



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 763 OF 2012

BETWEEN

PETER MBITHI MUTUA CLAIMANT

VERSUS

ATHI RIVER STEEL PLANT LIMITED RESPONDENT

Rika J

Court Assistant - Mr. Kidemi

Mr. Namada instructed by Namada & Company Advocates for the Claimant

Mr. Thuita instructed by Mwangi & Guandaru Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Claimant filed his Statement of Claim on 7th May 2012. He claims he was employed by the Respondent Steel Company on or about the month of January 2005, in the position of a Furnace Charger. He earned Kshs.3,050 per week. He was summarily dismissed by the Respondent in November 2010. He feels the Respondent acted unfairly and unlawfully, and prays for the following Award against his former Employer:-

(a) 1 month salary in lieu of notice at Kshs.12,200.

(b) Unpaid outstanding annual leave for the 5 years in service, at Kshs.61,000.

(c) Service pay at 18 days' salary, for every year completed in service, at Kshs.36,000/-

(d) Compensatory damages for wrongful and unfair dismissal, the equivalent of the Claimant's 12 months' salary at Kshs.146,400.

(e) A declaration that the Claimant's dismissal from employment was unfair, illegal and unlawful and the Claimant is entitled to damages.

(f) Interest on the total sum of Kshs.256,200 claimed.

(g) Costs

2. The Respondent filed its Statement of Response on 25th August 2012. It concedes employing the Claimant on or about January 2005 as a Furnace Charger. He absented himself without the leave of the Respondent on 8th October 2010. He conspired with Colleagues to sign for him the Attendance Register, to indicate he was present at work, while he was not. At the same time he received wages for 8th October 2010 to 12th October 2010, while knowing he rendered no work and was absent. His Colleagues accepted their offences, wrote apologies, while the Claimant was unapologetic. He was paid his terminal dues, and absolved the Respondent from further liability on 20th November 2010. He was paid his leave dues for the period between 2006 and 2010. The Claim has no merit, and should be dismissed with costs to the Respondent.

3. The Claimant gave his evidence, and closed his case, on 20th November 2012. The Respondent's evidence was given by its Human Resource Officer Mr. Christopher Wangul on 10th July 2014, when the hearing closed. The Parties confirmed the filing of their Closing Submissions before Hon. Justice Nzioki wa Makau on 4th November 2014. The file was forwarded to the Trial Judge at his new Station in Mombasa for the writing of this Award.

4. The Claimant testified he was on duty on 8th October 2010. The Respondent did not give him the opportunity to defend allegations made by the Respondent against the Claimant, set out under paragraph 2 of this Award. He was asked to write a letter of apology to continue working. He declined.

5. Cross-examined, Mr. Mutua explained there were about 15 Furnace Chargers. The Employees signed an acknowledgement, showing payment of all dues including annual leave pay. He acknowledged receipt of Kshs.4,453 in leave pay for the year 2006. This trend continued to the year 2010 when he left.

6. Summary dismissal was on 4th December 2010. He was dismissed by Mr. Wangul. He did not write to the Respondent complaining he was unfairly treated. He reported the dispute to the Labour Office. He was dismissed in 2010, and filed this Claim in 2012. His Colleagues apologized. He refused to do so, because he was not on the wrong.

7. The Respondent alleged the Employees were stealing by manipulating the Attendance Register. 26 Employees were affected. The Claimant refused to apologize because he was innocent. He was subscribed to N.S.S.F, and contributions were made for specific months. He seeks leave pay from the year 2005. He could not tell if this Claim for leave was time-barred.

8. Christopher Wangul confirmed to the Court the Claimant was employed as a Furnace Charger. His salary was as shown in the Claim. He was found guilty of gross misconduct for forging the Attendance Register, and summarily dismissed.

9. The Respondent had noticed some Employees were not reporting on duty. On examining the Attendance Register, the Respondent noticed these Employees were shown to have signed the Register, even while absent.

10. In Respondent's Appendix 1, the Claimant was recorded to be absent without permission, on 8th October 2010. Appendix 2, the Weekly Attendance Sheet for 8th October 2010, which the Employees signed before payment of their dues, indicated to be signed by the Claimant. He was paid, though absent.

11. investigations carried out by the Respondent showed 29 Employees, between October and November 2010, had manipulated the employment records this way.

12. The Claimant was summoned by the Management. He appeared before Wangul, accompanied by the Shop Steward of the Furnace Section. He conceded the offence. The Respondent decided to terminate. If one was remorseful, termination decision was commuted to a warning. 11 of the 29 guilty Employees

expressed remorse and were warned and retained.

13. The Claimant and 5 of his Colleagues refused to apologize, and reported the dispute to the Labour Office. The Labour Officer concluded termination was lawful.

14. The Claimant was summarily dismissed, and not entitled to notice pay. He was a Member of the N.S.S.F., and not entitled to service pay. He was paid all his dues, including annual leave pay, and acknowledged receipt.

15. Wangul testified on cross-examination that he conducted the disciplinary case. There were no minutes of the meetings before the Labour Office.

16. The witness did not give the Claimant a Notice to Show Cause why disciplinary action should not be taken against him. Wangul was unsure about the date the disciplinary hearing took place; had no record of the hearing; and the Claimant's admission of the offence was un-recorded. There was no evidence who prepared the document marked as Appendix 1 of the Response, showing the Claimant was absent without permission. The letter of summary dismissal did not have the explanation to the Claimant, that he could be retained on conceding offence and apologizing.

17. The apologies written by the other employees did not mention the Claimant. The Claimant was paid his dues. Termination was lawful.

The Court Finds and Awards:-

18. The Claimant was employed by the Respondent Steel Company as a Furnace Charger, earning Kshs.3,050 per week, effective from January 2005. He left employment on 4th December 2010. The Respondent summarily dismissed the Claimant alleging the Claimant manipulated the Attendance Register for 8th October 2010, to show he was present at work for duty, while he was not. He conspired with his Colleagues who signed the records to enable the Claimant receive wages for days when he remained absent.

19. The employment records attached to the Statement of Response adequately show that Employees were involved in the doctoring of the Attendance Register. They would take un-authorized days off, and cover for each other, to be able to continue earning wages for no work done.

20. The Court has no reason to doubt that the Claimant actively participated in this scandal. Respondent's Appendix 1 shows he was absent without permission from work on 8th October 2010. Appendix 2, the Weekly Attendance Register indicates the Claimant, while absent, signed in. The Court can see no other reason why these records were manipulated, other than to deprive the Respondent of its rightful man-hours. The Employees manipulated the Attendance Register, earned wages illegally, and can hardly be heard to complain about the consequences of these acts of gross misconduct. The Respondent established substantive justification under Section 43 and 45 of the Employment Act 2007.

21. The evidence of the Claimant suggests he was heard before the decision was made against him. It was not contested he was accompanied by his Section's Shop Steward Mr. Mohammed. He acknowledges he was asked by the Respondent to write an apology, he declined, while others who did so, had summary dismissal commuted to warning, and were retained.

22. The Claimant was summarily dismissed for a demonstrable act of gross misconduct and is not entitled to notice pay. He was availed of his annual leave pay for every year from 2006 to 2010, as shown in the Annual Leave Records attached to the Response as Appendix 7. He acknowledged payment of annual leave pay for every year. He was a member of the N.S.S.F., and ineligible for service pay under Section 35(6) of the Employment Act 2007. Summary dismissal was grounded on fair and valid reason, and carried out fairly, and no compensation is merited. In sum, IT IS ORDERED:

a) *This Claim has no merit and is dismissed in its totality.*

(b) *No order on the costs.*

Dated and Signed at Mombasa this 3rd day of December 2014.

James Rika

Judge

Dated, Signed and Delivered at Nairobi this 16th day of December 2014.

Nzioki wa Makau

Judge