



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1490 OF 2012

ANTHONY KIVULU KIILU.....CLAIMANT

VS

ATHI RIVER STEEL PLANT LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 27th August and filed in Court on 28th August 2012 the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Statement of Response on 19th December 2012 and the case was heard on 19th June 2013 with Miss Akhaabi instructed by Namada & Co Advocates appearing for the Claimant and Miss Nyaruita instructed by Mwangi & Guandaru Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Christopher Wangul. Both parties field written submissions.

The Claimant's Case

2. According to the Claimant, he was employed by the Respondent as a Mason in September 2004. At the time of leaving employment, the Claimant earned a daily rate of Kshs. 463, which was paid weekly. On or about 5th October 2011, the Respondent's Management called a meeting which was attended by the Claimant and other employees of the Respondent.

3. At the meeting, one of the Directors of the Respondent issued a directive to all employees in attendance inclusive of the Claimant to provide a written record of the work which they had accomplished from January 2011 up to the date of the meeting. The Claimant told the Court that ordinarily he did not keep any written records since he relied on instructions from his immediate supervisor on the tasks to be undertaken on any given day.

4. According to the Claimant, it was the Respondent's management and supervisors who kept such records. The Respondent's demand upon the Claimant was therefore unreasonable. Unable to produce the records, the Claimant was ordered to return all Company property in his possession and leave the Respondent's premises. It was the Claimant's case that the Respondent's action amounted to unfair termination of his employment.

5. The Claimant therefore claimed the following:

- a. A declaration that the termination of his employment was unfair and unlawful
- b. One month's salary in lieu of notice.....Kshs. 13,890

- c. Pay in lieu of 3 years' leave.....41,670
- d. Service/gratuity @ 18 days pay for every completed year.....25,002
- e. 12 months' salary in compensation for unfair termination.....166,680
- f. Costs and interest

The Respondent's Case

6. In its Statement of Response, the Respondent stated that the Claimant was assigned duties of stone laying, tile fitting, plastering and column setting and he was responsible for keeping his individual records of work done for approval on a daily basis. According to the Respondent, these records were vital for assessing the Claimant's performance based on set targets.

7. On or about January 2009, the Respondent met with the Claimant and his colleagues and set targets for a 10 hour working period. The targets were reviewed upward in January 2011.

8. On 5th January 2011, the Respondent summoned the Claimant and his colleagues on their failure to meet the set targets. On 6th January 2011, the Claimant did not report for duty and instead made a report at the Labour Office to the effect that his employment had been terminated.

9. Subsequently, a meeting was convened by a Labour Officer by the name Njagi at which the Respondent's Human Resource Officer, Christopher Wangul was in attendance. The Claimant and his colleagues were represented by Musyoki Kanoo and Richard Musembi Nzuve. It was agreed at this meeting that the Respondent would issue the Claimant and his colleagues with a work schedule. Thereafter, the Claimant absented himself from work without any explanation. The Claimant was later paid all his terminal dues

Findings and Determination

10. I will first dispense with the issue of the effective date of the Claimant's employment with the Respondent. According to the Claimant, he was employed by the Respondent in September 2004. However, on the National Social Security Fund (NSSF) Provisional Statement of Account submitted by the Claimant, the date of his employment is indicated as 1st January 2009. In the absence of any further documentary evidence, the Court has adopted the date provided in the NSSF Statement of Account as the effective date of the Claimant's employment with the Respondent.

11. The Claimant sought a declaration that the termination of his employment was unfair and unlawful. Section 47(5) of the Employment Act, 2007 provides that:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

12. The burden placed on each party is clear and does not shift. The Claimant told the Court that he was dismissed because he was unable to produce work records whose custody lay with the Respondent. The Respondent on the other hand averred that the Claimant declined to commit to set work targets and absconded duty.

13. Even after resolution of the dispute in the presence of a Labour Officer, the Claimant failed to resume duty. The Claimant did not controvert the Respondent's account on this score and I therefore find that no case for unfair termination of employment was made out. The claim for compensation for unfair termination therefore fails and is dismissed. The claim for one month's salary in lieu of notice also fails.

14. In response to the Claimant's claim for pay in lieu of leave the Respondent produced leave

pay records showing payment to the Claimant in 2009, 2010 and 2011. In view of my finding that the effective date of the Claimant's employment with the Respondent was 1st January 2009, the claim for pay in lieu of leave fails. The Claimant was a contributing member of NSSF and is therefore not entitled to service pay. The upshot of this Award is that the Claimant's entire claim is dismissed.

Each party will bear their own costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2013

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*