



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 460[N] of 2009

BETWEEN

JOSEPH SAIKA

ONGAYO.....

CLAIMANT

VERSUS

NEW WORLD INDUSTRIES

LIMITED..... RESPONDENT

*Rika J
CC. Elizabeth Anyango*

Mr. Rakoro instructed by Rakoro and Company Advocates for the Claimant

Mr. Mohammed instructed by Mugambi Mungania and Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL DISMISSAL OF JOSEPH SAIKA ONYANGO

AWARD

1. The Statement of Claim was filed on 20th August 2009. The Respondent filed its Reply and Counter-claim on 30th November 2009. The Claimant testified on 24th February 2010 and called one witness Fredrick Odindo who serves as the Assistant General Secretary of the Engineering Workers’ Union, who testified on 17th November 2010 when the Claimant closed his case. Jugal Kishore Bhalla, the Director of the Respondent testified and closed the Respondent’s case on 11th January 2012. The dispute had gone through the conciliation overseen by Mrs. Kahuthia from the Labour Office, but parties were not able to secure her evidence.

2. Saika testified he was employed by the Respondent as a Spray Painter, in 1983. He worked from 8.30 a.m. to 4.30 p.m. He was not given a written letter of employment, but had a Staff Identification Card. His last monthly salary was Kshs. 5, 726.25. On 13th August 2007, Saika was assigned duty at the Kenya Breweries Industries at Ruaraka by Bhalla. There was heavy traffic, and the Claimant was late in reporting. On the following day 14th August 2007, Bhalla demanded that the Claimant gives an explanation on his lateness of the previous day. The Claimant gave his explanation, but Bhalla would hear none of it. Bhalla terminated the Claimant’s contract of employment, saying he no longer wanted to see Saika at his company. Saika explained that the Respondent was initially known as Afrigas Limited, and

became New World Industries in 2010. The company was in the business of running Gas Stations. Saika worked at one such Station at Parklands in Nairobi. After termination, he sought the assistance of his Union. The Claimant testified on cross-examination that Parklands Service Station was an outlet of the Respondent. He did not have documents to show Afrigas became New World Industries, but recalled the name actually being changed at the company premises to read New World Industries. He last worked on 13th August 2007. He agreed the muster roll showed he was absent from work on certain days. He conceded that he had received advance payment in excess of days worked. He was locked out of the workplace. He did not demand payment of August 2007 wages. The Claimant prays the Court to Award -:

[a] A declaration that the lockout of the Claimant was unlawful, null and void;

[b] The Claimant be paid his full salary and allowances during the period of the unlawful lockout;

[c] In the alternative, he is paid all his terminal benefits;

[d] He is paid 12 months' salary in compensation;

[e] The Court issues such other suitable orders;

[f] Costs; and interest.

3. Fredrick Odindo told the Court that Saika was a Member of the Engineering Workers Union. He reported that he was locked out on 14th September 2007. The Union sought to have a joint meeting with Bhalla. The Respondent declined to have such a meeting because there was no recognition agreement between the Respondent and the Union. The Claimant referred the dispute to the Minister on 28th November 2007. The Minister appointed a conciliator Mrs. Kahuthia. The Respondent did not attend conciliation meetings. The Claimant then engaged the services of an Advocate, and the Union's role came to an end. Answering questions from the Respondent's Advocate, Odindo testified he did not know that the Claimant took an advance payment from the Respondent on 15th August 2007. If he did, it was probably for days worked. There would be a conflict with the allegation that he was locked out.

4. The Respondent's position is that the Claimant was engaged by the Respondent in May 2006 as a General Labourer. He worked up to August 2007. He earned a gross monthly salary of Kshs. 5,974.25. The Claimant was assigned duty at Kenya Breweries Limited on 13th August 2007. He did not report on 13th August 2007. He was sent back on 14th August 2007 to complete his task. He cannot have been dismissed on 14th August 2007, because even on 15th August 2007, he reported for duty and was advanced Kshs. 2,000 for the month of August 2007. The Respondent asked the Court to refer to the muster roll for August 2007. He failed to report on duty on 16th August 2007. He was a habitual absentee, as shown in the muster roll. He did not report after 16th August 2007. He terminated the contract without giving the requisite 28 days notice. The Respondent was entitled to summarily dismiss the Claimant. The Respondent counterclaims the sum of Kshs. 5,974.25 being the notice pay due from the Claimant to the Respondent, and Kshs. 2,000 being the sum advanced to the Claimant for the month of August 2007.

5. Bhalla testified that the Claimant was not consistent in attending duty. The muster roll showed him absent severally, without leave. The company was awarded a contract by Kenya Breweries Limited. Saika was sent to work there. He was not locked out on 14th August 2007. The muster roll shows he was paid advance of Kshs. 2,000 for the month of August 200, on 15th August 2007. He did not return to work. Bhalla did not hear anything from the Claimant until this Claim was filed. The Respondent is entitled to recover notice pay and the sum advanced from Saika. Bhalla testified on cross-examination that Parklands Service Station is independent from New World Limited. The two were partners. The muster roll went up to 2005. New World was incorporated before 2005. There were employees before 2005. There were no written letters of employment. The Respondent deducted from the Claimant's salary for days absent. Saika worked for eight hours. He worked on 15th August 2007. He was a General Painter. He did not mention he was delayed by heavy traffic on 13th August 2007. Bhalla spoke to the Claimant

on 15th August 2007 when he was paid advance. The witness was not aware of the conciliation meeting. The Labour Officer wrote. The Respondent did not recognize the Union. It was not known by the Respondent if the Claimant was a member of the Union. There was no demand letter from the Respondent to the Claimant before the institution of the Counterclaim. From 16th August 2007, he did not report to work. He did not claim his salary for 15 days worked. Redirected by his Advocate, the witness testified there was no other relevant muster roll. The Claimant read the muster roll and signed. He was an employee paid periodically at the end of the month. He did not notify the Claimant on termination of the contract. The Respondent prays the Court to dismiss the Claim and uphold the Counterclaim.

The Court Finds and Awards:-

6. Both the Claim and the Counter-claim must fail. The reason for this failure is based on the law, as contained in Section 84 of the Labour Relations Act Number 14 of 2007. Schedule 5 of the Act states that all dismissal and termination disputes that arose before the coming into force of the Labour Relations Act, are to be dealt with in accordance with the Trade Disputes Act, Cap 234 the Laws of Kenya. This dispute arose before the enactment of the Labour Relations Act. It was reported to the Minister on 19th September 2007, in accordance with the provisions of the Trade Disputes Act. The Chief Industrial Relations Officer consulted the Tripartite Committee under the Trade Disputes Act. The Investigator was appointed and proceeded under the Trade Disputes Act. The reference to this Court should have been under the Trade Disputes Act. There is no Certificate signed by the Minister and the Commissioner of Labour, enabling this Court to take cognizance of the dispute. The parties appear to have adopted a different procedural and substantive law from the Trade Disputes Act. It is not clear under which law the Statement of Claim, the Reply and the Counter-claim have been filed and prosecuted. It is not clear under which substantive law the remedies sought by both parties in a claim that arose on 14th August 2007, should be considered. ***Both the Claim and the Counterclaim are hereby dismissed with no order on the costs.***

Dated at Nairobi this 26th day of April 2013

James Rika

Judge