



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 277 OF 2014

BETWEEN

BERNARD GONZALE LANDO..... CLAIMANT

VERSUS

MEHTA ELECTRICAL LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Anaya Advocate, instructed by Matete Mwelese & Company Advocates for the Claimant

Mr. Tole Advocate, instructed by Ndegwa, Muthama & Katisya Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. The Claimant filed his Statement of Claim on 18th June 2014. He alleges he was employed by the Respondent Company as a General Casual Worker on the 3rd November 2011. He was appointed as an Ungraded Electrician on 2nd July 2012. He was dismissed by the Respondent verbally on 11th April 2014. The Respondent justified its decision on grounds that the Claimant had been intermittently sick, which called for the Respondent to further investigate; Supervisors at the Site were not willing to work with the Claimant; absenteeism; and that the Claimant did not perform his role well in the past 2 years. The Claimant feels he was unfairly and unlawfully treated by the Respondent and prays for the following orders:-

- a) A declaration that the Claimant was entitled to 1 month leave after every 12 months;
- b) Investigation and calculation of underpayments to the Claimant and payment by the Respondent of the same;
- c) A declaration that the Claimant's employment was on a contract basis;

- d) Certificate of service to issue;
- e) 3 months' salary in lieu of notice at Kshs. 39,606;
- f) Leave for 2012 at Kshs. 13,202;
- g) 1 week sick off at Kshs. 3,080;
- h) Salary for April at Kshs. 13,202;
- i) Compensation for unfair termination at Kshs. 158,424;

Total..... Kshs. 227,514

- j) Costs; and
- k) Any other suitable relief.

2. The Respondent filed its Statement of Response on 1st July 2014. The Respondent states it employed the Claimant as a Casual Ungraded Artisan. His contract required him to work at any Site assigned by the Respondent, under the Site Foreman. He failed, neglected, and/or refused to present himself to the assigned Site and Foreman. He absented himself. He ignored the Respondent's written instructions of 24th April 2014 to report for duty. Instead he instructed Advocates to write a demand letter to the Respondent on the same date- 24th April 2014-alleging his contract was unlawfully terminated. The Respondent paid him all the statutory dues after he left work. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified, and closed his case, on the 27th October 2014. The Respondent testified through its Site Supervisor, Stephen Omondi Ogola, on the 7th November 2014 when hearing closed. The Claimant confirmed the filing of his Closing Submissions to the Court on 5th December 2014, and Award reserved for 13th March 2015. The Respondent does not seem to have filed its Closing Submissions as had been directed at the end of the hearing.

4. Mr. Lando testified he was initially engaged by the Respondent as a Casual Employee, on 3rd November 2011. He was appointed on permanent terms on 2nd July 2012. He earned a salary of Kshs. 11,580. He worked up to 11th April 2014. He reported to Site. The Foreman did not assign him any duties. He was told by the Foreman to explain why he had absented himself. Lando testified he had been unwell and the Office was aware. He gave the Respondent medical documents from Bomu Hospital where he had been treated on 1st April 2012. He was suffering from Tuberculosis. He had the permission of his Supervisor.

5. This explanation was not sufficient to the Foreman. The Claimant was told he was contagious, and should not have reported to work. He should have instead presented himself at Port Reitz Hospital Mombasa, which specialized in TB treatment. He was told by a Mr. Kira- he did not know Kira's position in the Enterprise- that he should not report again for duty. The Claimant was not paid his terminal dues. He instructed Advocates to make demand for terminal dues and compensation. The Respondent answered alleging the Claimant absented himself. There was no enquiry made by the Respondent on the Claimant's absence. He had worked for 2 years. No warning issued. No notice was given and no reasons were given for termination. The Attendance Register attached to the Response showed an Employee who was absent was marked as such in the Register. Against the Claimant's name, he was not marked as absent; the space was left blank.

6. Cross-examined, the Claimant testified he was employed in 2011 and dismissed on 11th April 2014. There was Site Foreman and Supervisor. The Supervisor was responsible for giving Employees leave of

absence. The Supervisor was named Steve. The Claimant was unwell, suffering from TB. He sought medical attention. The illness did not affect the Claimant's capacity for work. The Hospital gave him 1 week sick-off from 11th April 2014. It is not true as alleged by the Respondent that the Claimant was apportioned duty on 11th April 2014. There was no requirement that the Claimant writes to the Employer, informing the Employer he would be absent. He was not issued a letter of termination. The Respondent answered the Claimant's demand letter and gave reasons for dismissal. He received no warning. It was incorrect to say an Employee had to sign against the Register on reporting to work. The Claimant's signature was shown to be missing in the Register on various days. He was absent on these days. Redirected, the Claimant testified he had the permission of his Supervisor to be absent, and need not therefore, have written to explain his absence. His Supervisor told the Claimant he could not continue working because he could contaminate others. The Claimant urges the Court to uphold his Claim.

7. Mr. Ogola testified his Company deals in electrical general installation. He was a Site Supervisor from 2013. The Claimant was under his supervision at the Nakumatt Likoni Site. The Claimant failed to report for duty from 24th March 2014 to 28th March 2014. Normally, Employees signed the Attendance Register on reporting for duty. There is no signature when they do not show up. The Register captured dates when the Claimant was absent. He did not have the permission of the Respondent. Ogola did not know of the Claimant's whereabouts. The Claimant returned to work on 29th March 2014. He did not explain his absence. He did not avail any medical records to the Respondent. He alleged he was unwell.

8. He said he was ready to work. He worked on 29th March 2014. He was asked by Ogola to prove to the Head Office that he was unwell during his absence. He did not report to work on 1st April 2014. On 11th April 2014, he called Ogola who advised him to report to the Head Office. The Office Manager instructed the Claimant to be reporting to the Head Office henceforth. He did not report after 11th April 2014. The Respondent wrote to him requiring an explanation. He did not explain. He was paid his dues.

9. Ogola testified on cross-examination that the Claimant informed him he was ailing. The Claimant said he was receiving treatment. The Supervisor Ogola advised the Claimant to report to the General Manager at the Head Office. The Manager-In-Charge was Mr. Kira. Ogola did not know if the Claimant was advised to be reporting to the Head Office because of his illness. He did not know if the illness kept the Claimant away from duty. He did not know that the Claimant was told to keep away from the Workplace by Kira because of the TB. The Register did not indicate the Claimant was absent even when he was away. This was because the Respondent did not know of his whereabouts. He did not notify the Respondent he would be away. Ogola was not involved in salary payments. The pay slip is unsigned. The Respondent did not counter-claim notice pay. Termination was fair. The Claimant was not victimized on the basis that he had TB. Ogola does not know where Kira is today. Ogola himself left Mombasa for his current posting in Kiambu, in May 2014. The Respondent urges the Court to dismiss the Claim.

10. The Claimant submits he was summarily dismissed on the ground that he was contagious. This was done by the Manager Mr. Kira. He was not heard contrary to his procedural guarantees under Section 41 of the Employment Act 2007. Relying on the ***Industrial Court at Nakuru, Cause Number 60 of 2013 between A.M.M v. Spin Knit Limited***, the Claimant submits the termination was unfair for want of due process. There was no evidence that the Claimant absconded. Ogola was not the Officer who dismissed the Claimant; he was not present when dismissal took place; and was compelled by the Respondent to testify to conceal the Respondent's ill behaviour. The Respondent did not show any laid down procedure for reporting when sick as laid down in ***the Industrial Court at Nairobi, Case of Sylvester Oduor Othwila v. Phoenix Aviation Limited [2014] e-KLR***. The Claimant urges the Court to find that the Respondent failed to justify termination and allow the Claim.

The Court Finds and Awards:-

11. The Claimant was first employed by the Respondent Company as a General Labourer, on casual basis, effective from 31st October 2011, earning a daily rate of Kshs. 300. The letter appointing him as such is dated 28th October 2011. The Claimant was subsequently placed on other short term contracts. On 2nd July 2012, he was appointed in an indeterminate contract as Ungraded Artisan, earning Kshs. 11,580

basic salary per month; house allowance of Kshs. 2,316; and tool allowance of Kshs. 300. This was the position served as of 11th April 2014, when he alleges to have been summarily dismissed by the Respondent. His basic salary however is shown to have been Kshs. 13,202 in the last pay slip. The Parties did not explain to the Court what became of the house rent allowance.

12. The Respondent through Mr. Ogola testified the Claimant absented himself from duty without the leave of the Respondent, between 24th March 2014 and 28th March 2014. He reported on 29th March 2014, worked the whole day but disappeared again from 1st April 2014. He communicated with Mr. Ogola on 11th April 2014, who advised the Claimant to report to the Head Office. The Claimant was advised to be reporting to the Head Office, but after 11th April 2014, failed to do so. The Respondent seems to have treated the Claimant's contract as terminated, as it is the evidence of the Respondent that the Claimant was subsequently paid terminal benefits. The Respondent exhibited a letter dated 24th April 2014, asking the Claimant to explain why he failed to report to the Head Office as instructed, and warning disciplinary action would be taken against him.

13. The Claimant refutes the Respondent's version, insisting he was summarily dismissed through the Manager Kira on 11th April 2014, on the ground that he was suffering from TB and was a risk to his Co-Employees.

14. The issues in dispute can be narrowed down to the following:

- a) Whether the Claimant deserted duty or was summarily dismissed on the basis of his TB infection; and
- b) Whether the Claimant merits the terminal dues, compensation, costs and any other suitable relief as prayed.

15. The Court has no hesitation in finding that the Claimant was not absent without lawful cause. He was suffering from TB. Medical evidence was availed to the Respondent. The Respondent's Management was informed by the Claimant that he was under treatment at Bomu Hospital. Mr. Kira the Manager opted not to testify, but according to the Claimant it was him who summarily dismissed the Claimant, on the ground that the Claimant was contagious. The Court has no reason to disbelieve the evidence of the Claimant that he was told by the Manager he ought to have been at Port Reitz Hospital, not at work exposing others to the infection. The Court does not think the evidence by the Respondent that the Claimant deserted duty, was convincing.

16. The letter warning the Claimant that disciplinary action would be taken against him for deserting work is dated 24th April 2014. It was written precisely because the Claimant had on 24th April 2014, written his demand letter through his Advocates, asking the Respondent to remedy the unfair termination. It was given the same date as the Claimant's demand letter, to enable the Respondent's Advocates make their Response dated 15th May 2014.

17. If the Respondent was serious about disciplining the Claimant, why did it not invite the Claimant to a disciplinary hearing after 24th April 2014?

18. The more believable version is that told by the Claimant. He acknowledges he had been ill, compelling him to be absent, after which he presented medical evidence to the Respondent that he was on TB treatment. He was asked by his Supervisor to report to the Head Office. The Manager then asked the Claimant to leave employment, not only because of the fear that the Claimant was contagious, but perhaps also, on considering the effect the Claimant's incessant absence from work, was having on production.

19. How is an Employer to respond where an Employee is afflicted with infectious disease? Section 6 of the Occupational Safety and Health Act Number 15 of 2007 requires the Occupier [which under the Act

includes Employer], to ensure the Workplace is healthy and safe to all Employees, other Staff, Customers and other Persons who visit the Workplace. Employers must therefore provide all Employees with working conditions that are free of known dangers. Section 8 of the Act bars Employers from victimizing Employees who may complain about an issue that poses risk to their safety and health at the Workplace.

20. The focus, where an Employee has been diagnosed with an infectious disease, should not only be on the particular Employee, but on the other Employees and other Persons at risk of exposure. The Employer should engage the Local Health Authorities and in particular the Directorate of Occupational Safety and Health, in responding to the emergency posed by the presence of the infectious disease at the Workplace. The Employer should always comply with the law relating to reporting of infectious disease at the Workplace.

21. The law recognizes infectious disease at the Workplace as being a Public Health issue which the Employer must take seriously, as much as it is the individual Employee's illness, over which he or she must take responsibility. Section 13 of the Act requires the Employee to ensure his own safety and health, and the safety and health of other Persons, who may be affected by his acts or omissions at the Workplace. Section 10 compels the Employee to cooperate with the Employer, and comply with any safety and health procedures, requirements and instructions. In some jurisdictions, the Employer is required to ask the afflicted Employee to provide a return-to-work release from a qualified Healthcare Provider. In the absence of such release, the Employer should follow the law and its Workplace Human Resource Policy and Procedure on Sick Leave, and other forms of Leave, before allowing the Employee back at work.

22. The Claimant revealed to the Employer that he was infected with TB. He sought medical attention. He appears to have acted responsibly. The Respondent did not act as required under the Employment Act 2007 and in particular under the Occupational Safety and Health Act 2007. There were no measures shown to have been taken to bring the issue to the attention of the Health Authorities. The Respondent offered the Claimant no assistance and adopted the wrong approach in stigmatizing, and dismissing the Claimant, to minimize the risk of the infection spreading at the Workplace.

23. The reasons given by the Respondent in justifying its decision were not valid. There is nothing to show the Claimant absented himself from work without lawful cause. The issue about the Claimant's performance alluded to in the Pleadings, was a non-issue. There was no evidence of Supervisors being unwilling to work with the Claimant.

24. What remedies are merited? The Claimant was in the end harshly treated for being sick and lost employment. ***He is granted the equivalent of 12 months' gross salary which the Court computes at Kshs. 13,202 + house rent allowance of Kshs. 2,316 = Kshs. 15,518 x 12 =Kshs. 186,216 in compensation for unfair termination.***

25. ***He is allowed 1 month basic salary at Kshs. 13,202 as notice pay.***

26. Although the Respondent generated a pay slip for April 2014, indicating the Claimant's dues were calculated for the entire month, there was no evidence of payment, and it was not even explained to the Court why one, who deserted work, on 11th April 2014, should receive the entire month's salary. The Claimant similarly attempted to mislead the Court asking for salary for the entire April 2014, while he ceased working on 11th April 2014. ***He is granted 11 days' salary for work done in April 2014, calculated at Kshs. 15,518 divide by 26 working days =Kshs. 596 x 11 days worked= Kshs. 6,556.***

27. There were no records given by the Respondent showing the Claimant took his annual leave of 24 days in 2012. There was no explanation why the Claimant was not allowed to take annual leave of 24 days in accordance with his contract, or why he was not compensated in lieu of leave. He had been working for the Respondent from 31st October 2011. ***He is granted annual leave pay of 24 days, calculated at Kshs. 596 x 24 = 14,304.***

28. He claims 1 week sick off at Kshs. 3,080. He was not clear on the nature of this claim. Was this the

money deducted from his pay on account of his absence? The Court does not think the Claimant gave evidence to justify grant of the item. It is declined. Other prayers of a declarative nature add no value to this Award. ***It is sufficient to declare that the Claimant's contract was unfairly terminated. The Claimant shall have his Certificate of Service. No order on the Costs.***

In sum, it is Ordered:-

- a) ***It is declared termination was unfair;***
- b) ***The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant 12 months' gross salary in compensation at Kshs. 186, 216; 1 month basic salary in notice pay at Kshs. 13,202; 11 days' salary at Kshs. 6,556; annual leave pay at Kshs. 14,304- total Kshs. 220,278;***
- c) ***The Respondent to release the Claimant's Certificate of Service forthwith; and***
- d) ***No order on the costs.***

Dated and delivered at Mombasa this 13th day of March 2015

James Rika

Judge