



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 433 OF 2014

BETWEEN

JUMA MWACHIDUDU MWAZARAKWE CLAIMANT

VERSUS

REA VIPINGO PLANTATIONS LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Asewe Advocate instructed by Otieno Asewe & Company Advocates for the Claimant

Mr. Makokha Advocate instructed by the Federation of Kenya Employers 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 the 10th September 2014. He states he was employed by the Respondent Plantations Company as a Machine Operator, in January 2012. He was injured while at work, leading to the amputation of his index and middle fingers, and deformity of the right wrist joint. The Doctors advised, upon assessment of his injuries, that the Claimant changes his place of work, or is given light duties. The Respondent ignored the medical advice, forcing the Claimant to go on with duties he could no longer undertake. The Respondent stopped his salary from June 2014. He considers he was thus, constructively dismissed. He seeks for an Award against the Respondent for:-

- a. A declaration that constructive dismissal of the Claimant was unfair, unjust and wrongful.
- b. 1 month salary in lieu of notice at Kshs. 7,886.
- c. Annual leave pay for 3 years at Kshs. 23,658.
- d. Salary for June, July, August and September at Kshs. 31,544.
- e. Overtime pay at Kshs. 118,560.
- f. 12 months' salary in compensation for unfair constructive dismissal at Kshs. 94,632.

g. Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on 21st October 2014. It concedes the Claimant was its Employee in the stated position. His last salary was Kshs. 8,754 per month. He was injured as stated in the Claim. The Doctors advised he is retired, or given light duties. He was assigned light duties, due to start on 27th June 2014. He did not take up the light duties. He deserted, never to be seen again at Rea Vipingo. The Respondent wrote to him on 7th July 2014 seeking reasons why he had not reported. There was no response. The letter of termination of employment dated 27th August 2014 issued. There was no constructive dismissal. The Claimant's contract was terminated for desertion. The Respondent prays the Court to dismiss the Claim.

3. The Claimant gave evidence on the 24th February 2015, and 13th March 2015 when he closed his case. The Respondent called 3 Witnesses. Head of the Human Resources Mr. Vincent Akulo gave evidence on the 13th March 2015. Assistant Production Manager Mr. Daniel Ngumbao Yaah and Company Clinical Officer Vincent Mojua Mwatemo gave evidence on the 29th May 2014 when the hearing closed.

The Claim

4. Mr. Mwachidudu Mwazarakwe testified he was not given a written contract on employment. He was injured on the 10th January 2014. He was treated at Joachim Hospital and discharged. He continued with treatment at Kilifi Hospital. He was recommended for light duties. He forwarded the Doctor's recommendation to his Employer. He continued to work doing the old duties. His hand pained. He was not offered any alternative and light duties. His June salary was not paid. He considered his contract terminated.

5. He was still on treatment as at the time he gave evidence. He testified he was paying the costs of his further treatment. His claims are merited, he told the Court. He still lived in the Company House, as his Wife was an Employee of the Respondent. He worked overtime without compensation. It is not true that his salary was Kshs. 8,754. It is incorrect to say he was offered alternative duties which he declined. He did not see the letter from the Respondent alleging he absconded. He does not have the Postal Address where the letter was alleged to have been posted. No letter was delivered to his home.

6. On cross-examination Mwazarakwe told the Court he was attended to by the Company Clinical Officer, and advised he could return to work on light duty. He discussed assignment of duty with his Supervisor Mr. Ngumbao. It is not true he refused to return to work. He was still in pain. He informed his superiors about the pain. He was to push the cart up the Plantations. This was the light duty offered. It was a duty performed by Ladies. He could not perform this duty. His earlier role, before the injury, comprised the arrangement of sisal in the machine for production. He informed the Company Medic he was denied the recommended light duty. He was not paid June salary, and did not receive the letters from the Respondent after employment. Zawadi Kenga is the Claimant's wife. She was employed by the Respondent in June 2014, after the Claimant left employment. She still works there. It is not true that she was employed because the Claimant could not be traced. It is not true the Claimant could not be traced. He lives in the same Company House with his wife. He did not work from June 2014. It is not true that he did only 7 hours daily while in employment. He did not take annual leave. Overtime was shown in his pay slips. He did not know how the claim for overtime amount of Kshs. 118, 560, was computed. Redirected, the Claimant told the Court he was advised if he could not continue working, he should go home. He worked in 2 shifts, and did overtime. He never left the Company House. He prays the Court to allow the Claim.

The Response

7. Akulo testified he joined the Respondent on 1st May 2004. The Claimant was an Employee of the Respondent. He was injured as stated in his evidence. The Respondent met the costs of his treatment. It was recommended the Claimant is placed on light duty, or retired on medical grounds. The Company Medic recommended the Claimant be placed on light duty, as he was still young and healthy. There were

Employees in active employment at the Respondent who had no arms; the Claimant had only lost his 2 fingers.

8. He was therefore assigned a Zegezege. This is a Truck which moves along rails within the Factory. It moves on its own, but needs a slight push to move. The Claimant was assigned the role of nudging the Zegezege on. He abandoned this work. He did not report to the Management, or the Company Medic. He just left.

9. The Respondent did not know the Claimant was still resident in the Company House. About 1500 Employees work for the Respondent. 1200 of these were accommodated in Company houses within the workplace. The Claimant's Wife explained to the Respondent that the Claimant had left employment. This was in July 2014. The Respondent still expected the Claimant to return. He did not. The Respondent therefore employed his Wife.

10. The Claimant is not entitled to notice. He deserted. He should instead pay the Claimant notice pay. He was paid his salary even when he was not working, while on sick leave. He cannot claim salary up to September 2014. He left in June 2014. Overtime was paid as shown in the pay slips. Work was task based. Overtime was paid if an Employee overstayed at work, or even when machine broke down or power supply interrupted. No work was actually done during such break, but overtime was paid. Shift allowance and attendance allowance were paid in accordance with the CBA. The Claimant is owed nothing by the Respondent. Compensation is not merited. The Respondent did not terminate the Claimant's contract.

11. Cross-examined, Atulo testified the Claimant still complained after May 2014, that he was in pain. He did not see the Company Medic to complain of continued pain. The Respondent opted to place the Claimant on light duty, not retire him. He did not attend to the Zegezege even once. It would not have worsened his injury. He lived in the Company house. The Respondent attempted to find out why he was not in. His Wife told the Management, "*Bwana alitoroka,*" [Kiswahili for "*my husband ran away.*"] The Management received the demand letter from the Claimant's Advocates. There was no attempt made to find out from the Advocates, where the Claimant was. The Respondent's letter to the Claimant dated 2nd July 2014 was not in reaction to the demand letter from the Claimant's Advocates. Annual leave depended on the exigencies of work. Work was task- based. The employment contract did not show it was task-based. It was provided for in the CBA. The CBA was not availed to Court. Shift allowance is shown in the pay slips to vary. The Production Manager could explain the variation. Gratuity was introduced in 2013. Earlier contracts did not capture this. He earned a monthly salary of Kshs. 8,754, effective June 2014. He was paid Kshs. 5,051 for 14 days worked in June 2014. The Respondent did not have a policy on retirement for medical reasons. Gratuity was paid on retirement. The Claimant was not constructively dismissed.

12. Ngumbao Yeah testified the Medics recommended the Claimant could do light duty. The Claimant reported to the Witness on 14th June 2014 and was assigned light duty as recommended. He was to push sisal loaded on trolleys which are moved along the rails. It is light work, less laborious, and ordinarily assigned to the Ladies. The Claimant did not take the light duty. He did not attempt to do this assignment. He disappeared. Work was task based, to be performed within 8 hours. If finished earlier, well and good. The Respondent paid downtime- paid when there were power outages or when machines broke down. The Claimant is not entitled to overtime. On cross-examination, the Claimant testified Medics advised Management the Claimant could resume duty. He had amputated fingers. It would take some effort to push the Zegezege. The contract of employment did not provide for task- based work. There was no extra work done; Employees were paid while waiting for restoration of production systems.

13. Clinical Officer Mwatemo, testified he received the medical opinion from the Doctor in Kilifi, recommending the Claimant be retired, or offered light duty. Mwatemo was of the view that the Claimant was still young, and suggested to the Assistant Manager Ngumbao, that the Claimant be availed light work. Ngumbao agreed to assign the Claimant light work. The Claimant had lost 2 fingers. Mwatemo was of the view that the Claimant would be able to push the trolley. He was assigned light work, but did not take it. Mwatemo testified on cross-examination that he had not himself, pushed a Zegezege. He would

not know how much effort it required to push one. The Claimant saw Mwatemo around 16th June 2014. The Medic advised the Claimant to try the light work. The Claimant was still on pain killers. He did not take the light work. He disappeared. The Respondent prays for dismissal of the Claim.

Closing Submissions

14. The Claimant cites the decision of this Court in ***Kenneth Kimani Mburu & Another v. Kibe Muigai Holdings Limited [2014]***, where it was stated that constructive dismissal occurs, where an Employee is forced to leave his job against his will, because of his Employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the Employee regards himself as having been unfairly dismissed. The Claimant urges the Court to find the Claimant, following these principles, to have been constructively dismissed, and grant the prayers sought. Relying on the same decision above, and the case of ***Tailors and Textiles Workers Union v. African Cotton Industries Limited [2014] e-KLR***, the Respondent submits the Claimant has fallen short in satisfying the ingredients for constructive dismissal. The conduct of the Respondent in assigning light duty to the Claimant as opposed to early retirement; and the employment of the Claimant's wife; do not show the Employer's conduct as being malicious. The Respondent should not be punished for extending its generosity to the Claimant.

15. The questions raised by this dispute are whether the Claimant was constructively dismissed by the Respondent; whether he was otherwise unfairly dismissed; and whether he is entitled to compensation for such dismissal, alongside the other remedies claimed.

The Court Finds:-

16. The employment history of the Claimant is largely undisputed. He was employed by the Respondent Sisal Company in January 2012. He was injured while at work, on 8th January 2014. He lost 2 fingers. The Doctor at Kilifi, and the Company Medic, advised the Claimant be placed on light duty, once the Claimant resumed work. The Respondent's position is that it offered the Claimant light duty. He was assigned Zezezege, a trolley which carried sisal along a rail, within the Factory, which was ordinarily pushed by Ladies, and considered a light duty. He was according to the Respondent to give this trolley a shove, but declined the light duty and deserted work altogether. The Claimant states he did not abandon his post. He was recommended for light duty owing to his injuries. The Respondent did not place him on light duty. He continued to work under the old conditions, and was constantly in pain. His salary was stopped mid-June 2014. He considered himself constructively dismissed.

17. Constructive dismissal as stated in the cases of ***Kenneth Kimani Mburu & Another v. Kibe Muigai Holdings Limited [2014] e-KLR***; ***Tailors & Textile Workers Union v. African Cotton Industries [2014] e-KLR***; and ***Industrial Court at Nairobi Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East & Central Africa Limited***, occurs where an Employee is forced to leave his job against his will, because of his Employer's conduct. Although there is no actual dismissal, the Employer's conduct is sufficiently bad, that the Employee regards himself as having been unfairly dismissed.

18. The concept is discussed in greater detail in the ***Supreme Court of Canada Decision in Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10***. Some of the features defining the concept include the following:-

- The Employer must be in breach of the contract of employment.
- The breach must be fundamental, as to be considered repudiatory breach.
- The Employee must resign, in response to that breach.
- It may also occur where the Employer through a course of conduct, evinces an intention no longer to be bound by the contract of employment.

The Court must consider whether the act or acts of the Employer have been such as to constitute a repudiation of the fundamental terms of the contract.

19. The evidence on record does not reveal a case of constructive dismissal. The Claimant did not

demonstrate fundamental breach by the Respondent, of his contract of employment. He was injured while at work in January 2014. He was treated, and reasonably accommodated by the Respondent during the period of treatment between January and June 2014. The Respondent continued to pay his salary and costs of hospitalization. It was recommended by the Doctor that the Claimant be retired or placed on light duty on medical ground. The Respondent opted to offer the Claimant light duty, while it was open to the Respondent to retire the Claimant altogether.

20. The Claimant was placed on light duty, shoving the Zegezege along the rails at the Factory. The Court was convinced by the evidence given by the Respondent's Witnesses that this was a light duty. It was a role normally carried out by the Ladies of Rea Vipingo. The Claimant did not even try. He just disappeared. He did not go back to the Management or the Medics to complain that the new role was not light enough. The stoppage of his salary was after he had failed to report for the light duty. It cannot be taken as being part of the Employer's unbecoming conduct, compelling the Employee into resignation. It was that even after being reasonably accommodated for about 6 months from the date he was injured; even on being given light duty; the Claimant abandoned work, and denied himself the right to remuneration. He continued to be accommodated in the Company House. His Wife was employed by the Respondent in his place, even though seemingly employed when the Claimant filed this Claim. An Employer who employs a Person's Wife, in place of that Person, is not in the view of the Court an unreasonable Employer. The acts of the Respondent did not evince an intention no longer to be bound by the contract of employment. If the Respondent intended to terminate the Claimant's contract, that option was there as recommended by the Doctors. The Claimant was not constructively dismissed. He abandoned his job after he was placed on the light duty of pushing Zegezege. The Claimant did not show that he was constructively dismissed.

21. The Respondent had a valid reason in terminating the Claimant's contract, through the letter of dismissal dated 7th July 2014. The ground stated in the letter was 'Absconding Duty'. This was a valid ground. Termination was substantively valid, under Section 43 and 45 of the Employment Act 2007.

22. There is considerable doubt on the fairness of procedure. The Respondent exhibited a letter dated 7th July 2014 asking the Claimant to report for duty within 1 week. The letter was sent to P.O.BOX 27 Mtsengo. The Claimant denied this was his address. The Respondent was aware the Claimant was resident in the Company House, within the Factory. There was no explanation by the Respondent why it would opt to post the letter to an address in Mtsengo, while the Claimant and his Wife were in plain sight within the Rea Vipingo complex.

23. The letter of dismissal was similarly posted to the address in Mtsengo. It is dated 27th August 2014. It was not told to the Court why again an important letter ending the Claimant's employment with the Respondent could not be delivered to his house within the Factory. The Court could not overrule the possibility suggested by the Claimant's Advocate during the cross-examination of the Respondent's Witnesses, that it was perhaps the Claimant's Advocate's demand letter which, resulted in the Respondent's letter conveniently dated 7th July 2014.

24. These letters did not satisfy the demands of procedural fairness. The Claimant deserted work, but his physical address was within the Respondent. His Wife was known to the Respondent. It was not impossible for the Respondent to deliver communication to the Claimant's house. It was not impossible to arrange for a formal hearing of the Claimant, in the manner contemplated by Section 41 and 45 of the Employment Act 2007. Where an Employee abandons his job, the Employer still has the obligation to hear the Employee. Genuine effort must therefore be made by the Employer, to trace the Employee, and initiate a disciplinary procedure where the charge of absconding or desertion is laid out and defended. Procedure leading to the termination of the Claimant's contract was not fair. He is entitled to compensation for unfair termination.

Remedies

25. The economic injury sustained by the Claimant has largely been mitigated by the employment of his Wife at Rea Vipingo. Her last contract shows she earns Kshs. 8,754, the same rate payable to the

Claimant monthly at the time he disengaged from the Respondent. He continues to live in the House provided by the Respondent. **Compensation must therefore be minimal and is granted at 1 month salary at Kshs. 8,754.**

26. There is no merit in the prayer for notice pay, the Claimant having abandoned his position, and the Respondent having had valid ground for dismissal. This prayer is rejected.

27. The Claimant's pay slips consistently captured an item described as 'overtime'. The Claimant pleaded for overtime allowance. Overtime pay is a compensation for work done, not an allowance. The Claimant seeks Kshs. 118,560. He did not justify this in his evidence. He did not give details of the exact hours done in excess of his normal hours. He said nothing of the payment shown as 'overtime' in the pay slips. The evidence of the Respondent that the Employees were paid overtime was not displaced by the evidence of the Claimant. It was in addition explained by the Respondent that Employees enjoyed 'downtime,' meaning that when machines broke down, or power supply interrupted, they continued to have the hours credited in their favour. Overall the claim for overtime pay cannot be sustained.

28. The Claimant seeks salary for June, July, August and September 2014. His letter of termination is dated 27th August 2014. His contract was still in force up to the 27th August 2014. Section 18 [4] of the Employment Act 2007 states that where an Employee is summarily dismissed for lawful cause, the Employee shall, on dismissal, be paid all moneys, allowances and benefits due to him up to **the date of dismissal**. The Claimant is entitled to his salary for June, July and August, no more and no less. **He is granted 3 months' arrears of salary at Kshs. 26,262.**

29. Lastly the Respondent undertook in its Response to supply the Court with the Claimant's Annual Leave records. What was supplied did not satisfy the question of pending annual leave days. The Attendance Register simply indicates nil days as do the pay slips. There was no document with the Claimant's imprint, such as a Leave Application Form, indicating days applied for, dates given and utilized, and annual leave balance if any. The Respondent's Witnesses were not able to say when the Claimant went on annual leave. **The Claimant is allowed 63 days of annual leave computed at Kshs. 21,211.**

30. Parties shall meet their costs of the Claim.

IN SUM, IT IS ORDRED:-

- a. **Termination of the Claimant's contract did not amount to constructive dismissal**
- b. **The Claimant's contract was terminated on valid ground, but deficient on fair procedure.**
- c. **The Respondent shall within 30 days of this Award pay to the Claimant 1 month gross salary in compensation for unfair termination at Kshs. 8,754; 3 months' salary arrears at Kshs. 26,262; and annual leave pay at Kshs. 21,211- total Kshs.56,227.**
- d. **Parties shall meet their costs.**

Dated and delivered at Mombasa this 31st day of July 2015

James Rika

Judge