



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.810 OF 2015**

**FRED JOHN OLUNGA .....CLAIMANT**

**VERSUS**

**KENAFRIC INDUSTRIES LTD .....RESPONDENT**

**JUDGEMENT**

The issue in dispute – compensation for unprocedural termination and Injury sustained at work.

1. The Claimant was employed by the Respondent as a Machine Operator and handling heavy machinery from 2009 to 2014. The Claimant reported on several occasions that the machine he operated had a problem but nothing was done by the respondent. On 10<sup>th</sup> May, 2012 while at work the claimant, while working on the machine he had his fingers squeezed and when he tried to pull them out the machine injured him. The Claimant was taken to Avenue Hospital by an ambulance but thereafter he was relieved of his duties for 2 weeks. In June, 2014 the Claimant filed suit against the Respondent for work injury and for damages.

2. In July, 2012 the doctor treating the Claimant recommended that he should only do light duties. The Claimant was also given 14 days off from 12<sup>th</sup> July, 2012 and while taking such leave, the Claimant lost his sister and he informed the Respondent and took additional leave days so as to participate in the funeral arrangements.

3. The claimant stayed at home until the funeral as finalised but when he returned from work the found he had been terminated. The Claimant refused to sign a letter given to him. At the time the August, 2012 salary had not been paid. The Claimant went back in April, 2014 but the new manager told the Claimant that she needed to look at his file before any instructions could be communicated.

4. The claim is that the Claimant believes he was terminated from his employment because he sued the Respondent for damages due to work injuries and the same was not based on any reasonable cause, not justified and unfair. The claim is for;

*a) Untaken leave 10 days in 2012 at Kshs.4, 973.00;*

*b) Untaken leave 24 days 2013 at Kshs.33, 206.60;*

*c) Leave pay, 2012 to 2014 Kshs.64, 655.00;*

*d) Withheld salary July, 2012 to December, 2014 Kshs.374, 999.00;*

e) Notice pay Kshs.12, 931.00;

f) Damages for unfair termination;

5. The Claimant testified in support of his case that upon employment he worked diligently but had an accident, he was treated at the hospital and given 14 days off. At the time he had 22 days of leave. While on off he lost his sister in Busia and had to attend burial. He asked the Respondent for time off to attend. While in Busia for burial he exceeded his leave days by 3 days since he had balance of leave days.

6. When he returned to work the Respondent told him he had sued them for work injury which was true as the injury occurred while at work and the Respondent had not paid. The Claimant was asked to sign some documents but he refused since he did not know the contents.

7. In 2014 the Claimant went back to seek his due but the human resource manager said she did not know him. No termination letter was issued to the Claimant and he is seeking his terminal dues and payment of due salaries to date. Since 2014 the Claimant was denied access at the Respondent premises.

8. The Claimant also testified that on 20<sup>th</sup> February, 2006 he was issued with a warning letter. While at work he got a call from home that his 4<sup>th</sup> born was dead and was required at home. He reported to Ben Wanjala and he was allowed to go for burial and move the body from Uganda in Tororo to Busia and in the process he was late at reporting to work for 2 days. He was issued with a warning letter.

9. In 2010 the Claimant got a warning letter after closing for the year he went to Busia and got sick and delayed to reported back to work for 10 days. He was admitted in hospital and when he reported to work he submitted the sick sheet.

10. In 2012 when the Claimant got injured while at work he was given 2 months off but his termination was without warning, hearing or reasons given.

## **Defence**

11. In defence, the Respondent admits that they employed the Claimant and was injured while at work and treated in hospital. Where the Claimant may have sued the Respondent for work injury, such claim has not been determined. The Claimant failed to report to work and he has not applied seeking readmission back to work.

12. The Claimant had a poor work history. On 18<sup>th</sup> April, 2006 the Claimant was absent from work without permission; on 13<sup>th</sup> January, 201 the Claimant was absent from work without permission for 8 days; on 2<sup>nd</sup> October, 2012 the Claimant was absent from work and in all instances he was issued with a warning. On the last instance the Claimant was issued with a show cause letter but he refused to accept as he had failed to be at work from 14<sup>th</sup> to 26<sup>th</sup> September, 2012. Such absence was without permission.

13. Following the show cause notice, the Respondent met with the Kenya Shoe Leather Workers Union on 16<sup>th</sup> October, 2012 to discuss the claimant's absenteeism and the disciplinary process that had been initiated. It was agreed that the Claimant should resume work on 22<sup>nd</sup> October, 2012 but he did not report. The Respondent wrote to the union seeking to have the Claimant resume work but he continued to abscond duty. All communications were sent to the union.

14. The Claimant as a deserter should not use the court to sanctify his misconduct after deliberately failing to attend work. The Claimant only reported back in 2014 without any explanation but such delay is not permissible and claims made should be dismissed with costs.

15. In evidence, the respondent's witness was Hannah Karuru who testified that as the human resource officer of the Respondent from the work records, the Claimant absconded duty. The Claimant had asked for leave of 14 days and never reported back to work. There was no information with his supervisor on

exceeding leave or any written communication seeking to have leave extended. When the Claimant reported back he was issued with a notice to show cause but he refused to accept it. It was then sent to his union. On 16<sup>th</sup> October, 2012 the Respondent held a meeting with the union and a return to work was agreed. It was a negotiated item as the Claimant was noted to have been attending at a funeral and noting the logistics involved, it was conceded that he should be allowed back. But the Claimant refused to report back to work.

16. A letter of termination was not issued as the notice to show cause was never completed. The union was informed and the Claimant taken as a person who had absconded duty. This cannot be unfair termination of employment

17. At the close of hearing, both parties filed written submissions.

### **Determination**

18. When an employee is sick, unwell or unable to attend work due to ill-health section 31 of the Employment Act vests the duty on the employee to inform the employer of their absence within a reasonable time. A third party is allowed to share such information. Such is necessary as absence from work without due cause is a matter of gross misconduct and warrant summary dismissal under section 44(4) of the Employment Act. Where an employee is therefore absent from work due to illness, even where the employer has work records with telephone details of the subject employee, the duty and responsibility to inform the employer of such circumstances is placed upon the employee.

19. The Claimant testified that when he got sick while at home he called his shift manager, Wanjala. The Claimant was given time off but he exceeded his leave days. The Respondent had his phone contacts but never called him. In 2012 the Claimant had 22 leave days, he took 14 and before that he had been given 2 months sick leave.

20. As such, the Claimant cannot be found to say that the Respondent terminated his employment due to suing the employer for work injury and the suit he had filed. The Respondent took him to hospital; give him time off of 2 months over and above the medical leave given of 14 days. For the Claimant to state that he took more days because he knew he had some leave days not taken is to violate the terms of his days of at the time. Had the Claimant wanted to take his leave days, he never applied or asked to take such days. To fail to attend work as directed and fail to inform the employer on the grounds that the employer had his phone contacts and should have called to find out how the Claimant was doing is to abuse his leave terms and conditions. Such cannot be justified as absence from work without due cause is regulated in law as a condition for summary dismissal.

21. The Claimant does not deny that he was unionised. The Claimant also confirmed that when he reported back to work in 202 and knowing that he had overstayed his leave; he was issued with documents that he refused to accept and or sign. His union was informed of the misconduct of benign absent from work, the union representative and shop stewards were informed and thus, the Respondent dully complied with section 41 of the Employment Act. The refusal by the Claimant to accept communication from the employer on the face of the fact that he reported back to work late, he acknowledged this fact but refused to take and or read what was communicated to him cannot be used to justify any misconduct and resulting termination of his employment.

22. Section 44(3) and (4) of the Employment Act allow summary dismissal on short notice where an employee has fundamentally breached his contract of employment and has absented himself from work without due cause. When the Claimant failed to report to work on time and for several day and when he was given a notice to show cause he refused to accept the same, such justified summary dismissal. The meetings held with the claimant's union confirm that the Respondent went out of their way to allow the Claimant back to work and an agreement that he should report back to work on 22<sup>nd</sup> October, 2012 demonstrate an employer ready to accommodate the claimant. However, the Claimant did not turn up at work. I find no justification for such gross misconduct. The Claimant then turned up in 2014 but he does not explain what he did in between, with his union or why he failed to report back to work before this

time.

23. The claim that the Claimant had 10 days of leave not taken in 2012 is not challenged in any material way. Such is thus due.

24. The Claimant worked until he took the 14 days leave in 2012 and was due back to work on 14<sup>th</sup> September, 2012. He never worked for the Respondent from this day. His union agreed with the Respondent that he should resume work from 22<sup>nd</sup> October, 2012 but he never reported back. No work was offered by the Claimant after 14<sup>th</sup> September, 2012. He cannot claim for any pay or leave after such date.

25. Leave for 5 years as claimed is not justified in evidence or on how this arises. The Claimant was unionised and no agreement is submitted to show how this claim for leave pay for 5 years arise.

26. Notice pay is premised on the evidence that the Claimant was terminated without notice however, on record is the notice to show cause issued to the Claimant which he confirmed that he declined to accept, it was sent to his union which agreed with the Respondent that he should report back to work on 22<sup>nd</sup> October, 2012 but the Claimant did not do so. He cannot thus claim notice pay after failing to attend work.

**Accordingly, the claim is hereby dismissed with costs save that the leave days due shall be paid at Kshs.4, 973.00.**

Dated, signed and read in open court at Nairobi this 15<sup>th</sup> day of June, 2017.

**M.  
JUDGE**

**MBARU**

In the presence of:

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