



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 197 OF 2014

BETWEEN

LUCAS BUKO STEPHEN CLAIMANT

VERSUS

DEVKI STEEL MILLS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Charles Gomba Advocate instructed by Charles Gomba & Company Advocates for the Claimant

Mr. Matheka Advocate instructed by Maira & Ndegwa 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 Amended Statement of Claim on 3rd June 2014. The Respondent filed its Response on 15th May 2014. The Claimant gave evidence and closed his case on 20th November 2014. The Human Resource Manager Enock Kiptum gave evidence for the Respondent on the same date, bringing the hearing to a close.

2. The Claimant states he was employed by the Respondent Steel Company around October 2010, in the position of a Furnace Charger, earning a salary of Kshs. 11,255 per month. He was not issued a written contract. His salary was increased to Kshs. 12,468 per month, in recognition of his hard work and dedication. On or about 14th February 2014, some metals were reportedly stolen from the Respondent. The Claimant was in a group of Employees implicated in the theft. He protested his innocence, but was summarily dismissed by the Respondent on 15th February 2014, as a result of the alleged theft. He was not warned, notified or given the reason for termination. *He claims from the Respondent 1 month salary in lieu of notice at Kshs. 12,468; accrued annual leave at Kshs. 7,878 for the year 2012 and Kshs. 8,727 for the year 2013; 12 months' salary in compensation at Kshs. 149,616; certificate of service; costs; and interest at Court rate.*

3. He testified that he worked for the Respondent from October 2010. He was a Furnace Charger. He last earned a monthly salary of Kshs. 12,468. He was found carrying metal home from the factory, on the 14th February 2014. The metal was not stolen. He was summoned by the Management on 15th February 2014 and summarily dismissed. He was not granted the opportunity to defend himself. He was not paid his full terminal benefits; he was only offered the salary for days worked. He conceded on cross-examination that the metal he was found carting away from the factory was scrap metal; he had not been authorized to have the metal. He wrote to the Respondent on the 15th February 2014 conceding the offence, and seeking pardon from the Respondent. He explained on redirection that he wrote this letter of admission and apology under duress. He was not heard. He prays the Court to allow his Claim.

4. Enock Kiptum testified the Claimant was initially employed by the Respondent in the year 2011. The Plant closed down, Employees' contracts terminated and terminal benefits paid to them, in May 2013. The closedown was necessitated by lack of raw material. The Respondent resumed operations in August 2013, re-employing the staff including the Claimant, who worked as a Furnace Charger.

5. The Claimant was found by the Security Guards on the 14th February 2014, stealing the Respondent's scrap metal. He admitted the offence and apologized to the Respondent in writing. He explained that he engaged in the offence because he was broke. It was confirmed by the Security Guards that the Claimant was a habitual scrap metal thief. The Respondent decided to terminate the Claimant's contract on the ground of gross misconduct. He was always paid his monthly dues on time. He was paid for days worked on termination. He was not owed any annual leave days. Each year, he was paid pro-rata leave. This is captured in the Pay Roll at page 8 of the Statement of Response, where the Claimant was paid Kshs. 3,698 in lieu of annual leave.

6. The Witness testified further on cross-examination that he holds a higher diploma in Human Resource Management. The Employees were paid accrued annual leave, severance and leave allowance when the Company was forced to close down due to insufficiency of raw material. The Respondent followed the redundancy law in the exercise. The Claimant was found to have the scrap metal on 14th February 2014. He was heard the whole of 15th February 2014. His offence was criminal in nature. He was not given a written notice of the hearing; the notice was verbal. The Respondent had the discretion to institute criminal proceedings against the Claimant. He implored the Respondent not to refer him to the Police for the sake of his family. The disciplinary meeting was attended by the Claimant, his Supervisor, and Assistant Security Guard. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.

The Court Finds:-

7. The Claimant was employed by the Respondent as a Furnace Charger, initially in October 2010. He was not issued a written contract at the beginning. He formally was absorbed as an Employee of the Respondent through a written contract effective from 17th October 2011. His salary under this contract was Kshs. 11,255 per month. Clause 5 of the contract suggested the Plant could be closed due to lack of raw material. The Plant was closed sometime in May 2013 for want of raw material. The Claimant alongside his Co-Employees left employment under what was deemed a redundancy situation. The Plant was able to resume production in August 2013. The Claimant was re-employed, through a contract effective from 7th August 2013, and his salary adjusted to Kshs. 12,468 per month.

8. He was summarily dismissed with effect from 14th February 2014. The reason given by the Respondent in justifying the dismissal decision, was that the Claimant had stolen scrap metal from the Respondent.

9. Was this, a valid termination reason, and was the decision arrived at fairly, under Sections 41, 43, 44 and 45 of the Employment Act 2007? Does the Claimant merit the terminal benefits and compensation for unfair termination as detailed in the Statement of Claim?

10. There is no doubt the Claimant was caught in the act of stealing his Employer's scrap metal. He conceded the offence and wrote the letter apologizing. He did not deny the offence at the workplace and

his vague statement in Court to the effect that the scrap metal was not stolen, is not worthy of belief. The Respondent had the choice to institute or not institute criminal proceedings against the Claimant. Fortunately for the Claimant the Respondent opted to treat the offence entirely, as an employment offence. It is absurd for the Claimant to argue that by exercising its discretion as it did in the matter, the Respondent absolved the Claimant of any wrongdoing. The Respondent was able to prove the reason for termination, show the reason was fair and valid in justifying termination, as required under the Employment Act 2007.

11. There was no hearing given to the Claimant. The offence took place on 14th February 2014. The Respondent alleges to have heard the Claimant the whole of 15th February 2014. There was no record of the alleged hearing shown to the Court. The Respondent's Witness did not persuade the Court that such a hearing as granted under Sections 41 and 45 of the Employment Act 2007 was given to the Claimant. There were no written charges; there was no written notice of the hearing; the Claimant was not advised of his right to be present at the hearing accompanied by a shop floor representative of his trade union or a workmate; there was no evidence of a panel constituted to hear the Claimant out; and summary dismissal followed almost immediately after the commission of the offence. The law requires that the Employee is heard, even in cases where admission of the offence has been made. The Employee must be allowed the opportunity to defend, explain and mitigate his case. At the end of a fair process, the form of punishment where these procedural steps have been observed might be anything else less than outright loss of employment. However grave the offence, it is therefore always important to give the Employee a fair hearing. This was lacking in the termination process. ***The Court allows the Claimant minimal compensation of 1 month salary at Kshs. 12,648.***

12. The Claimant does not merit 1 month salary in lieu of notice. He was engaged in an act of admitted gross misconduct. The Respondent was justified in summarily dismissing the Claimant for gross misconduct under Section 44[4] of the Employment Act 2007. It was demonstrated by the Respondent that the Claimant was paid cash in lieu of annual leave. The Pay Roll Summary for December 2013, Respondent's Exhibit 8, shows the Claimant received Kshs. 3,698 in leave encashment. Paragraph 6 of his Statement of Claim, and his evidence, to the effect that he was forced to work continuously for the whole year without annual leave, is incorrect. The Pay Roll Summary for June 2013 similarly supports the Respondent's position on annual leave, showing the Claimant had 7 days of pending annual leave, which were paid at Kshs. 3,357. The claim for annual leave pay is rejected.

13. Section 51 of the Employment Act 2007 requires the Employer to issue an Employee Certificate of Service upon termination of his employment, unless the employment was for a period of less than 4 consecutive weeks. The Claimant merits and shall be issued his Certificate of Service forthwith.

The Court Awards and Orders:-

- a. ***Termination of the Claimant's contract of employment was unfair on account of procedure;***
- b. ***The Respondent shall pay to the Claimant 1 month salary in compensation for unfair termination at Kshs. 12,468;***
- c. ***Certificate of Service to issue; and***
- d. ***Other prayers are rejected.***

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

James Rika

Judge