



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT MOMBASA
 CAUSE NO. 308 of 2013

BETWEEN

KIOKO JOSEPH (Suing as the Legal Representative of the Estate of JOSEPH KILINDA)..... CLAIMANT

VERSUS

BAMBURI CEMENT LIMITED RESPONDENT

Rika J.

Court Assistant: Benjamin Kombe

Mr. Oddiaga Advocate instructed by Stephen Oddiaga & Compnay Advocates for the Claimant

Mr. Njeru Advocate, instructed by Njeru & Company Advocates for the Respondent

ISSUES IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

(Rule 27(1) (a) of the Industrial Court (Procedure) Rules 2010)

1. The Claimant Joseph Kilinda filed his Statement of Claim on 20th September 2013. He states he was employed by the Respondent Company for 23 years. He worked as a Fitter Machinist.
2. He unfortunately passed away before the disposal of the Claim. His Legal Representative Joseph Kioko, joined the proceedings on 15th July 2014.
3. Mr. Kilinda was suspended by the Respondent on 13th January 2013, on the allegation that he was, on 12th January 2013 at about 2.00am involved in cutting and transporting from the Plant Metallic Kiln support beams belonging to the Respondent, without the Respondent's authorisation.
4. He was summarily dismissed with effect from 26th February 2013. The reasons for dismissal were enumerated as follows:-
 - a) Mr. Kilinda caused substantial loss to the Company, as he was seen on the 4th and 5th January 2013, cutting the universal metal columns size 300, and then using the Forklift to load the cut Metal beams into the quarry vehicle registration KBC 496M.

b) He caused substantial loss to the Company as he was found cutting universal Metal columns size 300 in the Company garage without approval on 12th January 2013.

c) He committed safety violations, as he cut the metal beams without authorisation and without following the laid down Company safety procedures.

d) He performed his work in a careless and improper manner, as it is confirmed he took the keys from the stores, claiming to be scheduled for on call on 11th January 2013, and failed to return the keys as expected. He willingly chose to leave the keys on the Forklift until 14th January 2013, when the Stores Clerks found the keys on the ignition, which was a high risk and breach of safety procedure.

5. The Claimant states the decision to summarily dismiss him was harsh and unfair. He was not paid accrued annual leave and gratuity. He prays for:-

- a) ***Accrued annual leave pay at Kshs.120,000 or a figure whose details the Respondent be compelled to produce.***
- b) ***Gratuity under the CBA at Kshs. 7,309,791.***
- c) ***Damages for wrongful dismissal.***
- d) ***Costs and interest.***

6. The Respondent filed its Statement of Response on 13th November 2012. It is

conceded the Claimant was an Employee of the Respondent. He was summarily dismissed, based on charges relating to the 4th January 2013, 5th January 2013 as well as other charges of 11th January 2013, 12th January 2013 and 14th January 2013. The dismissal was in accordance with the rules of natural justice, the law and the contract of employment. The Claimant, was heard, a decision made against the Claimant and accepted by the Claimant. The Respondent states payment for any accrued leave will be made; no other payment is due under the CBA; and no damages are payable, dismissal having been fair and lawful.

7. Parties agreed on 18th November 2014, to have the Claim considered on the strength of their Pleadings, Bundles of Documents and Submissions. The respective Advocates highlighted their briefs on 2nd March 2015, bringing the hearing to a close.

8. The Claimant submits he was unfairly dismissed and lost all his benefits. He was alleged to have been involved in theft.

9. In the letter of suspension, he was accused of theft which allegedly took place on 12th January 2013 at about 2.00pm. At the disciplinary hearing, the Respondent claimed the incident happened on the night of 11th /12th January 2013. It was also alleged by the Respondent the incident took place on 4th January 2013 and on 5th January 2013. The Claimant denied these allegations. It was not possible to ascertain the date of the alleged offence.

10. No witness was called at the hearing. Questions asked by the Claimant and his Union Representative were fundamental. They were never answered.

11. The Claimant was said to have acted in consort with Didas Okwemba, a Co-Employee. Didas was similarly dismissed. Didas filed ***Industrial Court of Kenya at Mombasa, Cause Number 87 of 2013 between Didas Tom Okwemba vs. Bamburi Cement Limited.***

12. The Court in the Case of Didas, found:-

a) The reason for dismissal was not valid, because the Employee was not sure which date the offence was done.

b) There was no evidence to conclude the Claimant transported the metal beams.

13. Given the similarity of the circumstances, the Claimant in the instant Claim urges the Court to reach similar findings and award in his favour.

14. The Claimant was unionisable in Job Group A. His salary under the CBA was Kshs. 105,939. Gratuity was payable in accordance with Clause 33 (a) of the CBA. He was denied this payment due to the summary dismissal

15. The Claimant submits the Respondent was served with the Claim and the Summons on 24th September 2013. It only filed the Response on 13th November 2013, 49 days after the service, and without the leave of the Court. This offends Rule 13 of the Industrial Court (Procedure) Rules 2010. The Claimant urges the Court to find the Response is incompetent and improperly before the Court.

16. The Respondent admits the Claimant is entitled to Leave payment and February 2013 salary.

17. The Claimant did not defend himself on the accusation that he was seen ferrying metal beams; he did not attempt an alibi; he did not deny he carried away the beams; he did not deny he spoke to the guard; and did not deny he was with Okwemba on the night of the incident. The allegations against the Claimant were confirmed by independent witnesses. The Claimant was heard on 22nd February 2013.

18. The Respondent submits the Claimant is entitled to annual leave pay of Ksh. 120,000 and salary for 13 days worked in February 2013, at Ksh105,939.

19. The CBA does not allow an Employee who has been summarily dismissed, to receive gratuity. The CBA contemplates payment of gratuity to an Employee whose contract is terminated in other modes, apart from the mode of summary dismissal. Gratuity is therefore, not payable.

20. The Respondent concedes its Response was filed late, without the leave of the Court. It however argues that the Pleadings, Documents and Submissions were filed and served upon the Claimant. Parties exchanged documents. They participated all through the proceedings. The Respondent urges the Court to consider the Response on the strength of the Constitutional Principle that justice be administered without undue regard to technicalities.

The Court Finds:-

21. The Claimant was employed by the Respondent Cement Company as a Fitter/Machinist, in the year 1990. He was summarily dismissed with effect from 26th February 2013 on the allegations of stealing metal beams from his Employer.

22. His terms and conditions of service were governed by the Employment Act, the CBA concluded between the Respondent and the the Kenya Chemical and Allied Workers' Union and the Latarge East Africa Employee's Handbook.

23. He was paid nothing on summary dismissal. The Respondent has conceded and the Court Awards, that the ***Respondent shall pay to the Claimant annual leave pay at Kshs 120,000 and salary for 13 days worked in February 2013 at Kshs. 105,939.***

24. The balance of the dispute is made up of the following issues:-

a) Whether termination was fair and compensation merited.

b) Whether Gratuity is payable

c) Whether the Respondent's Statement of Response should be considered.

25. Starting from the last issue, the Court Finds the Statement of Response was filed out of time, 49 days after service of the Summons and was filed without the leave of the Court. Rule 13 of the Industrial Court (Procedure) Rules 2010 was offended.

26. What should be the consequence? The offence is mitigated by two facts. The Court received the Statement of Response upon presentation for filing by the Respondent. The Registry Staff must be blamed for this trend. Pleadings filed in disregard of the Court's own Rules should not be received at the Registry, without the leave of the Court.

27. Secondly, the Claimant received the late Pleadings. He participated In the proceedings to the end, without alerting the Court of the violation of the Rules. Parties exchanged Pleadings, Documents and Submissions. It would be against the Constitutional principle on administering justice without undue regard to technicalities, for the Court to totally close out the Statement of Response on the basis of the late filing.

28. *The consequence shall be that the Respondent meets the costs of the Claim.*

29. Sections 41, 43 and 45 of the Employment Act require the Employee is availed procedural and substantive justice, preceding the termination decision.

30. Considerable assistance to the Court in determining whether the Respondent honoured these obligations, has been made available to this Court in form of the decision of Hon. Justice Onesmus Makau in ***Industrial Court at Mombasa Cause Number 87 of 2013 Didas Okwemba vs. Bamburi Cement Limited.***

31. Didas was alleged to be an accomplice to the Claimant. The Court in the case of Didas found:-

- There were no eye witnesses to the offence
- The Respondent's workplace is completely fenced off, with only 3 exit gates, guarded 24 hours.
- The beams were not transported through the gate, but through unknown means.
- The reason for dismissal was not proved, and summary dismissal was not justified.

32. The dates of the alleged offence as observed in the case of Didas, and in the Closing Submissions of the Claimant herein were inconsistent.

33. Although the Claimant was notified of the disciplinary hearing and attended such hearing, he did so without a clearly, drawn statement of the offence. In the meeting of 22nd February 2013, the Claimant requested for Witnesses to be called. The Disciplinary Panel, without attaching any specific reasons, told him it would not be ideal to present Witnesses, but that Witness Statements could be availed.

34. This was not a fair opportunity granted to the Claimant to defend himself. A fair opportunity as held in the Industrial Court at Nairobi case of ***David Wanjau Muhoro v. OL Pejeta Ranching Limited (2014) e-KLR*** must incorporate.

1. Right to sufficient time to prepare for the hearing.
2. Right to fully understand the charges.
3. Right to documentation.

35. The findings in *Didas'* case coupled with an independent review of the facts in the instant Claim, enables the Court to conclude termination was unfair, both on procedure and substance. ***The Claimant shall be paid by the Respondent 6 months gross salary in compensation for unfair termination.***

36. The Respondent submits gratuity was not paid to the Claimant on the ground that he was summarily dismissed. The CBA did not provide for gratuity payment in event of summary dismissal.

37. Once the Court has made a finding that the summary dismissal was unfair and unlawful, then the Claimant's entitlement to gratuity under the CBA becomes reinstated. The Claimant's 23 years of service must be recognized and rewarded, as intended by the CBA. The Claimant asks the Court to be treated as if he retired normally under Clause 33 of the CBA, and is paid gratuity under that Clause.

38. The Court allows the prayer for gratuity, to be computed at 3 months basic pay for each year completed in service.

39. Costs to the Claimant.

40. In sum, IT IS HEREBY ORDERED:-

a) Termination of the Claimant's contract of employment was unfair.

b) The Respondent shall, within 30 days of this Award, pay to the Claimant -

i) Annual leave pay at Kshs.120,000

ii) 13 days' salary at Kshs. 105,939

iii) 6 months gross salary in compensation for unfair termination

iv) Gratuity computed at the rate of 3 months pay for each completed year of service.

c) Costs to Claimant.

Dated and delivered at Mombasa this 22nd day of May 2015.

James Rika

Judge