



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 237 OF 2013**  
**BETWEEN**  
**KENYA BUILDING, CONSTRUCTION, TIMBER**  
**AND FURNITURE INDUSTRIES EMPLOYEES UNION.....CLAIMANT**  
**VERSUS**  
**COSMINO ROSAFIO.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Ms. Chege Industrial Relations Officer for the Claimant*

*Mr. Cosmino Rosafio the Claimant in Person*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

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

1. The Claimant is a registered Trade Union, representing Unionisable Employees in the Building and Construction Industry. This Claim was filed by the Claimant Union on behalf of its 37 Members [Grievants], who were alleged to have been employed by the Respondent in various positions, in his construction business. The 37 Grievants are named as follows:

1. Changawa Katana
2. Charo Kaingu
3. Charo Kazungu

4. Christopher Katana
5. Daniel Kadzitu
6. Daniel Kahindi
7. Dzombo Hare
8. Fondo Simon
9. Furaha Mwaringa
10. Joseph Katana
11. Juma Kenga
12. Kahindi Karisa
13. Kapembe Mnogo
14. Karabu Katana
15. Karisa Chanzera
16. Kasena Kadenge
17. Katana Tsuma
18. Katana Baya
19. Katana Kiti
20. Katoi Kazungu
21. Katsele Charo
22. Kazungu Chengo
23. Kesi Fundi
24. Michael Katana
25. Mraba Mweni
26. Mwangome Katana
27. Ngumbao Kaingu
28. Omar Kaingu
29. Raphael Kenga
30. Richard Kazungu
31. Robert Mealimu

32. Samwel Kasiwa
33. Sebastian Kitsao
34. Thadeus Katana
35. Thomas Kazungu
36. William Baya
37. Tyson Fodo.

2. The Claimant states the Respondent did not pay the Grievants their terminal benefits at the end of their contracts. Termination was on 8<sup>th</sup> May 2004. It is alleged the Respondent had agreed, but later reneged, to pay to the 37 Grievants terminal dues comprising arrears of wages; overtime pay; annual leave pay; notice pay; and holiday pay, as tabulated in the Schedules attached to the Claim as appendix 'B'.

3. The dispute was formally reported to the Minister for Labour sometime in 2005. An Investigator was appointed to investigate the dispute and prepared a Report dated 1<sup>st</sup> October 2010. The Investigator confirmed: -

- a. The 37 Grievants were Employees of Cosmino Rosafio.
- b. Their services were terminated by the Respondent after they decided to join the Trade Union.
- c. They were paid wages of Kshs. 150 per day, which was below the minimum wage of Kshs. 161.50 applicable at the material time.
- d. They worked excess hours without overtime pay.
- e. They did not go on annual leave and did not receive pay in lieu of annual leave.
- f. Before the report was made to the Minister, the Respondent computed the sums due to the Grievants at a total of Kshs. 286,547, which he accepted to pay. The Respondent committed to pay this amount in the presence of the Trade Union Officials and the District Labour Officer.

4. The Respondent did not file any Appearance or Response in Court, until 29<sup>th</sup> December 2014. The record indicates the Respondent had been granted leave earlier to file his Response, but did not comply. The belated Statement of Response was filed after the Court directed on 10<sup>th</sup> December 2014 that owing to the lengthy period the dispute has been pending, Parties to file written submissions and such affidavits as they may choose to file within 21 days, with the decision of the Court reserved for 6<sup>th</sup> March 2015.

5. The Respondent denies everything, including the fact that the Claimant is a registered Trade Union. He has never been involved in construction. He does not have a Recognition Agreement with the Claimant Union. He never employed the Grievants, and did not at any time agree to pay them any terminal benefits. Furthermore, he holds the Claim is time barred, under Section 90 of the Employment Act 2007.

*The Court Finds:-*

6. The Claim is not time barred. Termination took place on 8<sup>th</sup> May 2004. The dispute was reported to the Minister in 2005, under the Trade Disputes Act Cap 234 the Laws of Kenya. The Minister exercised his discretion in receiving the dispute under Section 4 [4] of the Trade Disputes Act.

7. The Claim was filed in Court for adjudication after the Respondent failed to agree with the Report that resulted from the Investigator appointed by the Minister. Adjudication of the Court was a consequence

that flowed from that refusal. It was a progression in a dispute resolution system, involving the Ministry of Labour and the Industrial Court which at the time the dispute arose, was an Institution under the Ministry. The Claimant forwarded the Form 'A' to the Respondent which under the Trade Disputes Act, was the Notice used in initiating disputes upon the failure of the ADR mechanisms at the Ministry level. The Respondent declined to sign the Form.

8. Under Section 84 of the Labour Relations Act Number 14 of 2007, disputes on termination of employment which arose prior to the coming into force of the Labour Relations Act, are to be dealt with in accordance with the Trade Disputes Act under the Fifth Schedule. It is not correct as submitted by the Respondent that the Claim offends Section 90 of the Employment Act 2007. It is a Claim that is validly brought pursuant to the Trade Disputes Act.

9. The general denials contained in the Statement of Response are of no persuasive value. The Claimant Union is an old Trade Union, actively involved in the Building Industry, and a frequent User of the Industrial Court. Its registration cannot be doubted. Arguments raised on Recognition are totally irrelevant. This is not a recognition dispute. The Labour Office investigated the dispute and confirmed the Grievants were Employees of the Respondent; he terminated their contracts; he offered to pay terminal dues; but then made a turnaround.

10. The Court has no reason to disbelieve the findings and recommendations of the Investigator from the Ministry of Labour. The Respondent made submissions before the Investigator, and did not deny employing the Grievants. He stated he enjoyed cordial relations with the Grievants, until they enlisted with the Trade Union and destabilized him. He questioned the manner in which the Trade Union went about recruitment of his Employees, which he deemed to be disruptive of his business. Other issues raised in the Statement of Response did not feature before the Investigator.

11. The Respondent should have settled this Claim in accordance with the computations attached to the Statement of Claim as appendix 2. The prolongation of the dispute, for whatever reason- hearing has taken place 10 years after the poor Employees lost their jobs- was ill-advised. Termination seems to this Court to have taken place simply because the Grievants had joined the Claimant Union. The Grievants were victimized for exercising their freedom of association, guaranteed under successive Constitutions of Kenya, the Trade Unions Act Cap 233 the Laws of Kenya, and the International Labour Organization Convention 87 of 1948 on Freedom of Association and Protection of the Right to Organize. The Respondent should not have viewed the Grievant's enlisting with the Claimant Union, as a disruptive event, inimical to his business, and an event calling on the Respondent to terminate the Grievants' contracts. Termination offended Section 15 of the Trade Disputes Act, and compensation to each of the Grievants is allowed at the equivalent of 2 months' wages, at the rate applicable on the date of termination.

IT IS ORDERED:-

***a. Termination of the Grievants' contracts of employment was unfair;***

***b. The Respondent shall pay to each Grievant 2 months' wages in compensation for unfair termination under Section 15 of the Trade Disputes Act; and terminal benefits as contained in the schedule marked as appendix 2 in the Memorandum of Claim;***

***c. The Award shall be satisfied in full within 30 days of its delivery; and***

***d. No order on the costs and interest.***

Dated and delivered at Mombasa this 6th day of March 2015

James Rika

Judge