.

6. The Claimant adopted his Witness Statement filed in Court on 5th June 2015, in his evidence. He restates the contents of his Statement of Claim in his Witness Statement.

7. He asked Gabriel the Personnel Manager to have Claimant's suspension made in writing. Gabriel declined and chased the Claimant away from his Office. The Personnel Manager asked the Claimant to see him on 4th March 2015. The Claimant saw Gabriel as instructed on the material day. Gabriel told the Claimant the Claimant's contract had been terminated because the Claimant had expressed his intention to sue the Respondent for work injury. The Claimant was not paid any terminal dues.

8. Cross-examined, the Claimant told the Court he signed a certain book on employment in 2006. The Respondent retained this book. It is not true that the Claimant's name was first entered in this book, in the year 2008.

9. He worked in continuity although casual. He was paid weekly. He did general work when the machine was out of order. There were times there was no available work. The Claimant earned Kshs. 250 per day initially, and Kshs. 471 on exit. He was injured on 15th October 2014. The Respondent paid for his treatment. Personnel Manager gave the Claimant sick leave. If the machine broke down, Employees would be advised to go home. It is not true that Claimant's contract was terminated for infrequent duty attendance. He did not quarrel Gabriel or insult him in any way. The Claimant reiterated termination was on account of his intention to bring Claim against the Respondent for work injury.

10. Amollo told the Court the Claimant worked under his supervision. Amollo was employed in April 2008. The Claimant joined later, on 18th August 2008. Attendance Register shows Claimant joined in 2008. He was injured on 15th October 2014. He was treated and given sick leave of 3 days, not 14 days. He did not report back to work a long time after the injury. He was irregular in attendance of work. Amollo did not note down the specific date the Claimant left, as he was irregular. It was when Management enquired about the Claimant's absence, that Amollo realized the Claimant had not been reporting to work. The Respondent did not act unfairly, and did not terminate Claimant's contract.

11. Amollo testified on cross-examination that he could not confirm that the Claimant worked prior to the year 2008. The Claimant was a General Worker/ Back Roller. He worked elsewhere when the machine broke down. There are no documents showing the number of sick off days given to the Claimant. Amollo could not deny or confirm that Gabriel terminated Claimant's contract on 4th March 2015. He did not

have evidence to show the Claimant irregularly attended work. Management did not enquire into Claimant's absence. His contract was not terminated on the ground that he intended to sue the Respondent for work injury. On redirection, Amollo testified that the Claimant was not placed through a disciplinary process because he was in casual employment. Casuals, in the evidence of Amollo, are not subject to disciplinary processes. It was not necessary for Amollo to write to Management to say a Casual Employee was missing.

The Court Finds:-

12. Parties agree the Claimant was employed by the Respondent as Back Roller / General Worker. His daily rate of pay at Kshs. 471, paid weekly is not disputed. It is agreed that he was injured while at work on 15th October 2014.

13. The Claimant's position is that he wrote demand letter through his Advocates, expressing his intention to sue the Respondent for work injury. Personnel Manager summoned the Claimant to office on receiving the demand letter on 11th February 2015. He suspended the Claimant up to 4th March 2015. When the Claimant reported on 4th March 2015, he was told there was no more work for him. His contract was terminated. He was paid nothing.

14. According to Amollo, the Claimant was injured at work as stated. He was treated. The Respondent paid for treatment. The Claimant did not report back to work for a long time after the injury. The Company did not terminate his contract.

15. On cross-examination, Amollo testified he could not deny or confirm that the Claimant's contract was terminated by Gabriel, as narrated in the Claimant's evidence. Management did not enquire into the Claimant's whereabouts. There are no documents showing what number of sick off days, the Respondent availed to the Claimant.

16. Weighing the evidence of the Claimant against that of Amollo, it is clear to the Court that the Claimant's was more consistent, truthful and believable. How is an Employer unable to confirm or deny whether an Employee's contract has been terminated?

17. Even assuming the Respondent is correct on the date of employment [2008], it is not correct in holding that the Claimant was still in casual employment in the year 2014, and therefore not entitled to a disciplinary process. The Claimant demonstrated he worked for an aggregate number of days qualifying him to be considered as a regular Employee, under Section 37 of the Employment Act 2007.

18. Respondent's Witness was evasive on the date of Claimant's employment testifying that he could not confirm if the Claimant worked before 2008. Section 10 [7] of the Employment Act 2007 places the burden of proving or disproving alleged terms of contract on the Employer. The Respondent did not prove it employed the Claimant in the year 2008. It did not disprove the Claimant's assertion that he was employed in early 2006. The Court upholds early the year 2006, as the date of employment.

19. In all, the Respondent proceeded from the premise that because the Claimant was in its estimation a Casual Employee, he did not have the protections and guarantees extended to regular Employees under the Employment Act 2007. He did not merit a fair disciplinary process; he did not merit annual leave; he did not merit service pay; and notice pay, benefits which would be available in regular employment. The Claimant was entitled to conversion into regular terms under Section 37. The Court is entitled to declare he served on regular terms under the same law.

20. The Respondent did not hear the Claimant, either for the offence of intending to sue the Respondent for work injury; or the offence of desertion. Termination was instigated by the Respondent through its Personnel Manager Gabriel. It was by word of mouth. It was not based on valid reason. Fair procedure was totally absent from the process.

21. The Court is satisfied the Claimant has established his Claim, to the required standard, save for the

prayer on punitive damages.

IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 12,246; accumulated annual leave pay at Kshs. 89,019; service pay at Kshs. 63,585; arrears of salary at Kshs. 10,362; and the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 156,942- total Kshs. 332,154

c) Certificate of Service to issue.

d) Interest granted at 14% per annum from the date of Judgment.

e) No order on the costs.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge