



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 689 OF 2013**  
**JOSEPH WAMBUA MUSEMBI.....CLAIMANT**

**VERSUS**

**ATHI RIVER STEEL PLANT LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant in this suit seeks the judgment of this Court that there be a declaration that the termination of services was unlawful and unfair and therefore he is entitled to payment of his terminal dues and compensatory damages which he has quantified at Kshs.163,200/=.
2. He states that from August, 2006 he was employed by the Respondent as a general labourer and worked as such continuously with due diligence until October, 2011 by the Respondent dismissed him after he sought through an advocate, compensation for injuries he sustained while he was at work. He averred that he was neither offered a hearing nor an explanation prior to his dismissal.
3. The Respondent admitted employing the Claimant but denies that his services were wrongfully and or unfairly terminated.
4. According to the Respondent, the claimant in the months of August and September absented himself from work on several occasions without excuse or explanation or lawful cause. To this end the Respondent attached attendance sheet for the month of August and a few days of September, 2011 to vouch for this.
5. Regarding the claim for leave, the Respondent averred that the Claimant is not entitled to make this claim since he was paid for leave each year worked. The Respondent attached copies of leave payment sheets for the years 2009-2011 signed by the claimant.
6. In his evidence at the trial, the Claimant reiterated the averments in his memorandum of claim.
7. When he was shown appendix 3 in the Respondent's bundle of documents which showed him to have signed for receiving some money he stated that the payment was for his two weeks' pay and that the leave allowance was too low. He also admitted receiving his leave allowance for 2009.
8. Concerning absence from work exhibited by appendix 1 in the Respondent's bundle of

documents, he stated that the days he was shown absent he was unwell.

9. On the part of the Respondent, Christopher Wangombe testified that the claimant's services were not terminated because he took the respondent to Court. According to Mr. Wangombe the claimant last working day was 11<sup>th</sup> September, 2011. He described the Claimant as an on and off employee.

10. In cross-examination, he stated that the claimant was never warned over his absence from work.

11. The onus of proving the termination of employment was unfair and or wrongful rests with the employee while that of justifying reason for dismissal rests with the employer.

12. It is common ground that the claimant was absent from work from time to time. According to the Respondent, the Claimant was an on and off worker while according to the Claimant the days he was absent he was unwell.

13. The Respondent to vouch for the assertion that the Claimant was habitually absent from work exhibited before the Court attendance sheets showing when the Claimant was absent. The Claimant on its part apart from averments in his pleadings and testimony in Court never produced or exhibited any document or called any witness to vouch for his assertion that he was unwell on the days he was away from work and that the nature of illness was such that it was not possible to attend work. The Claimant further did not produce any evidence or allege in his memorandum of claim how he attempted to communicate his absence from work.

14. The Respondent has further on its part demonstrated that the demand letter from Musili Mbithi the basis upon which he claimed to have been dismissed was issued on 8<sup>th</sup> April, 2013 yet the Claimant had averred that he was dismissed in August, 2010 on account of the said demand letter which sought admission of liability to compensate the claimant on account of injuries he sustained at work.

15. Taking the foregoing analysis into account and considering the balance of proof as settled in civil claims, the respondent has reasonably demonstrated that the Claimant more probably than not absconded from work. Absence from work without permission or lawful cause is one of the grounds for summary dismissal. To this extent even if the Court were to find that the Respondent dismissed the claimant which is not the case here, such dismissal would have been justifiable.

16. The Court therefore finds this claim without merit and dismisses the same with costs.

17. It is so ordered.

Dated at Nairobi this 6<sup>th</sup> day of February 2015

Abuodha J. N.

Judge

Delivered this 6<sup>th</sup> day of February 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge