



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 76 OF 2012

[Consolidated with Cause Number 428 of
 2013]

BETWEEN

1. KATEMBE KIRONGO MTUMWA

2. STEPHEN WAFULA
 CLAIMANTS

VERSUS

STEEL MAKERS LIMITED
 RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

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

Mr. Alwenya instructed by M.L. Alwenya & Company 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 first Claimant, Mr. Katembe Chirongo Mtumwa, filed his initial Statement of Claim on 3rd December 2012. There were subsequent Amendments, the last Amended Claim being filed on the 22nd May 2014. The Respondent filed its Response to the Amended Claim on 19th March 2013, and a Further Response on the 5th April 2013.
2. The second Claimant, Mr. Stephen Wafula, filed his Statement of Claim on the 5th December 2013, while the Statement of Response was received in Court on the 14th April 2014.
3. Both Claimants are former Employees of the Respondent. They claim their respective contracts of

employment were unfairly and unlawfully terminated by the Respondent.

4. Mtumwa seeks the following orders against the Respondent:-

- a. *3 months' salary in lieu of notice at Kshs. 43,625.*
- b. *Outstanding annual leave pay at Kshs. 14,625.*
- c. *August 2012 salary at Kshs. 14,625.*
- d. *Gratuity at 16 days' salary for 12 years completed in service at Kshs. 108,000.*
- e. *Compensation for unfair and unlawful termination at 12 months' salary at Kshs. 175,500*

Total.....Kshs. 356,625

The first Claimant seeks also an order for a declaration that termination was unfair; a declaration that failure to issue Certificate of Service attracts penal consequences; costs; interest; and any other suitable remedy.

5. Wafula prays for:-

- a. *3 months salary in lieu of notice at Kshs. 72,165.*
- b. *August 2012 salary at Kshs. 24,055.*
- c. *24 days of annual leave at Kshs. 24,000.*
- d. *Gratuity at 16 days' salary for 20 years completed in service at Kshs. 251,753.*
- e. *12 months' salary in compensation for unfair termination at Kshs. 245,460.*

Total... Kshs.

617,488

Wafula prays for the additional reliefs contained in the first Claimant's prayers above.

6. The two Claims were consolidated with the concurrence of the Parties on the 23rd February 2015. Mtumwa gave evidence on 24th July 2013 and 26th June 2014 when he rested his case. Wafula testified, and closed his case, on 26th June 2014. The Respondent gave evidence common to both Claims, through its Works Manager Mr. Surendra Menon, and the In-Charge Melting Division Mr. Pillai Prasanna. The two Witnesses gave evidence on the 23rd February 2015. Hearing closed on the 28th July 2015.

1st Claimant's Case

7. Mr. Mtumwa was employed by the Respondent Company as a Dresser in the Melting Department, on 1st May 1995. He was issued a letter of appointment dated 1st April 1995. His designation is shown as 'Dresser' not 'Addresser' as repeatedly stated in his Pleadings and Submissions. He earned as of the date of termination, Kshs. 11,625 in monthly basic pay and Kshs. 3,000 per month in house rent allowance. He states he was summarily dismissed by the Respondent on 25th August 2012.

8. He testified he was injured at some point in time while on duty, and deployed to work in the stores. On 25th August 2012, he was alleged by one of his seniors to have stolen from the stores. He was peeling copper wires before smelting. It was said he had stolen them. He was issued the letter of summary dismissal by Personnel Officer Mr. Kalama. He was not given the reason for the dismissal. It was the first Claimant's duty to peel the coppers wires before smelting. It was not possible to leave the factory with the company property. He would have to obtain a gate pass to move out such property. He was not paid anything after dismissal. He was denied salary for August 2012.

9. On cross-examination the first Claimant testified on 17th August 2012, he was doing his duty as assigned by his immediate boss Mr. Wafula, [Claimant Number 2]. There was a main store and a store for materials. The Claimant used to work in both stores. He was on the material day working in the store

behind the smelting department. One had to get a requisition to move goods to the main store. The Claimant was alone on 17th August 2012 in the store. The door was ajar. He was peeling cables which would be used in connecting electrical installations. He was sent to do this work by Mr. Wafula. He was found in the store by Menon and Prasanna. Ali Suleiman was not there. He told them he was sent there by Wafula. Kalama asked the Claimant questions. This interview was recorded. Kalama took the Claimant's statement dated 17th August 2012. Wafula had the requisition; Mtumwa was merely a helper. The Claimant was told he was dismissed because of the incident. He did not steal anything. He was a Member of the Kenya Engineering Workers Union which had a CBA with the Employer. According to the CBA, summary dismissal disentitled the affected Employee of terminal benefits. The Claimant seeks compensation for unfair termination and terminal dues. He agreed he had previously been adjudged by the Employer, to have committed other employment infractions. The first Claimant worked for 17 years.

10. He concluded his testimony on redirection with the clarification that he was not aware what Kalama recorded in the interview. The Claimant did not sign the statement. It was not true that Wafula was broke and had sent the Claimant to commit a crime, to redress the financial distress.

2nd Claimant's Case

11. The 2nd Claimant states he was employed by the Respondent on 15th September 1992 as a Storekeeper. He was employed through a written contract. He earned a monthly salary of Kshs 24,055 all inclusive. He was a Member of the Kenya Engineering Workers Union. He was summarily dismissed alongside his Co-Claimant. He states he was not notified of termination. He was not given 1 month pay in lieu of notice. Summary dismissal was not preceded by any hearing or justification. He states he was denied substantive and procedural justice.

12. He testified his duty involved keeping of records. The Respondent had a main store and a subsidiary one. He sent his junior Mtumwa to the subsidiary store, to clean the store. There were wire scraps, which would be stripped, weighed and sent to the foundry division. They could not be moved without the 2nd Claimant's requisition. Wafula asked Mtumwa to strip the wires. Managers Menon and Prasanna went to the subsidiary store and found Mtumwa there. He informed the Managers he was sent to the subsidiary store by Wafula.

13. Later on Wafula was called to the Personnel Office. He found Mtumwa had recorded a statement. He was asked to do the same. The 2nd Claimant did not write a statement. He testified Kalama asked him questions. Wafula did not record a statement or sign one. The statement exhibited by the Respondent was not in the 2nd Claimant's handwriting. Wafula was summarily dismissed. Security Guards were asked to escort him out of the factory. He tried to talk to Menon but was waved away. The Claimant sought the assistance of KITUO CHA SHERIA who issued a demand letter. Wafula took the letter to the Respondent and was issued the letter of summary dismissal on 30th August 2012. The letter stated that the 2nd Claimant had declined receipt of a suspension letter.

14. Wafula testified he was denied the opportunity to be heard. He was not given the chance to attend a hearing accompanied by a Trade Union Representative. Mtumwa was similarly denied. The Respondent wrote to KITUO alleging its decision was based on investigations carried out. No report of the investigation was availed to the 2nd Claimant. The 2nd Claimant testified he was not paid August 2012 salary; notice pay; and annual leave pay for 2011/ 2012. He seeks gratuity in accordance with the CBA.

15. He told the Court on cross-examination that he went on annual leave last on 31st January 2011. He was dismissed on 17th August 2012. He was a Member of the Union. He was in charge of 3 stores. He sent Mtumwa to strip the cables. He sent Mtumwa to the subsidiary store. Wafula normally opened and locked the stores. The 2nd Claimant did not record a statement with Kalama, but was questioned. He agreed he sent Mtumwa to clean and strip the cables. A Trade Union Official was later called by the Management. The Official was not there during the interview. He refused to take the suspension letter because it was not read to him. He was issued the summary dismissal letter dated 30th August 2012. This

made reference to a suspension letter.

16. KITUO wrote a demand letter. It indicated the 2nd Claimant instructed KITUO he was suspended on 17th August 2012. Wafula insisted he did not see the suspension letter. The 2nd Claimant testified he had received warning letter in 1994 on missing goods; another in 2004 on incomplete monthly returns; and another in 2005 on lost water pipes. Wafula stated he explained himself and the Respondent accepted his explanation about the warnings. Wafula did not tell Mtumwa that Wafula was broke and needed money, before sending Mtumwa the subsidiary store. Wafula was in charge of goods worth millions of shillings and had no intention of stealing. He concluded his evidence on redirection emphasizing he did not send Mtumwa to steal from the subsidiary store. There were Security Guards outside the stores. He was given the opportunity to explain his role, but was not heard on dismissal. He was dismissed because of his disciplinary history.

Response

17. The Respondent conceded the Claimants were its Employees. They worked on the terms indicated in their Claims. The dates material to the Claims are not contested. The Respondent's position is that the Claimants were found to have colluded on the 17th August 2012, to steal electric cables from the Respondent's stores. They engaged in an act of gross misconduct. They were fairly and lawfully summarily dismissed as a result of the gross misconduct. The first Claimant was a habitual absentee and his general performance was poor. He had been issued several warnings. The 2nd Claimant's tenure was characterized by numerous incidents of unexplained losses of the Respondent's property. He was variously warned.

18. Surendra Menon testified Mtumwa was Stores Helper, and Wafula the Storekeeper. On 17th August 2012, Menon did his rounds in various production centres. He checked the water cooling towers. He enquired from Wafula about the stock levels, with regard to an item called fills. The item was used in water cooling. Wafula informed Menon there were only 2 of pieces of the fills left in the store. Accompanied by Mr. Kumar from the smelting department and Mr. Wafula, Menon proceeded to the refractory store to confirm the presence and condition of the fills. Wafula had custody of the keys.

19. They were surprised to find Mtumwa peeling wires in the refractory store. The door was ajar. Kumar said he had not given instructions on the peeling of any wires. The wires looked new. These wires were supposed to be in the main store. On questioning Wafula, he said he did not know why Mtumwa was there. Mtumwa said he was asked by Wafula to peel the wires, sell them and fetch money for Wafula.

20. Menon called the Personnel Officer Kalama and the Shop-steward. Investigations commenced. There were sufficient grounds to suspend the Claimants. They were issued suspension letters dated 17th August 2012. Suspension was for 7 days. Mtumwa ran away, while Wafula stood his ground, saying he was innocent. Another Store-man Ali Suleiman, who has since retired, witnessed the events in the refractory store. Based on the investigations, the Respondent summarily dismissed the Claimants.

21. Termination was fair. Mtumwa was caught stealing. He explained he was acting on the instructions of Wafula. Theft was for the benefit of Wafula. The CBA allowed for summary dismissal without terminal benefits, in cases of Employees involved in such acts of gross misconduct. Mtumwa had been suspended previously. Both Claimants had warning letters. Security Guards at the gate could be compromised. The factory stands on 45 acres of land and is surrounded by a wall. It is not possible to man the whole area. It was not impossible to siphon out items. There was no requisition for copper wires on 17th August 2012. Wafula was not authorized to requisition for materials. The Claimants' statements on investigation were not signed; Mtumwa ran away while Wafula refused to cooperate.

22. On cross-examination Menon testified Mtumwa assisted Wafula in carrying goods. Wafula could issue lawful instructions upon Mtumwa. Peeling of the wires was done by the foundry department. It is possible Mtumwa was assisting somebody else. This however was not his job. Menon did not go to the Human Resources Officer. He asked Mtumwa to go there. The Claimants recorded statements with

Kalama. Kalama no longer works for the Respondent. The Claimants did not sign the statements. Menon was not able to say if it was likely the statements did not originate from the Claimants. The Claimants were involved in the investigation.

23. Menon testified he was not aware if the Claimants were heard. They were caught in the process of stealing. There was no letter inviting them for a disciplinary hearing. If termination was consensual, the Claimants would have been entitled to their terminal benefits under the CBA. The Claimants worked for many years for the Respondent. It would not be unfair if Menon lost his job after many years of service, without terminal benefits, in circumstances such as related to the Claimants. Redirected, Menon told the Court he involved the Shop Steward in the disciplinary process, which was as good as involving the Trade Union. The Claimants were present when their statements were recorded. They did not request for further disciplinary hearing. Mtumwa's job did not involve peeling of wires; he did not work for the foundry department.

24. Prasanna is in charge of the smelting department. On 17th August 2012, Prasanna and Menon approached Wafula, enquiring about cooling fills. Wafula informed them the fills were in another store. The gentlemen went to this other store as narrated in the evidence of Menon, and found Mtumwa peeling wires. Mtumwa was shaking and explained he was asked by Wafula to peel and sell the wires, because Wafula was broke. Wafula denied he gave such instructions. Menon called the Personnel Officer who dealt with the matter. Cross-examined, Prasanna testified Menon, Mtumwa, Suleiman and Kalama went to the Human Resources Office; Prasanna did not go there.

25. The Claimants submit they have shown they were unfairly dismissed. Dismissal was not preceded by valid reason or reasons, and was not fairly carried out. They were denied terminal benefits given to them under the CBA. They merit compensation for unfair termination. They rely on the **CBA, Section 18, 41,43, and 45 of the Employment Act 2007** and Industrial Court decisions in **Loice Otieno v. KCB [Cause Number 1050 of 2011 at Nairobi]** and **Asiema v. Kivi Milimani Hotel [Cause Number 1197 of 2011 at Nairobi]** in buttressing the need for substantive and procedural justice in termination of employment.

26. The Court was not able to trace the Respondent's Closing Submissions in the record.

27. The issues for determination are, as traditionally is the case with unfair and unlawful termination claims, whether: termination was based on valid reason or reasons; whether it was carried out fairly; and whether the Claimants deserve the remedies sought.

The Court Finds:-

28. The Claimants were employed by the Respondent for many years. Mtumwa was employed as a Dresser on 1st May 1995. Wafula was employed on 15th September 1992 as a Storekeeper. Both were summarily dismissed on 25th August 2012, on the ground of attempted theft. Mtumwa earned a gross monthly salary of Kshs. 14,625 on exit and had 17 years completed in service, while Wafula earned Kshs. 24,055 gross monthly salary on exit and had 19 complete years of service. Wafula was Mtumwa's immediate boss. Mtumwa worked as an Assistant to Wafula.

29. There is ample evidence that the Respondent had valid reason in summarily dismissing the Claimants. This is clear from the evidence adduced by Menon and Prasanna. On 17th August 2012, Mtumwa was found peeling cables in a store where he was not ordinarily assigned to work. He was alone and shaking. It was not his role to peel wires. This was the role of the foundry department. Prasanna was in charge of the melting department. He had not asked for wires to be peeled for smelting. The Claimants did not explain why they were peeling wires. Wafula testified he sent Mtumwa to the subsidiary store to clean. Alternatively he explained there were wires to be peeled and sent to the foundry department. He did not tell the Court if Prasanna had requested for such peeled cables. The inconsistency in Wafula's instructions to Mtumwa persuades the Court the two Employees were up to no good. It strengthens the evidence of the Respondents that the Claimants were attempting to steal the copper wires.

30. The activities carried out by the Claimants were not mere suspicions about theft; Mtumwa was captured live. He confessed he was instructed by Wafula to peel and steal. Wafula was broke and needed cash. This evidence was consistently given by the Respondent's Witnesses. It is strong and credible evidence. It is acceptable to the Court. There was valid reason to justify dismissal.

31. Menon and Prasanna invited Kalama the Personnel Officer to deal with the Claimants. Statements were taken from the Claimants. The Court does not see any reason to conclude the statements did not originate from the Claimants. They did not sign the statements, but the contents in those statements, seen against the other evidence of the Respondents, reflect a truthful account of the events of 17th August 2012.

32. The Claimants were suspended in accordance with the CBA. Investigations were carried out as shown by the recording of the statements. The Shop steward was engaged with the investigation. What completely lacked from the process was a disciplinary hearing, in the mode prescribed under Section 41 of the Employment Act 2007. There were no charges leveled against the Claimants. They were not called to answer any charges. They were not called to a disciplinary hearing, accompanied by workmates or shop-floor trade union representatives of their choice. The Respondent investigated the Claimants' conduct, but appears to have assumed that was sufficient before taking the dismissal decision. It was not sufficient for purposes of meeting the demands of procedural fairness under Section 41. Between suspension on 17th August 2012 and summary dismissal on 25th August 2012, there was no hearing of any shade. It was not for the Claimants to request for a hearing as suggested by Menon in his evidence. The law demands Employees are heard without having to make request for a hearing. In this regard, termination was unfair, deserving redress through compensation under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act. Weighed against the finding on substantive justification, ***the Court grants the Claimants a minimal 3 months' gross salary each in compensation for the procedural violation.***

33. The Court has held the view in past decisions that Section 18 [4] of the Employment Act 2007 requires Employers to pay to Employees who are summarily dismissed, all moneys, allowances and benefits due to them, up to the date of dismissal. Parties cannot contract in their individual or collective employment agreements, to pay Employees who are summarily dismissed nothing. Terminal benefits are payable, regardless of the manner of termination. Clause 24 of the Parties CBA, states that any Employee who is summarily dismissed, shall not be entitled to any terminal benefits. This is inconsistent with the minimum standards created under Section 18[4] of the Employment Act 2007, and therefore not to be enforced. Terminal benefits are earned and there can be no justification in denying Employees who have worked over 15 years, their terminal benefits. If an Employee occasions the Employer any loss leading to dismissal, the Employer can always deduct the loss from the terminal benefits under Section 19 of the Employment Act 2007. What is impermissible is for the Employer to decline paying terminal dues altogether, to the Employee. The CBA grants Employees annual leave of 26 days [clause 17]; 3 months' termination notice or 3 months' salary in lieu thereof [clause 31]; and gratuity of 16 days' salary for every year completed in service for Employees with over 10 years of continuous service [clause 31]. Parties agree the CBA applied to the Claimants. These benefits are, except for notice pay as discussed below, available to the Claimants. The ***Claimants shall have their terminal benefits as tabulated by the Court hereunder.***

35. The Claimants were summarily dismissed for an act of gross misconduct. Summary dismissal under Section 44 [1] of the Employment Act 2007 means termination without notice, or with less notice than that to which the Employee is entitled by any statutory provision or contractual term. Acts of gross misconduct are punishable by summary dismissal under Section 44 of the Act, and in the case of the Claimants, similarly punishable under their CBA. Although entitled to be heard as concluded above, they were not entitled to have notice of termination or pay in lieu thereof, having been involved in an act of gross misconduct. Notice pay is not a benefit due to them under Section 18 of the Act and under the CBA. The claim for notice pay is rejected. Parties shall bear their costs of the Claim. In sum the Court **ORDERS:-**

[a] Summary dismissal was based on valid reason, but procedurally flawed.

[b] Katembe Kirongo Mtumwa shall be paid by the Respondent: 3 months' gross salary for unfair termination at Kshs. 43,875; Salary of Kshs. 14,062 for 25 days worked in August 2012; 26 days of annual leave pay for 2011/2012 at Kshs. 14,625; and gratuity at 16 days' salary for every completed year of service [17 years] at Kshs. 153,000- total Kshs. 255,562.

[c] Stephen Wafula shall be paid by the Respondent: 3 months gross salary for unfair termination at Kshs. 72,165; Salary of Kshs. 23,129 for 25 days worked in August 2012; 26 days of annual leave pay for 2011/2012 at Kshs. 24,055; and gratuity at 16 days' salary for every completed year of service [19] years at Kshs. 281,258- total Kshs. 400,607

[d] The Claimants shall be issued their respective Certificates of Service.

[e] Other orders sought in the form of declarations add no value to this decision and are rejected.

[d] Parties to meet their costs of the Claim.

Dated and delivered at Mombasa this 9th day of December, 2015.

James Rika

Judge