



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1491 OF 2013**

**CONSOLIDATED WITH**

**CAUSE NO.1492 OF 2013**

**HARUN CHARLES Onsondo .....CLAIMANT**

**AND**

**JOSHUA MUTUNE .....CLAIMANT**

**VERSUS**

**ORBIT ENTERPRISES LIMITED.....RESPONDENT**

**JUDGEMENT**

The Claimants were both employed by the Respondent in June 2010 as Welders. Salary was kshs.11, 300.00 per month. On 6<sup>th</sup> June 2013 the Claimants were verbally dismissed form their employment. There was no notice, heading or reasons given for the termination and the same was unlawful.

The claim is for the dismissal to be rescinded or in the alternative compensation be paid for wrongful and unfair dismissal of the claimant; terminal dues be paid in accordance with the Employment Act; salaries due until retirement at 60 years and costs.

In evidence, Charles Onsondo testified that upon employment by the Respondent in 2010 he was a *fundi* and he worked in Westlands and in Arthi River areas. On 6<sup>th</sup> June 2013 he reported to work and his supervisor told him that there was no work for him. Harrish was the manager and he did not allow them back to work. The due salary was not paid and there was no prior notice of any misconduct. The last day at work was 6<sup>th</sup> June 2013. His last salary was kshs.12, 500.00 per month.

In cross-examination the Claimant testified that he was supervised by Macharia but the manager was Harris. Samuel was the Shop steward. On 6<sup>th</sup> June 2013 the Claimant was at work and he spoke to Harris but he was not allowed to sign in. he was with Joshua who was also dismissed. They were both made to change clothes but were not allowed to work.

Joshua Mutune also testified that upon employment by the Respondent he worked diligently. On 6<sup>th</sup> June 2013 his supervisor was Harish at Arthi River. He was assigned work with 4 others – Charles, Jomutha and his son and the claimant. He reported to work at 7.30am but the Respondent officers rejected his card that had to be signed for him to be recorded for the day. Harish took his card and told the Claimant he had no work and should go to the office. He found Mr Macharia who promised to address his problems.

Macharia sent him to the head office in Westlands where he found Herman who told him to go away but was not paid his dues. There was no notice or reasons given.

In cross-examination the Claimant testified that he was working with Charles Ongondo but only learnt later that he had been terminated on the same day. On 6<sup>th</sup> June 2013 he worked from morning to 4.30pm but Harish refused to sign his card. Herman did not give him a hearing or pay his terminal dues.

## **Defence**

In defence, the Respondent case is that the Claimants were employed on 1<sup>st</sup> March 2010 at a monthly salary of Kshs.9, 150.00 and at the time of termination they were earning kshs.8, 905.00 per month and a house allowance of kshs.3, 400.00 per month. On 6<sup>th</sup> June 2013 the Claimants were assigned work at the quarry by Mr Macharia their supervisor but they failed to do so and used insulting language toward the supervisor. A meeting was held on 12<sup>th</sup> June 2013 to resolve the matter when the shop steward Mr Samuel Imbebi was present but the Claimant walked out. On 13<sup>th</sup> June 2013 the Respondent wrote to the union of Kenya Quarry & Mines Workers Union regarding the case. The claimant's advocate did a demand letter but the Respondent was still discussing with the union. The Respondent emphasised the fact that the Claimants had not been dismissed they just refused to work.

The defence is also that on 3<sup>rd</sup> March 2012 the Claimant participated in an illegal strike over late salary payment. Upon request to explain the same they Claimants admitted to participating in an illegal strike and apologised. The Claimant left work on his own volition and has never returned back to work. The claims should be dismissed with costs.

In evidence, the Respondent called Samuel Imbebi Akhalira the shop steward and a Machine Operator with the respondent. He is also a member of the Kenya Mining & Quarry Workers Union. He worked with the Claimants who complained that their day on 6<sup>th</sup> June 2013 had been cancelled. Macharia had to investigate. He asked the Claimants to proceed for work and have a meeting at 1pm but they refused and insisted that their complaints must be heard first. At 1pm he took the Claimants to the quarry office and present were Macharia, Harish, Site supervisor and the witness. The supervisor said that when the Claimants were allocated duty, they were found on their cell phones and despite verbal warnings, the Claimants kept going back and forth on phone and did not attend to their work. There was an exchange that almost resulted in a fight. This was the reasons the cards were cancelled.

Sammy Kuria Mburu also testified that he works at the Respondent head office as a Clerk. He gets reports from the field. He got a message from the quarry that the Claimants would come to his office. There was a meeting with the Nyoro for the union. The Claimants refused to attend. The Claimants were never dismissed from work they refused to attend as directed.

It is not in dispute that the Claimants were unionised under the Kenya Quarry & Mine Workers Union. With such unionisation, any matter arising out of the work place, the first point of call was with the shop steward. Mr Imbebi testified that he was the shop steward and worked with the claimants. On 6<sup>th</sup> June 2013 there was a misunderstanding at the place of work but he advised the Claimants to proceed to work and have a meeting at 1pm but they declined to oblige.

In the contested evidence from both sides, on record is the letter dated 13<sup>th</sup> June 2013 from the Respondent to the union noting that the Claimants had refused to work and despite the intervention of the shop steward the Claimants were using insulting language towards the Quarry in charge Mr Macharia. The union also wrote to the demand of the claimant's advocate noting that the Claimants had absconded duty.

Where an employee absconds duty, refused to work or refused to take directions given by the employer and where an employee uses abusive language while at work, section 44(4) of the Employment Act apply. Such an employee is to be given a hearing as required under section 41(2) of the Act. The matters set out under section 44 of the Act allow summary dismissal with short notice as the case may be depending on

the circumstances of the case. Where there is a union involved, the union upon notification of the misconduct of their member, the applicable agreement with the employer should be put into account. In this case, the shop steward did his fact finding on the material day of 6<sup>th</sup> June 2013 and found the Claimants to be at fault. However, the letter from the union dated 13<sup>th</sup> August 2013 suggest that the union agreed with the findings of the Respondent that the Claimants refused to work. There is no independent meeting/consultation or effort shown by the union or Respondent where the claimant's case was addressed. A forum where the Claimants were given a hearing to defend themselves. Where the Claimants were summoned at the head office, such is not documented. Where the Claimants were summoned and refused to attend, the Respondent seem to have been satisfied that the union was addressing the matter. However, the employer has the responsibility to pursue an errant employee and upon failure to oblige as directed, issue appropriate notice or letter of dismissal.

It is therefore not just sufficient to state that the employee absconded duty. Efforts must be shown that the employer, with the full details of their employee made effort to hear such an employee and such efforts were frustrated. Even where the employee is unionised. The subject and right-holder here is the employee.

I therefore find justification in the claimant's evidence that they were verbally dismissed, no reason was given and such dismissal was without reason. Such is procedurally unfair.

The Claimants are seeking to be reinstated. However, where Claimants are said to have absconded duty; used abusive language on their supervisor; and refused to work as allocated, such are matters that have broken trust between the parties and to return the Claimants to such an environment will not be conducive.

Where due process is not followed, compensation is due under the provisions of section 49 of the Employment Act. However in making the assessment of dues payable, the previous misconduct of the employee must be put into account. Charles Ongondo had a case of misconduct vide his letter of apology dated 26<sup>th</sup> March 2012. This was not so long before the dismissal. The matters set out in the *apology* are gross. Such relates to plans for industrial action against the respondent. With the admissions therein, and the fact that this was not challenged in the claim or in evidence, I take it the Claimant is aware of the events leading to this apology. Such conduct comes to bear in proceedings such as this one.

**In conclusion therefore, the Claimants shall not be reinstated. Judgement is entered for the claimants; Charles Ongondo Haron is awarded compensation for one Month at as his last gross pay of Kshs.12,305.00; Joshua Mutune is awarded 3 months' pay in compensation all being Kshs.36,915.00.**

**Each party shall bear their own costs.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 7<sup>TH</sup> APRIL 2016.**

**M. MBARU**

**JUDGE**

In the presence of

.....  
.....