



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.511 OF 2013**

**JAMES SANDE AMUYEKA ..... CLAIMANT**

**VERSUS**

**SUPER FOAM LIMITED ..... RESPONDENT**

**CONSOLIDATED SUITS**

**CAUSE NO. 512, 513, 514, 515, 516 AND 517 OF 2013**

**MARIA NJERI MWANGI**

**JOHN KIRUGI RUMURI**

**ASFORD KINYUA**

**PAUL WAMBUA**

**DAVID KINYANJUI**

**LUCIAN KASUVA MBOLU**

**JUDGEMENT**

1. The issue in dispute is the unfair/unlawful termination and refusal to pay terminal dues and benefits.

2. All the claimants were employees of the respondent, the facts to the case relate to the same events and similar issues in dispute all against the respondent. In application of Rule 9 of the Industrial Court (Procedure) Rules, all the suits herein were consolidated for purposes of hearing and disposal noting similar facts and respondent all in the same series. James Sande Amuyeka gave evidence for and on behalf of all the claimants, but Lucian Kasuva Mbolu opted to testify in his own case. 3. The respondent called Reuben Nyaberi the Human Resource Officer as the sole witness.

**Claimant's case**

4. The claimants were employed by the respondent on diverse dates;

James Sande was employed on 1<sup>st</sup> May 2001 as a Bag making Machine Operator;

Maria Njeri Mwangi was employed on 23<sup>rd</sup> August 1995 as a Bag making Machine Operator;

John Kirugi Rumuri was employed on 1<sup>st</sup> December 1991 as a Bag Making Machine Operator;

Ashford Kinyua was employed on 1<sup>st</sup> October 1992 as a Bag Making Machine Operator;

Paul Wambua was employed on 23<sup>rd</sup> March 1996 as an Operator on Extrusion and Palletizing Machine Operator;

David Kinyanjui was employed on 1<sup>st</sup> December 1991 as a Bag Making Machine Operator; and

Lucian Kasuva Mbolu was employed on 1<sup>st</sup> January 1993 as an Operator on Extrusion and Palletizing Machine Operator;

5. The claimants were all terminated on 14<sup>th</sup> June 2012 and are demanding payment of terminal dues, service pay, leave due; two months' notice pay, payment for rest days, salary arrears and pro rata leave. The dues are computed as;

James Sande is seeking a total of Kshs.377, 425.40;

Maria Njeri is seeking a total of Kshs.505, 811.00;

Ashford Kinyua is seeking a total of Kshs.832, 233.00

David kinyanjui is seeking a total of Kshs.840, 821.00;

John Rumuri is seeking a total of Kshs.840, 821.00;

Paul Wambua is seeking a total of Kshs.574, 222.70; and

Lucian Mbolu is seeking a total of Kshs.667, 700.00.

6. The claimants are also seeking payment of compensation for unfair termination.

7. Noting the **Defence and Counter-claim** by the respondent, the claimants filed their consolidated statement of response and stated that there was no procedural transfer as the respondent failed to consult the claimants and also did not give them time to consider the same. The transfers were immediate and letters were issued at 6.pm at close of day. The unilateral decision to transfer the claimants was contrary to section 35(3) of the Employment Act. The claimants were punished with an unelaborated leave and there was no basis for the application of section 41 of the Employment Act. The claimants work stations were not indicated to them and could therefore not ignore any orders from a supervisor they did not know and thus opted to remain at home until clear directions/orders were given. Clause 28 of the CBA could not work as there was no labour relations at paly. Claimants were reinstated on 11<sup>th</sup> April 2012 and were required to resume duty on 2<sup>nd</sup> May 2012 but no letter was issued to this effect and based on experience and knowledge of the contract duties, the claimants could not work in a new station as they were reinstated as machine operators. The respondent dispatched letters to the union and labour officer leaving out the shop steward who was the one supposed to receive all work related complaints. At the time show cause letters were issued, the claimants had no new contracts on their reinstatement and hence no disciplinary action could follow and there was nothing to show cause about.

8. In further reply to the defence and counter-claim the claimants stated that they were not returned on the pay roll of the respondent after dismissal in December 2011 to them to show cause on any

disciplinary matter. Section 44 of the Employment Act canto applies to them. The claimants admit that they were terminated on 28<sup>th</sup> December 2011. That they are owed in severance pay; leave due; two months' notice noting the claimants were terminate don 28<sup>th</sup> December 2011 that was to take effect on 22<sup>nd</sup> August 2012; rest due for the period at work; and salary arrears for 5 days noting termination was on 28<sup>th</sup> December 2011 and the payroll was done on 22<sup>nd</sup> hence there are 5 days not paid for.

9. In evidence, James Sande on behalf of the claimants testified that he was employed on 1<sup>st</sup> may 2001 as a Machine operator in the polythene department and started at a salary of kshs.12, 336.00 per month. He served until June 2012 when he was terminated. He demanded for his terminal dues; severance pay; leave; 2 months' notice pay; pay for rest days; salary arrears for 5 days; and pro rata leave of 23 days as under clause 23 of the CBA. He is also seeking compensation for unfair termination.

10. The claimant also testified that on 28<sup>th</sup> December 2011 all the claimants reported on duty after the Christmas break but the human resource officer Mr Reuben Nyaberi stopped them and informed them that their department was not open. The claimants informed the union and noted that they had been terminated as a notice had been served on the union. On 11<sup>th</sup> January 2012 the union reported to the Minister noting there was an unfair termination and action of redundancy. The Minister appointed the Labour Officer, Thika Ms Regina Kiiru as the Conciliator. On 11<sup>th</sup> April 2012 the conciliator called for a meeting and it was agreed that the claimants be reinstated back to their positions as machine operators and attendants on 2<sup>nd</sup> May 2012.

11. The claimants further testified that when the claimants resumed work as agreed with the conciliator they were stopped by the factory [respondent] watchman and who directed them to go and get clearance from the human resource officer Mr Reuben Nyaberi. At the office of Mr Nyaberi, he informed them that their positions had been overtaken by events and gave them a price list of the other respondent's companies and noted that the polythene company was a different entity with a different price list hence it no longer could take the claimants. That the department the claimants were employed under became an independent company and the two companies could not work together. The claimants were therefore sent out to await further consultations with the respondent director. The claimants remained outside the premises waiting to resume their duties.

12. On 15<sup>th</sup> June 2012 the respondent's manger told the claimants to collect their Certificates of Service. On 22<sup>nd</sup> August 2012 the respondent told the claimants never to be seen or to appear at their premises. The claimants were thus not paid any dues. The claimants are therefore seeking claims outlined in each memorandum of claim together with compensation. The claimants remained employees of the respondent until their unfair termination. They remained at the respondent premises awaiting resumption of duty until 22<sup>nd</sup> August 2012 when they were ordered never to appear. The claimants also seek severance pay as this was a case of redundancy. The reason given for termination was that the claimants refused to resume work but the correct position is that the claimants were directed to report back as machine operators but the respondent refused to allocate them with such duties.

13. In cross examination, the witness confirmed that as an employee of the respondent he agreed to do all allocated duties. He received letter dated 1<sup>st</sup> November 2011 transferring him from plastics to sewing department that was effective the same date. He did not report to the new department. Upon dismissal there was a meeting with the Conciliator who directed the claimants to resume duty as machine Operators. He received a letter inviting him for a disciplinary hearing but the respondent failed to follow due process. He was unionised and the shop steward. At the hearing meeting, present was the union branch secretary. The letter of termination was sent to his home address and the union got a copy of the same. The reason for termination was not misconduct; he was told that his positon had been overtaken by events.

14. The witness also stated that his last salary was paid in December 2011. From January to April 2012 no salary was paid. He was transferred from his previous department of polythene on 1<sup>st</sup> November 2011 and did not report to the new department. All the claimants got similar letters of transfer but they

did not report to the new area of deployment.

15. Lucian Mbolu also gave evidence in support of his claim and stated that he was employed by the respondent since 1<sup>st</sup> August 1993 and was terminated on 28<sup>th</sup> November 2011 without being given any reason. He went to the Labour Officer and it was agreed that he should be reinstated but the respondent refused to do so. He is seeking payment of severance pay, leave; salary arrears and notice pay of two months. He is seeking severance pay as he was stopped from working after serving the respondent for many years. He had leave due at the time of termination. He had worked for a week that was never paid for.

16. In cross examination, Lucian Mbolu confirmed that he was with the respondent as an employee from 1993 to 28<sup>th</sup> December 2011 as his last day of work. He has claimed the termination day was June 2012 as the labour officer had told him to report back to work but the respondent refused to allocate him work. He did not resign or fail to work. He did not sign the letter of resignation. The claim for severance pay is in accordance with clause 23 of the CBA.

### **Respondent's case**

17. The respondent filed a **defence and Counter-Claim**. In defence the respondent stated that they employed the claimants in their various capacities and issued them with letters of appointment spelling out the terms and conditions of employment. The claimants did not serve diligently as they refused to take instructions or lawful directions by the officers in charge of the various departments and the human resource department in particular. On 1<sup>st</sup> November 2011 the respondent procedurally transferred the claimants from Plastics Department to the Foams Department within the same factory at Ruiru where fellow employees had been transferred at the same time. On 2<sup>nd</sup> November 2011 the claimants reported to work and instead of taking up the new duties at the new work stations, the claimants incited fellow workers who started protesting that they did not wish to work at the new designations and thus neglected to perform any work at the factory as they were required to do. The claimants asked to be declared redundant immediately. The claimants made derogatory utterances while protesting their transfer which utterances were tantamount to incitement to other employees and meant to disrupt the work environment and to cause disturbances. This would have led to tension and destruction of property at the factory.

18. The defence is that when the respondent decided to transfer the claimants there was need to retain competency and grading, dignity of the workers and the provisions of the CBA. As a result of failure to work, the respondent sent the claimants on compulsory leave from 3<sup>rd</sup> November 2011 to 8<sup>th</sup> December 2011. The respondents advised the claimants to use the time away to reflect on their conduct noting that they had refused to work at their new designated work stations. This information was shared with the union.

19. The defence is that after the leave given was finished, the claimants refused to return to work as directed. On 8<sup>th</sup> December 2011 a show cause notice was issued as this then became a case of gross indiscipline. The claimants refused to show cause or attend to their duties. On 19<sup>th</sup> December 2011 the respondent wrote to the claimants reminding them that the continued desertion of work was gross misconduct that justifies summary dismissal and was thus directed to report back to work on 28<sup>th</sup> December 2011. The claimants did not comply and continued to desert duty on 28<sup>th</sup> December 2011 forcing the respondent to issue summary dismissal letters. The respondent invoked the provisions of section 44 of the Employment Act as they had exhausted all avenues set out in law and in the CBA clause 28. The claimants were asked to clear and get their terminal dues which they declined to do.

20. On 11<sup>th</sup> January 2012 the union referred the matter to the minister who appointed a conciliator, the respondent cooperated fully and upon conclusion a Certificate of Conciliation and a Memorandum of Agreement were agreed and issued noting that the claimants be reinstated as machine operators on 2<sup>nd</sup> May 2012. Pursuant to the conciliation, the respondent wrote to the claimants on 23<sup>rd</sup> April 2012 stating the duties they had been allocated. This letter was copied to the Labour office and the union. Despite

such notice, the claimants failed to report to work. On 10<sup>th</sup> May 2012 the respondent wrote to the union on the failure by the claimants to report back to work and contrary to the conciliation agreement.

21. On 21<sup>st</sup> may 2012 the respondent wrote to the claimants a show cause noting that failure to report to work was tantamount to a violation of the conciliation agreement and on 29<sup>th</sup> may 2012 the claimants were invited to a disciplinary hearing on the 12<sup>th</sup> June 2012. The provisions of section 41 of the Employment Act were adhered to in this regard. At the hearing, the claimants chose James Sande as their shop steward and representative to be present and were categorical that they wished to be declared redundant and were not interested in showing cause as to their failure to report to work and desertion of duty. Having considered the claimants conduct and failure to give reasonable grounds for their misconduct and absence from work on 14<sup>th</sup> June 2013 the claimants were all dismissed from duty. The claimants knowingly and without due regard to the law deserted duty and despite efforts to have them work, refused to comply. The direction given to resume work was reasonable and not contrary to labour practice. The claimants did not offer any services or labour to the respondent from 1<sup>st</sup> November 2011 to 31<sup>st</sup> December 2011. The respondent suffered losses as a result as it had to reinforce its workforce to perform the duties that the claimants ordinarily would attend.

22. The claim for severance pay is not due as this was not a case of redundancy. **What was due to the claimants is service pay for the years worked.** There is no leave due as all was paid for and in November 2011 the claimants took their leave that was compulsory. Notice pay is not due as this was a case of summary dismissal due to gross misconduct. No rests days were pending at the time of dismissal. There are no salary arrears as the last work day was 1<sup>st</sup> November 2011. No further service was rendered to have the claimants be entitled in salary arrears. Pro rata leave is not due in a case where the claimants were not on duty since 1<sup>st</sup> November 2011. The claimants were terminate lawfully and cannot claim any dues from the respondent save for what is admitted in service pay. The claims should thus be dismissed with costs.

23. In counter-claim, the respondent stated that the claimants failed to attend to their duties from 1<sup>st</sup> November 2011 to 31<sup>st</sup> December 2011 yet they continued to receive their salaries. The respondent is seeking back the salaries paid for the time the claimants were out of duty. The claimants were in breach of their contracts of employment and should not be made to benefit from the same. Such refund of salaries paid should be paid with interests and costs.

24. In evidence, the respondent's witness Mr Reuben Nyaberi testified that he has worked with the respondent as the Human Resource Manager since 2006. He worked with the claimants. On 1<sup>st</sup> November 2011 the claimants were issued with departmental transfers within the respondent company. The claimants refused to be moved and on 3<sup>rd</sup> November 2011 the respondent was forced to send them on compulsory leave. The claimants then refused to resume duty after their leave was over. They were issued with show cause letters on 8<sup>th</sup> December 2011 but failed to respond. On 19<sup>th</sup> December 2011 the respondent directed the claimants to report to work on 28<sup>th</sup> December 2011 but they again refused to comply. The respondent wrote to their union on the ongoing gross misconduct and dismissal. The union intervened and reported the matter to the minister and a conciliator was appointed and held a meeting on 11<sup>th</sup> April 2012 and an agreement was reached directing the respondent to reinstate the claimants from 2<sup>nd</sup> May 2012. Reinstatement letters were issued on 23<sup>rd</sup> April 2012 but instead the claimants resigned.

25. The witness also testified that when the claimants refused to resume work as directed they wrote to the union and it was agreed the claimants were to be at their work stations on 23<sup>rd</sup> May 2012 but they insisted on resigning from their position. Letters were received from Paul Wambua, David Mbugua, Lucian Mbolu, Ashford and John Kirugi. James Sande and Maria Njeri did not resign and they were expected to resume duty but failed to turn up. The respondent issued a notice to show because why they should not be disciplined; they were invited for a hearing. Both claimants attended and insisted that they could not resume duty as they were Machine Operators and disputed their transfers to another department. This was however found not to be a valid reason and a decision was taken that they should be summarily

dismissed.

26. The witness also stated that from November 2011 to June 2012 they held negotiations to have the claimants back to work but they were adamant and refused to attend duty. When the claimants resigned all their benefits were computed and cheques delivered at the Labour office. The CBA was followed as at clause 28 for the 5 claimants who resigned but James Sande and Maria Njeri were dismissed and thus not entitled to any dues. In paying terminal dues the respondent remitted the following cheques;

On 16/08/12 paid Kshs.67, 604.00 to Lucian Mbolu;

On 23/08/12 paid Kshs.67, 604.00 to Lucian Mbolu;

On 30/08/12 paid Kshs.67, 604.00 to Lucian Mbolu;

On 15/08/12 paid Kshs.75, 990.00 to David Mbugua;

On 22/08/12 paid Kshs.75, 990.00 to David Mbugua;

On 29/08/12 paid Kshs.75, 990.00 to David Mbugua;

On 14/08/12 paid Kshs.74, 593.00 to Ashford Kinyua;

On 21/08/12 paid Kshs.74, 593.00 to Ashford Kinyua;

On 28/08/12 paid Kshs.74, 593.00 to Ashford Kinyua;

On 13/08/12 paid Kshs.79, 485.00 to John Kirugi Rumuri;

On 20/08/12 paid Kshs.79, 485.00 to John Kirugi Rumuri; and

On 27/08/12 paid Kshs.79, 485.00 to John Kirugi Rumuri.

27. The two other claimants, James Sande and Maria Njeri we dismissed. They were not entitled to benefits.

28. In cross examination, the witness stated that the claimants were all in the plastics department and were supervised by Isaac Peter Gitau. The claimants were terminated on 28<sup>th</sup> December 2011 after failing to report to work. James Sande was a shop steward and was aware of the departmental transfer but declined to be moved. The relationship between plastic and foam is close and the respondent found no differences in moving the claimants in this new department. The core business of the respondent was in plastics and mattresses and has added a new department of tanks. The respondent operates 24 hours and the claimants were issued with new letter in the evening after their shift so as to report in their new areas the next day. This was during the high season and there was a lot of work to be done and the claimants were all needed by the respondent. The transfers were procedural. The respondent had done similar transfers before as this was meant to improve production and the claimants had performed well before. The respondent believed the claimants would perform well in their new stations. When the respondent makes changes, this is passed through the supervisors and written notices given. There were several supervisors in the plastics department. This was a routine human resource decision. All machine operators are the same and can be moved to any department. Fred Weeks was one such employee who agreed to the transfer and is working well.

29. The witness also stated that the labour officer directed the respondent to reinstate the claimants as machine attendants but they failed to report back despite letter issued to them and copied to the union and labour office.

30. Upon cross examination by Lucian Mbolu, the witness stated that the respondent received his

letter of resignation on 23<sup>rd</sup> May 2012. He was not at work since November 2011. The resignation was accepted. The labour officer had directed the respondent to reinstate the claimants back to their former positions but the respondent retained the prerogative to allocate work. Terminal dues were given to those who resigned.

## **Submissions**

31. In submissions the claimants stated that they were employed by the respondent until 28<sup>th</sup> December 2011 when they were forced to take compulsory leave. Termination letters was sent to their home addresses, copied to their union, Kenya Chemical and allied workers union (KCAAWU) and the Labour Officer, Thika. The claimants were reinstated upon the conciliators finding that they had been declared redundant. The respondent failed to follow the reinstatement as agreed.

32. The claimants also submitted that on 1<sup>st</sup> November 2011 two managers were moved into a new company and called it a department of the respondent and intended to move the 7 claimants from Bag Making and palletizers operators but were now being moved to a new company. This was misuse of power by the respondents and a contravention of management and that led to unfair termination. The respondent changed business before and the claimants declared redundancies and changed names to the current one. It was wrong for management to practice discrimination in issuing transfer letters to a department where the claimants were not capacitated. That the claimants were terminated without being given a hearing. The compulsory leave was effected without prior notice contrary to good labour practice. The claimants were removed from the payroll and could not know where to report. The claimants were kept outside their work station on the date they were to resume duty. The claimants did not tender any resignation letters as alleged. When the union was notified of the termination of the claimants, it was clear that there was no longer any vacancy for them in the respondent business and hence should be paid redundancy pay.

33. Lucian Mbolu also submitted that all the claimants were terminated on 28<sup>th</sup> December 2011. The pay roll was closed on 22<sup>nd</sup> December and for the 5 days they were employed; they were not paid and should thus receive this as due. The reconciliation process was used to delay the return to work and this is wrong and so the claimants should be paid as claimed. The shop steward was the union representative at the workplace and nothing should have taken place without his knowledge and in this case James Sande was not made aware of the changes the respondent sought to effect on 1<sup>st</sup> November 2011. This then resulted in unfair termination of the claimants.

34. The respondent on their part submitted that sections 45 of the Employment Act allow an employer to terminate an employee where there is a valid reason and the same is done through a fair procedure. Such a termination is not unfair. In this regard 5 claimants resigned their positions and two others were taken through a disciplinary process and found to warrant summary dismissal. The CBA was followed the law. Those who resigned were paid their terminal dues and the others were not entitled to any dues. Section 44 of the Employment Act was applied in the case of James Sande and Maria Njeri. Before their summary dismissal, the claimants were given a hearing was held in **Banking Insurance and Finance Union (Kenya) versus Consolidated Bank of Kenya Limited [2014] eKLR**.

35. The respondent is entitled to claim in counter-claim over salaries paid when the claimants were not at work from 1<sup>st</sup> November 2011 to 31<sup>st</sup> December 2011. When the claimants resigned they never gave notice and should pay the respondent tin lieu of notice. The respondent is entitled in costs as the claims are not warranted. The claims should be dismissed and judgement entered against James Sande and Maria Njeri for the sum of Kshs.25, 737.00 being salary paid in November and December 2011 for work not done; John Rumuri, Ashford Kinyua, David Kinyua and Lucian Mbolu to pay Kshs.54, 033.90 for salaries paid for period not worked; and Paul Wambua should refund Kshs.39, 636.00.

## **Determination**

The issues that emerge are two-fold being;

## **Whether the claimants are entitled to the remedies sought; and**

## **Whether the respondent is entitled to the counter-claim.**

36. Before delving into the issues outlined above, the conduct of the claimants witness is worth interrogation. Throughout the proceedings James Sande Amuyeka sought to act as the representative of the claimants. This is allowed but such representation must be in compliance with the practice of the law and the Rules of the Court. The witness became the lead claimant on the basis of the consolidation of the suits herein and not due to his previous capacity as a shop steward. What is clear in this regard is that while James Sande remained in the employment of the respondent, he was a shop steward. Such position ended with his dismissal. It cannot be assumed outside the work environment and to serve any other useful purpose outside the workplace. To assume that he is still the respondent's shop steward and that he is the only one who can articulate the issues on behalf of the other claimants is misguided. The other claimants too are not blameless. They sat in court and acted helpless as James Sande made various presentations on their behalf in court. When prodded by the court to each make a statement in support or denial of their cases before court, and despite effort to adjourn the matter to have the claimants reconsider their decisions to make personal presentations in court, they all in unison opted to have James Sande act on their behalf. Only Lucian Mbolu stood out alone and opted to argue his case. This outline is relevant here as James Sande is no longer a shop steward. A shop steward is the person at the shop floor, at the factory, at the work place where he represents the interests of employees with the employer. In matters of litigation, such a person is a litigant just like any other claimant. James Sande cannot act as the union official as this is not a matter that was submitted by the union. The consolidated claims were filed by individual claimants. In the application of Rule 9, James Sande became the lead claimants and not a representative of the claimants in the capacity of a shop steward or as in the case of union presentation. A shop steward at the workplace is the person who filed grievances on behalf of other employees with management but it becomes different when this shop steward is the subject of grievance and the management has to make a decision. Such a shop steward cannot assume the role of the shop steward and argue their case, this must be escalated to another union official or through another shop steward as to act as the aggrieved employee and combine this with the role of a shop steward would be to create a conflict of interests and the resulting outcome would be a marred decision that is rife with bias as the employee who acts in his case is not independent. James Sande should therefore have removed himself from the role of shop steward and asked the union or another shops steward or an official of the union to act in his place and instead in negotiating with the respondent on matters that commenced on 1<sup>st</sup> November 2011 in this case. For James Sande to continue acting as the shop steward then and proceeded to act in court as such, he no longer remained impartial and was closed under the myth of his former self. Where the claimants were unionised, this was an appropriate case for the union to take up. This is not the case here as the claimant opted to act in person.

37. Section 55 of the Labour Relations Act is relevant to refer.

*55.(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for trade union members in a workplace to elect from among themselves trade union representatives in accordance with the constitution of the trade union.*

*(2) A trade union representative elected under subsection (1) is entitled to:-*

*(a) Represent members in grievance and disciplinary hearings at the workplace; and*

*(b) perform any other functions specified in the recognition agreement or constitution of the trade union.*

38. without limiting the role of the workers representative at the workplace, where a shop steward is the subject of any grievance, complaint or alleged misconduct, they should remove themselves as the representative and have that role taken by another representative. To be ones advocate, prosecute the matter and is to defeat the very purpose of having a representative act or appear on behalf of an employee.

The town should never be merged. The results are not the same in such a merger. There is no impartiality. Independence is lacking. Such an employee loses a crucial part of representation at the work place. See **Seth Panyako versus KUDHEIHA, Cause No.1292 of 2011.**

39. The changed labour relations environment since 2007 has given an employer few liberties. Such liberties include allocation of work to an employee as a prerogative of the employer. Section 10(3)9d) of the Employment Act articulates this as;

*(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—*

...

*(d) either the place of work or, where the employee is required or permitted to work at various places, an indication of that place of work and of the address of the employer;*

40. Once an employee is given a contract of employment as outlined under section 10 of the Employment Act, an employer can cause changes to such a contract in pursuance to the provisions of section 13 of the Act thus;

*13. (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.*

41. The requirement thus is that any change to an employment contract must be communicated in writing. It must be in a separate document other than the original contract documents. However such a change to the employment contract that affects the terms and conditions of the employment must be reasonable and capable of being performed by the employee.

42. In this regard therefore the Court in **KUDHEIHA versus Pwani university, Cause No. 242 of 2014 (Mombasa)** where the court held;

*Employees, and this includes the dual role-playing Shop Stewards, must therefore restrict themselves to legitimate activities. Employers on the other hand, and Courts for that matter, must only tolerate legitimate activities. Employers retain the right to take disciplinary action and mete out appropriate disciplinary sanctions against deviant Employee behaviour on display during the strike [grievance handling] action.*

*The Employer, in dealing with Shop Stewards, is required to consider if the alleged misconduct is committed by the Shop Steward as an Employee, or is ancillary to the duties of a Shop Steward. This consideration stems from the dual nature at the workplace, of Shop Stewards*

43. In this case it is common cause that on 1<sup>st</sup> November 2011, the respondent issued transfer letters to the claimants. They were to move in a *Departmental transfer* vide letters dated 1<sup>st</sup> November 2011. Their terms of employment were to remain the same save for the move from Plastics to foam department. From the evidence of the claimants, they were never consulted about the transfer and this was on short notice as the transfer was to take effect immediately. The transfer letter was issued at 6pm, after their day shift and they were to report to the new department the next day. From the evidence of the respondent, the claimants refused to be transferred to the new stations, there was no work on 2<sup>nd</sup> November 2011 and the claimants started agitating other employees as they were disputing their transfer. This was causing tension and assessed as likely to create disturbances, and action was thus taken to have the claimants proceed on compulsory leave from 3<sup>rd</sup> November 2011 for 30 days until 8<sup>th</sup> December 2011. The leave notice noted that the claimants had refused to report to their new stations. The claimants have all acknowledged receipt

of this notice. the union was copied to all the notices.

44. On 8<sup>th</sup> December 2011, the claimants did not report to work. A letter was issued to them by the respondent noting this much. A show cause was thus issue requiring the claimants to respond within 12 hours giving reasons as to why they failed to report to work. The union was copied to the communication

45. The claimants did not respond and in evidence, it was stated that since the claimants did not know their place of work, they did not have a supervisor; they did not know who to respond or report to. That they had not been allocated any work as machine Operators and therefore could not respond.

46. The above notwithstanding, on 19<sup>th</sup> December 2011, the respondent issued notice to the claimant to report to work on 28<sup>th</sup> December 2011 after the break. The notice also indicated that failure to report back to work would mean the claimants had refused to obey lawful command and would result in summary dismissal. It was the evidence of the claimants that they reported to work on 28<sup>th</sup> December 2011 but the human resource officer told them that their department was not open and they were to proceed in their transferred stations. The claimants were apprehensive of their security as they were not trained in the new department and since they had not been consulted in the changes, the respondent had failed in their management and thus discriminated against the claimants. The claimants also submitted that It was wrong for management to practice discrimination in issuing transfer letters to a department where the claimants were not capacitated. They thus did not report to the new stations.

47. As a result of the foregoing, the respondent terminated the claimants on 28<sup>th</sup> December 2011 making reference to the notice issued on 19<sup>th</sup> December 2011. The reasons for termination were cited as;

*... you knowingly refused to obey proper instructions vide letter to you dated 19.12.2011 and absenting yourself from your new work station an action which is against regulations.*

*This is a serious offence which amounts to gross misconduct and is a fundamental breach of your obligations under your scope of employment.*

48. *You will be entitled to your service dues which will be processed by Finance Department.*

49. This letter of termination, the reasons and the basis is not contested at all. The failure to report to work as noted in the letter issued to the claimant and dated 19<sup>th</sup> December 2011 is not challenged. The reason of failure to comply with directions issued by the respondent and there being a breach of the employment contract is not contested. This decision to terminate the claimants is equally not challenged in appeal.

50. What the claimants did is to report the dispute to the union. in this regard on 11<sup>th</sup> January 2012 the union reported a dispute to the Minister noting;

*... we are addressing this letter to you reporting the existence of a trade dispute between the parties are required by the Labour Relations Act, section 6291) on wrongful termination/redundancy of the above named grievants. ... out efforts to resolve the above dispute has been exhausted.*

51. It is however note indicated which efforts the union or the claimants had put in place to address their termination before the report to the Minister. The letter sent to the Minister is copied to the respondent, FKE and COTU but there is no indication as to what measures had been employed form 28<sup>th</sup> December 2011 to 11<sup>th</sup> January 2012 so as to exhaust all mechanisms in addressing the termination of the claimants. What is clear at the end of the day is that the claimants were as of 28<sup>th</sup> December 2011 terminated by the respondent and they were to ensure collection of their terminal dues from the Finance Department.

53. Section 43 of the Employment Act is here relevant to refer thus;

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

54. As at 28<sup>th</sup> December 2011, the respondent as the employer had valid reasons to cause the issuance of termination notices to the claimants. The reasons are outlined in the notices issued to the claimants. The termination was as a result of the claimants failing to report to work, despite having been issued with letters of transfer which was the prerogative of the employer to do; they were sent on compulsory leave upon failing to report on duty; the claimants were summoned to show cause which they failed to oblige; and when directed to resume work despite all their failing, the claimants were adamant that they had not been consulted before their transfers and had not been capacitated to work in the new department.

55. The duty was thus on the claimants to show that the reasons given for their termination as at 28<sup>th</sup> December 2011 were not fair, valid or justified. This I find, the claimants have failed to do. From 28<sup>th</sup> December 2011, the claimants ceased being the employees of the respondent.

56. Whatever action was taken after the date of termination did not bear fruit. The claimants were never reinstated and they did not work for the respondent again. Where such efforts with the Ministry did not bear fruits, the agreement with the Labour Officer, Thika, is not the subject of enforcement in this case. Where the respondent was willing to reinstate the claimants following negotiations with the conciliator, such efforts were frustrated by the very beneficiaries of the same, the claimants. They refused to report to stations they had been allocated. This cannot be vested against the respondents as the employer. The respondent had work to be done, they were willing to take the claimants and give them a chance to offer their labour, the claimants were selective on the kind of jobs they wanted and refused the offer given to them by the respondent. the respondent is stopped in law from forcing any employee to work for them That would be contrary to any known law, protocol or fair labour practice. The claimants therefore opted out of the conciliator's negotiated terms. In any event as of 28<sup>th</sup> December 2011 the claimants did not have a job with the respondent; they had no right to claim for particular positions in the employment of the respondent!

57. The claimants engaged in unlawful conduct during the course of their transfers, especially for James Sande, who being a shop steward, acted in a manner not worthy of a Trade Union Shop Steward, and unacceptable even of an ordinary Employee. He placed himself outside the legal protection available to Shop Stewards against adverse actions taken by Employers during the transfer period. Such conduct is retrogressive and does not work for good labour relations. To act as such is only counter-productive. James Sande should have removed his position as a shop steward and clothed himself as an employee who had a grievance and allowed another representative to act on his behalf. Maybe then, rational decisions should have prevailed. He could have reported to the new station as directed and helped the other claimants do likewise. But this is not the case here.

58. I therefore find, the respondent have the power to transfer their employees and the case of the claimants it was done in a lawful manner and not be arbitrary. The claimants employment contracts could be varied, reviewed or changed on reasons given in writing which was done in this case and as held in **Severine Luyali versus Minister Foreign Affairs and Trade and Others, Petition No. 23 of 2014**. I find the existing business needs of the respondent for such changes being to ensure better productivity and good work performance as reasonable measures that warranted the effected transfers. Where the claimants were not capacitated to attend to any new role given, the responsibility was on the respondent to ensure training, induction or any other measure that was necessary to support their employees. To

refuse to report to duty on an apprehension that the claimants were incapacitated I find to be unfounded and lacking any rationale, basis or merit. The resulting termination of the claimants was therefore procedurally and fairly with good basis.

### **Remedies.**

59. Upon termination, an employee is entitled for payment of dues earned. Noting arise and is due after 28<sup>th</sup> December 2011 as the claimant did not resume work after this date. All dues are to be computed up and until this date. All the claimants have received their terminal dues save for James Sande and Maria Njeri. Whatever dues were available to the claimants as at 28<sup>th</sup> December 2012 are due and payable. This should be computed for James Sande and Maria Njeri like the other claimants and paid within 14 days.

60. The claimants seek severance pay. This was not a case of redundancy and such a claim is declined.

61. Service pay is admitted for years worked. This should be computed and paid as directed above. The question of resignation does not apply here. There was no resumption of work as at 28<sup>th</sup> December 2011 for the claimant to seek any pay after this date. The resulting resignations have no bearing herein. The claim for 5 days worked from 22<sup>nd</sup> to 28<sup>th</sup> December 2011 are said to be due as the pay roll was done on 22<sup>nd</sup> and so there are 5 days the claimants did not get their pay. Where the claimants remained full time employees of the respondent, they were paid on monthly basis. Where they received salaries for the month of December, such payments are not outlined as to how much was paid so as to have a balance of 5 days outstanding. Where such a claim exists, the duty is upon the claimants to articulate the same in their evidence. I find no basis for such a claim noting the claimants have acknowledged being paid for December 2011.

Notice pay in due where termination arises. In this case, the claimants were not at work from 8<sup>th</sup> December 2011 when they were directed to report back to work. They failed to show cause and in a case that should have warranted summary dismissal, the respondent opted to make it a termination. To claim notice where the employee has thus absconded duty, has been invited back to work and efforts made to ensure such an employee is retained at work is a goose chase. Such notice pay is not due in law or under the subject collective agreement. This is declined.

62. Pro rata leave is claimed. For 30 days the claimants was given compulsory leave. The claimants do not seek any leave days as due other than pro rata leave. This is not outlined as how it was due. It is not clarified as to how each claimant came to the outlined amounts. Factoring the 30 days compulsory leave given to the claimants, it would have been prudent to give clarity as to how the pro rata leave arose. This is not the case and the same is declined.

63. This is not a case of unfair termination. To the contrary, the claimants absconded duty. They failed to report back to work. Compensation is not due.

### **Counter-claim**

64. The respondent has counter-claimed for monies paid from November and December 2011 for days the claimants were not at work but were paid. The claimants lawfully remained the employees of the respondent until the date of their termination. Where the claimants failed to report back to work after their compulsory leave on 8<sup>th</sup> December 2011, they were engaged in an effort to have them resume duty, show cause notices were issued but not until 28<sup>th</sup> December 2011 were they terminated. From 3<sup>rd</sup> November 2011, the claimants were lawfully out of their work stations on compulsory leave. From 8<sup>th</sup> to 28<sup>th</sup> December 2011, the claimants were engaged in effort to have them back at work it was not until 28<sup>th</sup> December 2011 when termination letters were issued. Until then, the claimants had a right to receive their salaries. This cannot be taken away from them as they were rightfully the employees of the respondent. The counter-claim has therefore to fail.

**Conclusion.**

**In the end, the claims herein as consolidated must fail in their entirety. Save for the terminal dues lawfully owed to James Sande and Maria Njeri as at 28<sup>th</sup> December 2011. Nothing more. The claims by the claimants are dismissed. The counter-claim by the respondent is also dismissed. Each party shall bear their own costs.**

**Delivered in open Court dated and signed at Nairobi on this 30<sup>th</sup> day of June 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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