



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 344 OF 2013

BETWEEN

RICHARD MUIRURI NDUATI.....CLAIMANT

VERSUS

BUYLINE INDUSTRIES LIMITEDRESPONDENT

Rika J

CC. Edward Kidemi

Mr. Tom Wachakana instructed by Wachakana & Company Advocates for the Claimant

Mr. Nyaencha instructed by Nyaencha Waichari & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 14th March 2013, while the Respondent filed its Statement of Response on 24th April 2013. The Claimant gave evidence and rested his case on 18th February 2014. The Respondent did not call any Witness, wholly adopting its Statement of Response and Closing Submissions. The dispute was last mentioned in Court on 18th March 2014 when the Parties confirmed the filing of their Closing Submissions and were advised Award would be delivered on notice.

2. Nduati testified he worked for the Respondent Company as a Machine Attendant from 1998 to 14th January 2008. His role was to change moulds and cut bottles. He was issued a job identification card. The Respondent arbitrarily introduced contractual terms and conditions of employment around 14th January 2006. From hence, the Claimant was advised he would be employed on contract. His previous years of service were ignored. The contracts were reintroduced in January 2008 through blank Forms which the Respondent demanded the Claimant executes. The Claimant refused to do so and the Respondent

terminated the Claimant's contract of employment.

3. The Claimant holds termination was unfair and unlawful, contrary to Section 45 of the Employment Act 2007. He asks the Court to grant the following prayers-;

a) Declare termination was malicious, arbitrary, unlawful and invalid;

b) The Respondent to pay to the Claimant 12 months' salary at Kshs. 63,120 in compensation; 1 month salary in lieu of notice at Kshs. 5,260; and 1 month salary for every year worked at Kshs. 52,600; and costs of the Claim

4. He initially filed a Claim at the Chief Magistrates Court Milimani for terminal benefits, which he withdrew prior to institution of the current Claim. There were about 75 Employees of the Respondent affected by the controversial contracts. He was not paid any benefits on termination. He is married with 5 Children. He testified he is a Professional Mechanic. He approached the Labour Office, but his grievance was unresolved, compelling him to approach this Court.

5. He testified on cross-examination that he was not given a written contract in 1998. He did not know if the Respondent retained such a written contract on recruitment. The job identification card was given to regular Employees not Casuals. He was on permanent terms. He was a paid-up National Social Security Fund Member. Kshs. 5,260 per month was the applicable rate on the date of termination. The Respondent attempted to block the Employees from joining the trade union. It is not true that the Claimant left employment upon lapse of his contract dated 2nd January 2007. He was not requested to apply for renewal. He was sacked because of his desire to join the trade union. He agreed he had not pleaded this in his Claim. He was not paid dues accruing from his past service, at the point he was required to sign the new contract. There were salary underpayments. He withdrew the Claim in the Chief Magistrates Court. He prays the Court to uphold the Claim.

6. The Respondent's position is that the Claimant was employed in the role given in his Claim, but was employed on a fixed-term contract, which lasted on or about December 2007. He did not at any time serve on permanent basis. His contract was not unfairly or unlawfully terminated; it expired at the end of the fixed period. The Respondent denied knowledge of the withdrawal of the Claim filed by the Claimant at the Chief Magistrates' Court. He was offered renewal of contract which he rejected. The Respondent could not retain the Claimant against his will. The Respondent relies on the contract dated 2nd January 2007, signed by the Claimant for a period of 1 year, running from 1st January 2007 to 31st December 2007. The Respondent complied with the Law, by granting the Claimant this written contract, in accordance with Section 9 of the Employment Act 2007. The Claim must fail on these grounds. The Claimant did not show he worked for 10 years. He was subscribed to the N.S.S.F, and is not eligible to receive service pay under Section 35[6] [d] of the Employment Act 2007.

The Court Finds and Awards:-

7. There is reason to agree with the Claimant that he was employed by the Respondent as a Machine Attendant in 1998. He availed to the Court a copy of the Job Identification Card which is indicated to have issued on 24th April 1998. He however seems to have acquiesced to the change in the nature of employment. He signed a contract on 2nd January 2007, which was for a fixed term of 1 year, beginning 1st January 2007, and ending 31st December 2007.

8. This change seems to have been implemented earlier, with the Claimant referring to the 14th January 2006, as the date when the Respondent '*unlawfully and arbitrarily introduced new contractual forms.*' The contract document attached to the Statement of Response, signed by the Claimant on 2nd January 2007 would then be the second 1 year fixed term contract, the Claimant agreed with the Respondent, to serve under.

9. His assertion that he declined to sign the fresh forms, leading to termination was not convincing. He

would not have been in employment between January 2006 and December 2006, if he had not agreed on the 1 year contract. He is at the very least shown to have signed the contract beginning 1st January 2007 and ending 31st December 2007.

10. What happened after the last contract expired is that the Claimant and 5 of his Colleagues declined to sign renewal. The Claimant cannot say he was summarily dismissed; he declined to sign another fixed term contract. He desired to continue working under the previous indeterminate engagement. He however overlooked the fact that he had acquiesced to the change in the nature of employment, signed fixed term contracts and worked for at least 2 years under such an arrangement, and could not force the Employer to retract the fixed term contracts.

11. There was no summary dismissal; there was a lapse of a fixed term contract. The Claimant is therefore not entitled to claim a declaration that termination was unfair and unlawful; his claim for notice pay is misplaced; as is his claim for damages. The only outstanding questions are whether the Claimant merits service pay and costs.

12. He claims 1 month salary for every year worked. He did not show the Court that he served continuously for 10 years. The Court is persuaded he served continuously for 8 years, from the beginning of 1998 to the end of 2005, and merited to be recognized and rewarded for those years. Section 35 of the Employment Act 2007 was not in operation at the time, and there was no good reason given by the Respondent why it just terminated the old indeterminate contract of employment, introduced new ones, without paying the Claimant what was due under his creditable years of service. ***He is granted 15 days' salary for each of the 8 years completed in service, amounting to Kshs. 24,277, to be paid by the Respondent within 21 days of the delivery of this Award. Each party shall meet its own costs of the litigation.***

Dated and delivered at Nairobi this 27th day of June 2014

James Rika

Judge