



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI  
CAUSE NUMBER 670 OF 2012

**BETWEEN**

FRANCIS RUTTO CHESEREK .....  
CLAIMANT

**VERSUS**

ATHI RIVER STEEL PLANT LIMITED .....  
RESPONDENT

*Rika J*

*CC. Elizabeth Anyango*

*Mr. Namada & Mr. Makhoha, 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

1. The Respondent is a registered Company, based in Nairobi and involved in the Steel Industry. This Company employed Mr. Cheserek as a Moulder in the Moulding/ Casting Section, on 1<sup>st</sup> September 2008. He earned a salary of Kshs. 3,500 at the time he left employment in November 2011. He filed this Claim on 20<sup>th</sup> April 2012, alleging that his contract of employment was unfairly and unlawfully terminated by the Respondent. He asks the Court to Award him-:

- A declaration that termination was unfair and unlawful;
- One month salary in lieu of notice at Kshs. 14,000;
- Unpaid leave for the entire service period at Kshs. 42,000;
- Service pay at 18 days' salary for every year completed in service at Kshs. 25,000;
- Costs; and Interest.

2. The Respondent filed its Statement of Reply on 28<sup>th</sup> August 2012. The Respondent holds that termination was fair and justifiable. The Claimant was guilty of gross misconduct. He fought a Co-Worker George Ndolo Muthami within the Respondent's premises. He sustained serious injuries from the fight, and then lied to the Respondent that the injury was as a result of an accident that happened in the ordinary course of work. Both fighters were summarily dismissed after the Respondent investigated the

incident. The Claimant was paid his final dues, and at the time of termination acknowledged he was not owed anything by the Respondent. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified and brought his case to a close, on the 30<sup>th</sup> October 2012. The Respondent testified through its Human Resource Manager Christopher Wangul, on 30<sup>th</sup> January 2013. The case for the Respondent closed on 30<sup>th</sup> January 2013, and the matter was last mentioned on 11<sup>th</sup> March 2013 when the Court confirmed the filing of the Final Arguments, and Parties were advised Award would be read on notice.

4. Cheserek testified he was a Moulder, working at the Casting Section for 6 days in a week. He was paid a daily rate of Kshs. 583, which translated to Kshs. 3,500 per week. He was injured on his forehead, on the 2<sup>nd</sup> November 2011 by a Machine that was in use at the workplace. He was treated at the Athi River Medical Services. When he went back to work after treatment, he was told his contract of employment had been terminated. The letter of termination is dated 9<sup>th</sup> November 2011.

5. The Respondent alleged that Cheserek had fought a Co-Worker. The Co-Worker served in a different Section. Cheserek was not given an opportunity to defend himself. The Respondent alleged that the Claimant had written a letter of apology to the Respondent on 10<sup>th</sup> November 2011, where he also categorically stated that his injury was caused by George Ndolo Muthami. The Claimant denied he wrote such a letter and did not acknowledge the signature on the letter as belonging to him. He never went on leave. He was not paid cash in lieu of leave.

6. Respondent's annexure 3 which shows payment of Kshs. 8,616 made to the Claimant, related to days worked in November 2011. He was not paid for leave days as alleged in the Respondent's annexure 4. What was paid was Christmas bonus.

7. Under cross-examination, the Claimant maintained he was injured by the machine. The machine was rotating at the time of the factory accident. It was a machine used for mixing sand. No Employee fought another. The Work Policy did not permit Employees to fight each other. Cheserek did not write any apology letter. The signature on the letter is not his. He claims leave of 3 years, 2008 to 2011. He was employed September 2008. The signatures on the Leave Application Forms are not his. The signature on the slip acknowledging receipt of all dues, including annual leave payments, does not belong to Cheserek. The Claimant urges the Court to allow the Claim.

8. Wangul admitted Cheserek was an Employee of the Respondent, for the period given in his Statement of Claim. He was a Moulder, working in the Casting Section.

9. The Claimant went to Wangul's Office on 22<sup>nd</sup> November 2011, alleging he was hit on the head by George Ndolo, a Co-Worker. The injury was on his face. The two Employees were accompanied by a Security Officer.

10. The two Employees went to Wangul later on 3<sup>rd</sup> November 2011, and stated Cheserek was injured by the machine. Wangul and Cheserek went to the place where the machine was. Wangul asked the Claimant to explain how the machine injured him on the face. The Claimant was not able to explain. Later, Wangul took George to the same place and asked him to explain how the Claimant was injured by the machine. George gave a different version, and the Respondent then issued the two Employees with their letters of termination around 9<sup>th</sup> November 2011.

11. The Claimant wrote an apology letter to the Respondent and admitted he made a mistake by fighting at the workplace. He did not ask for any sick off following his injury. He was paid his terminal dues. He signed acknowledging receipt, and discharged the Respondent from future claims. All Employees were paid cash in lieu of leave at the end of every year. This was what they preferred. Wangul asked the Court to dismiss the Claim.

12. In answer to questions put to him on cross-examination, Wangul stated he has a Certificate in Human

Resource Management, and has worked with the Respondent from 2005. He is familiar with the Employment Act 2007. The Claimant was dismissed for fighting a fellow Employee. There was no other reason.

13. On the first day the Employees came to Wangul in the company of the Security Officer, they all said the Employees had been fighting. The incident was recorded by the Respondent, but the records had not been made available to the Court. On 3<sup>rd</sup> November 2011, the Claimant changed his story and alleged he was injured by the machine. The two Employees changed the story on the second occasion. The Safety Officer was absent at the time the fighting occurred. 20 other Employees worked with Cheserek and George. The Respondent did not record statements from these other Employees.

14. Wangul investigated the incident with the assistance of George Olwana the Shop-floor Union Representative. There was no investigations report prepared at the end of the process. There were no formal charges against the Claimant. He was not required to respond to any issues, even verbally. There were no warning letters issued to the Claimant. The apology letter is dated 10<sup>th</sup> November 2011, while the letter of dismissal is dated 9<sup>th</sup> November 2011. Apology came after dismissal. It was a layman's way of appealing against the dismissal

15. The Respondent adheres to the Work Injury Benefits Act Number 13 of 2007. It would have pursued compensation for the Claimant if he had been injured in the ordinary course of work. The apology letter does not say injury was occasioned by the fight. The Respondent did not report the fighting to the Police. Wangul expected one of the fighters to lodge an assault complaint with the Police. Kshs. 8,616 was paid as leave days owed to the Claimant. This was leave for 2009. There was no record given by the Respondent of the Claimant's monthly salary. The Claimant alleges his salary was Kshs. 14,000 per month. He was paid salary for October 2011. No evidence was adduced by the Respondent to contradict the rate of Kshs. 14,000 per month stated by the Claimant.

16. Wangul closed his testimony on redirection with the statement that the two Employees told him they were fighting. The Employment Act did not require the Claimant be given formal charges. Employees are insured against work injury. The apology letter did not say the Claimant was not injured while fighting, or that he was injured by a machine. The Respondent asks the Court to dismiss the Claim.

#### *The Court Finds and Orders-*

17. Francis Rutto Cheserek was employed by the Respondent Company, as a Moulder in the Moulding/Casting Section, effective from 1<sup>st</sup> September 2008. He earned Kshs. 583 per day, worked 6 days a week, giving him Kshs. 3,498 per week, or Kshs. 13, 992 per month.

18. He alleged that he was injured on the face by a machine, while in the ordinary course of his work, on 2<sup>nd</sup> November 2011. The Claimant was injured on the forehead. He was given sick off of one week and treated at Athi River Medical Services. After he returned to work, the Respondent alleged that the Claimant was injured while fighting a fellow Employee George Ndolo Muthami, and summarily dismissed him on 9<sup>th</sup> November 2011.

19. Did the Respondent have valid reason or reasons for summarily dismissing the Claimant, and was the decision by the Respondent justifiable? There is a letter which the Court finds, was written by the Claimant on 10<sup>th</sup> November 2011, a day after the summary dismissal letter was issued. It's titled, '*Apology Once More.*' The Court is persuaded the letter was written by the Claimant as a form of appeal against the decision of his Employer of the previous day. From the wording of the letter, he had conceded he fought George earlier; otherwise he would not be apologizing *once more*. The contents of that letter support the Respondent's position that the Claimant was injured in a fight with a Co-Worker. He said, '*I will not blame the Company. The only person I will take action on is known per the name George Ndolo Muthami, and in all I do promise my injury was caused by that person and I will deal with him and not the company.....hoping that you are going to honour my apology and let me continue working.*'

20. It is clear from this confession that the Claimant was involved in fight at the workplace with George. He suffered injuries, but was later tempted to collude with his Co-worker, to alter the cause of his injuries, probably in an attempt to avoid disciplinary sanction. It is not lost on the Court that although he made the conscious effort to mislead his Employer as to the cause of his injury, he did not have the courage to lodge a workmen's compensation claim, since it would have called for medical proofs and additional investigations on the circumstances of the injury. He did not even try to convince the Court how a rotating machine at the workplace, injured his face accidentally. Unless there were some industrial materials flying into his face from the machine, the Court was at a loss to understand how the Claimant's face came into contact with a machine that is affixed to a particular place at the factory. Accidental injuries involving such machines that the Court has encountered in the course of its work, involve Employee's Limbs, not faces. The Court has heard cases where an Employee has accidentally placed his hands or legs in a rotating machine and suffered injuries to the limbs; cases of an employee accidentally suffering facial injury from such machines are uncommon. The Claimant did not persuade the Court how he was injured on the face. The Court finds the evidence of Mr. Wangul that both Employees were unable to explain how the machine injured the Claimant on the face, believable.

21. The Claimant came out across as an untruthful witness. He serially disowned his signature which appears in different documents, including the apology letter. He received leave payments and signed in acknowledgement, but disowned the document marked annexure 4 of the Statement of Reply. The pay rolls for 2009 and 2010 show he was paid for untaken leave. He alleges part of the payment was in Christmas bonus, but gave no document or other evidence to substantiate the claim for bonus. He is not entitled to leave pay of Kshs. 42,000. He attached his National Social Security Fund membership card, to the Statement of Claim. He was a member of the Fund. Service pay is not available to him under Section 35(6) of the Employment Act 2007. He was summarily dismissed on valid grounds. He is not entitled to notice pay. The only prayer that is left for the consideration of the Court is whether any form of compensation is payable to the Claimant.

22. There were certain procedural defects in the manner the Respondent carried out its decision. There were no formal charges, and no investigation report was compiled. No form of disciplinary hearing that would satisfy the requirements of Section 41 of the Employment Act 2007, took place. No disciplinary panel was convened before the letter of summary dismissal issued. The Claimant was entitled to have formal charges, explaining to him in a language he understands, the offences against him. He was entitled to be accompanied to the disciplinary hearing by a Co-Worker, or a Trade Union Representative of his choice, at the panel hearing. The Respondent had an obligation to hear out the Claimant. These procedures were not respected by the Respondent, which makes the claim for unfair termination sustainable, and which calls for minimal compensation. IT IS ORDERED-:

**[a] Termination of the Claimant's contract of employment was unfair on account of procedure;**

**[b] The Respondent shall pay to the Claimant ½ months' salary at Kshs. 6,996 in full and final settlement; and**

**[c] No order on the costs;**

Dated and delivered at Nairobi this 17<sup>th</sup> day of September, 2013

James Rika

Judge