



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1113 OF 2012

BETWEEN

KENYA CHEMICAL AND ALLIED WORKERS UNION..... CLAIMANT

VERSUS

NATIONAL CEMENT COMPANY LIMITED RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Mueke Industrial Relations Officer of the Claimant, instructed by the Claimant

Mrs. Maira instructed by Maira & Ndegwa Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant Union initiated the Claim herein on behalf of its 2 Members Geoffrey Nzioka and Joseph Mbuvi Muli [Grievants], through a Statement of Claim, dated 27th June 2012. It is not clear from the record when the document was received in Court. The Claimant filed affidavits in support of the Claim, sworn by the 2 Grievants on 19th February 2013, and received in Court on 27th February 2013.
2. The Respondent filed its Statement of Response and a Witness Statement on 27th November 2012. The Respondent also filed a Supplementary List of Documents on 18th February 2014. Nzioka testified on 10th May 2013, while his colleague Joseph Mbuvi Muli testified on 4th December 2013 when the Claimant closed its case. The Respondent called its Human Resources Manager Hilary Bosire, who testified on 18th February 2014 when the hearing closed. The dispute was last mentioned on 18th March 2014 when Parties confirmed the filing of their Closing Arguments and were advised by the Court Award would be delivered on notice.
3. The Claimant's position is that the Grievants were employed by the Respondent Cement Company. Nzioka was employed on 6th June 2010 as a Welder, earning Kshs. 320 per day. This was paid weekly in arrears. The terms were changed on 1st January 2011, whereof Nzioka was employed under contract, paid a monthly basic salary of Kshs. 8,700; house rent allowance of Kshs. 1,305; and milk allowance of Kshs. 900- total gross monthly pay at Kshs. 10,905. He had a clean employment record. His contract was terminated by the Respondent on 21st March 2011, on the allegation that he was involved in the

recruitment of Employees into the membership of the Claimant Union.

4. Muli was employed by the Respondent on 21st July 2009 as a Fitter. He earned Kshs. 400 per day, paid weekly in arrears. He likewise was later employed on contract from 1st January 2011, earning a basic monthly salary of Kshs. 10,520, house rent allowance of Kshs. 1,578 and milk allowance of Kshs. 900-total at Kshs. 12,998. He claims the monthly basic under the Regulation of Wages [General] [Amendment] Order 2010 was Kshs. 14,139 for Mavoko Municipality, and he was thus underpaid. He had a clean employment record. His contract was terminated at the same time with Nzioka's, over the same reason.

5. The Claimant urges the Court the Court to find termination unfair and unlawful, and grant the following Orders:-

- a. Reinstatement of the Grievants without loss of benefit, privileges, salaries and other benefits;
- b. In the alternative, the Grievants be paid their full terminal benefits in accordance with the law; and
- c. Costs be provided for.

6. In his testimony, Nzioka told the Court he was only paid for days worked on termination. The Respondent wished its Employees to join a rival trade union, the Kenya Quarry Workers' Union. The Employees joined the Claimant to the chagrin of the Employer. Cross-examined, Nzioka testified he was not given a letter of employment in 2010. He only had the letter of 20th January 2011. The Company was under construction when he joined. The Company was not in production. Asthan, a Civil Engineer at the site when Nzioka was first employed, was an Employee of the Respondent, just like Nzioka. The letter of employment of 20th January 2011 had a provision for probation of 3 months, ending 31st March 2011. Termination was on 21st March 2011, within the period of probation. There was no requirement for the Respondent to give reasons for termination. The letter of termination stated reasons for termination. It was explained that the Company did not need the Grievant's services any longer. He agreed he entered employment as a Casual Worker. He had asked the Respondent to pay him advance of terminal benefits of Kshs. 2,000. This was paid. He was to collect the balance of Kshs. 2,480 on 26th March 2011. He found this to be insufficient. He did not know if it was deposited with the Ministry of Labour. He expected to receive service pay and pay for days worked. There was a CBA signed between the Respondent and Kenya Quarry Workers Union. The cement industry should not be represented by the Claimant Union. Redirected, Nzioka stated that production started in September 2010. He was still an Employee of the Respondent.

7. Muli testified he is a Metal Worker. He worked with Bamburi Cement, before joining National Cement Company Limited in 2009. He worked continuously, and earned Kshs. 400 per day. He was not employed by a Contractor; he was employed by the Respondent. In March 2011, the Employees were given written contracts. These were distributed to the Employees by the Guards. The Employees were not given time to read the contracts. His contract was terminated on 21st March 2011, on the ground that he had enlisted as a Member of the Claimant Union. He paid subscription fees to the Union. He was only paid Kshs. 2,000 on termination. He did not agree with the Conciliator's Report.

8. Cross-examined, Muli testified he was employed on 21st July 2009. He was not issued a letter of employment. The Respondent was already in production, not setting up. It is not true that he worked for Asthan, an Independent Contractor engaged by the Respondent in setting up the facility. The contract given to Muli in January 2011 had a probation period of 3 months. Notice of termination during probation would be 7 days. The probation period was not over, as of 21st March 2011 when the contract was terminated. The Respondent informed the 2nd Grievant his contract was terminated because the Management was not satisfied with his performance; it was not because of trade union activities. He was paid Kshs. 2,000 and signed petty cash voucher. The Guards prevented him for accessing the office when he went to collect the remainder of his dues later. He was not a Casual Employee. He was entitled to bring a Claim for unfair termination. He did not know about another Union called Kenya Quarry Workers Union. Redirected, Muli stated he was advised by the Personnel Manager that his contract was terminated on account of his joining the Claimant Union; nothing was mentioned about poor performance. The

Claimant urges the Court to grant the prayers shown in paragraph 5 above.

9. The Respondent states it only started production in 2011. Prior to this, the factory was under construction. The 2 Grievants were employed as Casual Employees by the Independent Contractor engaged by the Respondent, named Asthan. Asthan would channel their dues, through the Respondent, but they were never employed by the Respondent. They were subsequently employed by the Respondent on 1st January 2011. They were to serve on probation for the first 3 months. Either Party could terminate the contract during probation, by giving 7 days' notice or 7 days' wages in lieu of such notice. The Respondent has a recognition agreement with the Kenya Quarry and Mine Workers Union. The Claimant Union cannot represent the Grievants in respect of this dispute. The Grievants requested for, and were paid advances of Kshs. 2,000 each. They declined to collect the balance of their dues on 26th March 2011, which was thereafter deposited with the Labour Office. Termination was not unfair or unlawful in either case.

10. Hilary Bosire, the Human Resources Manager of the Respondent testified that the Respondent manufactures cement and its by-products. He has worked for the Respondent from 2010. In 2010, the Respondent was not in production. The factory was under construction. Bosire was involved in the recruitment of Employees. He met the Grievants at the premises. They were working for an Independent contractor Mr. Asthan. They were employed by the Respondent from January 2011. They were placed on probation. They did not complete the period of probation. Hilary terminated their contracts on 21st March 2011, relying on Section 42 of the Employment Act 2007. He paid them 7 days' wages in lieu of notice, in accordance with the terms of the contract. The contract between Asthan and the Respondent lapsed in November 2010.

11. Bosire told the Court the Respondent does not have any relationship with the Claimant Union. It has a Recognition Agreement with the Kenya Quarry and Mine Workers Union, with whom it has concluded a Collective Bargaining Agreement [CBA]. The Respondent's pay roll confirmed the Grievants worked between January and March 2011. They were paid advance of terminal dues of Kshs. 2,000 each. They did not go back to the Respondent to collect the balance after that. The Respondent deposited their dues with the Labour Office Machakos on 30th March 2011. The sums deposited were Kshs. 5,900 each, comprising notice pay of 7 days and pro-rata leave of 2 ½ months- less Kshs. 2,000 advanced. The Respondent acted fairly, and owes the Grievants nothing. There is a demarcation dispute between the Quarry Union and the Claimant Union, but the Industry is currently represented by the former.

12. Bosire testified while answering questions from Mr. Mueke that he was employed in November 2010. Operations started in January 2011. Grievants were employed in January 2011. The contract between Asthan and the Respondent had not been availed to the Court. Asthan was not an Employee of the Respondent; he was an Independent Contractor. Probation was for 3 months. The Employees would be evaluated after 3 months. Their appraisal reports were not available. They were not issued with letters to show cause why their contracts should not be terminated. Either Party could terminate by notice of 7 days or payment of 7 days' wages. Bosire testified upon redirection by Mrs. Maira that probation was in accordance with the law. There was no requirement for notice to show cause why the contracts should not be terminated. The Respondent required the Employees to have Craft Certificates. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Awards:-

13. There is no law which bars the Claimant Union from representing the 2 Grievants in this dispute. It is not a requirement under the Labour Relations Act that for a Trade Union to act for its Members in individual disputes filed in Court, that Trade Union should have a recognition agreement with the concerned Employer.

14. Recognition under Section 54 of the Labour Relations Act 2007 is granted to a Trade Union by an Employer, to enable that Trade Union, collectively bargain on behalf of its Members and unionisable Employees in a particular collective bargaining unit. Recognition grants the Trade Union the right to act as the sole collective bargaining agent. It is focused on the collective rights and interests of Members and

potential Members of the Trade Union.

15. Legal representation in an individual dispute, does not fall within the right to act as the sole bargaining agent, granted to the Trade Union through recognition. Employees, even where the Employer has recognized a particular Trade Union, may opt to belong to another Trade Union other than the recognized Union, and legitimately be represented in individual disputes in Court, by such other Trade Unions. This is a separate relationship, from that created between the Trade Union and an Employer by dint of recognition. The Constitution of Kenya under Article 41, and the Labour Relations Act 2007 under Section 4, allow Employees and Employers wide latitude in exercise of associational freedoms.

16. The 2 Grievants chose to belong to the Claimant Union, paid subscription fees, and could not be barred from doing this, or from being represented in Court by the Trade Union of their choice, on the ground that the Employer has a Recognition Agreement with another Trade Union, the Kenya Quarry and Mine Workers Union [KQMWU]. In dispute is not an issue implicating the right of the KQMWU to act in the representation of the collective rights or interests of the Unionized and Unionisable Employees of the Respondent; in issue is the representation of 2 individual Employees in an individual dispute filed in Court. The Constitution of Kenya and the Labour Relations Act 2007 permit them to belong to the Claimant, and to enjoy all the benefits of their association with the Claimant, as prescribed under the Claimant's constitution, including the enjoyment of the benefit of legal representation. The only area in which the Claimant Union cannot engage in for now, is in collectively negotiating and bargaining with the Respondent, as it is deprived that right by the exclusive right of collective bargaining granted KQMWU through the existing Recognition Agreement. The Claimant is properly before the Court.

17. There is adequate evidence the Grievants were engaged by the Respondent as Casual Employees, before the formal employment through the fixed term 1 year contracts signed by them on 10th January 2011. Nzioka was employed as a Casual Employee on 6th June 2010. He worked as a Welder, earning Kshs. 320 per day. Muli was employed on 21st July 2009 as a Casual Employee, working as a Fitter, at a daily rate of Kshs. 320.

18. There was no evidence showing the Grievants were employed by an Independent Contractor engaged by the Respondent. No evidence was shown by the Respondent, on the existence of an Independent contractor called Asthan. No document was availed to this Court relating to this independent contract.

19. The Human Resources Manager Mr. Bosire testified he found the Grievants working at the Respondent when he joined in November 2010. The Respondent did not start production until January 2011, and Bosire was involved in recruitment of Employees. The contract with Asthan, ended in November 2010, at the same time Bosire joined.

20. The Court does not think that merely because the Respondent was not manufacturing cement and sundry products before November 2010, it did not have Employees, and did not employ the Grievants. The roles carried out by the 2 Grievants, Welding and Fitting respectively, are roles that would remain relevant, during the setting up of the Plant and after such setting up. These roles were retained from January 2011.

21. Bosire testified the Grievants used to be paid their daily rates in arrears after 1 week, through the Respondent. It is not likely that an Independent Contractor would allow his Principal to determine and manage the rates of remuneration of his own Employees. The Respondent offered the Grievants fixed term contracts, signed on 10th January 2011. The 2 Grievants continued to serve in the same capacities- Welder and Fitter. They were in continuous employment, serving in the same Enterprise, and discharging the same roles.

22. In the view of this Court, the fixed term contracts signed by the Grievants were given to them, understandably, because the Respondent was going into production. There was a Human Resources Manager, recruited to assist in the recruitment of Employees. The Respondent however, made a mistake, in treating the 2 Grievants as new Employees, in a New Business. They were old Employees, who should have been treated differently.

23. The Respondent should at the time it went into production, have converted the Grievants' casual employment, into regular employment under Section 37 [a] of the Employment Act 2007. They had worked in aggregate, and continuously for the Respondent, for a period in excess of 1 month. They merited regular employment, without the precondition of probation.

24. The probation clause was not reasonable or fair, granted the period of time served by the Grievants in continuity. Nzioka had served for 6 months, while Muli had served for 1 ½ years, at the time they signed the fixed term contracts. They ought not to have been subjected to probation. Section 42 of the Employment Act 2007, cannot therefore be interpreted to their disfavour. Probation was never intended for old Employees.

25. The Respondent justified termination on the ground that the Grievants' services were unsatisfactory. The Grievants testified their contracts were terminated on account of their joining the Claimant Union. There was no evidence to support either ground. There were no records of the Grievants' job performance, given to this Court to support the assertion that their services were unsatisfactory. The Claimant did not provide the Court any material to show the Grievants were victimized on account of their trade union activities.

26. The Employer however has the exclusive duty of demonstrating the reason or reasons, for termination under Sections 43 and 45 of the Employment Act 2007. The Claimant had no duty whatsoever, in establishing the reason or reasons why its Members' contracts were terminated. The Respondent did not show to the Court valid reason or reasons, in terminating the Grievants' contracts of employment.

27. The Grievants wish to be reinstated. The Court does not think this is a reasonable or practicable remedy, given that it is now well over 3 years, from the date the Grievants left employment. The Industrial Court has held the position, even before the advent of the ceiling of 3 years from the date of termination imposed by the Industrial Court Act 2011 in cases of reinstatement, that reinstatement is not an ideal remedy where a long period of time has passed from the date of termination. Workplaces are dynamic, means of production and work systems change, and it is never easy for the Employer and the Employee to rebuild a stable employment relationship after years of disengagement. The prayer for reinstatement is declined.

28. The Claimant asks in the alternative, that the Court grants the Grievants 'full benefits and entitlements as required by law'. Unfortunately, the Claimant did not make an attempt at directing the mind of the Court on the range of 'full benefits and entitlements as required by the law.' The Claimant is engaged in a demarcation dispute with KQWMU and expectedly, did not seek that the Employees be paid in accordance with the CBA concluded by KQWMU. The Conciliator appointed by the Minister for Labour had recommended the Grievants be paid 1 month salary in lieu of notice, accrued leave, wages earned, off duty and public holidays. In addition, the Conciliator recommended Nzioka be paid 1 month gross salary in compensation, and Muli 2 months' gross salary in compensation for unfair termination. Certificates of service were to issue. The Grievants rejected these recommendations.

29. In the view of the Court they should not have done so. The recommendations were reasonable. They had worked for relatively short periods, to expect obese terminal cheques. In this Claim it is difficult to grant the Grievants unspecified accrued leave, wages earned, off duty and public holiday. Claimants coming to the Court must give details of such prayers, because unlike the recommendations of a Conciliator, the decision of the Court must be detailed, effective and executable. It is also meant to be a final decision, and where appealed, the decision must be clear and understandable to the Superior Courts. If this Court grants the Grievants 'full benefits and entitlements as required by the law' or upholds the Conciliator's recommendations and grants the unspecified terminal benefits, where will the Parties go from here? The Claimant alluded to underpayments in the Statement of Claim, but makes no specific claim on this, and gave no evidence in support. The Claimant and the Grievants did not assist the Court at all, in clarifying their prayers. In the end, *the Court Orders-*:

[a] Termination of the Grievants' contracts of employment was unfair;

[b] The Respondent shall, within 30 days of the delivery of this Award, pay to Geoffrey Nzioka 1 month basic salary in notice pay at Kshs. 8,700 and 1 month gross salary in compensation for unfair termination at Kshs. 10,905- total Kshs. 19,605 AND pay to Joseph Muli 1 month basic salary in notice pay at Kshs. 10,520 and 2 months' gross salary in compensation at Kshs. 25,976- total Kshs. 36,496.

[c] The Respondent may retrieve the sums deposited with the Labour Office, upon satisfying this Award;

[d] Certificates of service be released to the Grievants forthwith; and

[d] No order on the costs.

Dated and delivered at Nairobi this 2nd day of July 2014

James Rika

Judge