



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 173 OF 2012

MILTON MGALLA MVURYA & 12 OTHERSCLAIMANTS

VERSUS

DEVKI STEEL MILLS LTD [MSA]RESPONDENTS

J U D G M E N T

The claimant have jointly sued the respondent alleging wrongful dismissal and claiming an aggregate of ksh.2,732,337.76/ as terminal dues.In addition they seek declaration that their terminal was wrongful and unconstitutional and for such they have prayed for general damages plus costs and interest.

In response the respondent has denied liability and contended that the claimant either deserted employment or were dismissed for misconduct or participating in an illegal strike on 4/10/2011. In addition she has averred that the claimants were paid all their employment dues and as such they are not entitled to the dues sought in their suit. She prayed for the suit to be dismissed with costs.

The suit was heard on 10/6/2013 when Milton Mgala Mvurya, Dominic Mutie and Malombe Mayuki testified for the claimants as CW1, CW2, and CW3 while Enoch Kiptum testified for the respondent as RW1.CW1 told the court that that he was employed by the respondent from 2004 as a driver and grass cutter.He started with a daily wage of ksh.280/ which was later increased to ksh.350 per day and total to ksh.10,500/ per month.That he used to work 12 hours per day and his over time was paid at normal rate instead of 1 ½ times as provided by the law.That on 4/10/2011 there was meeting between the management, workers and the union to discuss the grievances which had led to a previous strike in march 2011 including working conditions, drinking water, overtime and low wages.

Only a few workers were called into the meeting including the 11th claimant. In the meeting Mr. Rajiv for the management said that all the workers would be terminated, and fresh recruitment done.That on 10/10/2011 the claimants were called for the payment of their terminal dues but they were paid only for the days worked and promised to continue with work the following Monday but they were never given the job back. That the termination was without notice and terminal dues were never paid.

That the claimants never went for leave during their service and claimed pay in lieu of leave.They also claimed payments in respect of their overtime worked. On cross examination he confirmed that he was never given employment contract when he was hired in 2004.That he was driver of a saloon car.He however admitted that his employment record for 2004 showed that he was employed as a general worker. He denied that they were paid cash in lieu of leave. He insisted that he was entitled to 21 days

leave with full salary. That whenever he went to sign for the pay the cashier never allowed him to counter check what he was signing for.

He confirmed from the records that at the end of 2005 he was paid ksh.5302/ for 14 days leave plus ksh.1792/ for overtime. He however disagreed with the calculations. He also confirmed from the records that leave and over time was paid for in 2006 , 2007 and 2008 but he contended that the rate for overtime applied was law instead of the 1 ½ rates of the normal rate. That they worked on Sundays and public holidays and they ought to have been paid double the normal rate.

He admitted that between January 2009 and August 2010 the company was closed. He considered his service to have been continuous because even during the period the company was closed, he did not seek alternative employment. He admitted that at the end of 2010 he was paid his overtime and leave but he did not sign. That since 2008 he used to be paid through the bank. He admitted that he went to work on 3/10/2011 and 4/10/2011 and denied that there was a strike. He further denied that they caused disturbance and contended that it was not possible because police were present as usual in the factory.

According to him the workers wanted to go on with work while the meeting by the management and the workers representatives went on but the management refused. That the management told them that the workers were to be paid and fresh recruitment be done. That the following Monday they were never recruited but instead they were threatened with police action if they returned to the work place. He admitted that the employment record for October 2011 showed that he was paid salary, overtime and leave for which he signed.

He maintained that he served for 7 years from 2004 to 2011 and prayed for service pay.

CW2 was employed by the respondent in 2010 and worked until 2011. That in March 2011 he got injured while on duty and was hospitalized but the treatment records were reclaimed by the hospital on behalf of the respondent. That he was told by the respondent to go for a rest until he was called back but he was never called back. That he never went for leave and was never paid his service pay. According to him he was dismissed without notice. He confirmed that at the end of 2010 he was paid salary, overtime and leave. He remembered after seeing records that he was injured in July 2011 but continued to do light duties. He confirmed that in August he never worked because of the injury. That the personnel told him to stay at home until he was called. He denied ever absconding work.

That on 4/10/2011, he attended the meeting at the work place and no employee was allowed to get in the gate. He maintained that there was no strike. That all the workers were told to go away but he was told to come the following day because his case was different from the others. That he was only paid for one week and no termination letter was ever served.

CW3 stated that he worked for the respondent from 2004 to July 2011 when he was terminated. That no reason was given for the termination and no disciplinary was ever given to him before the termination. That he was also never paid his terminal dues plus pay in lieu of leave which he contended that he never took during all his years of service. He also claimed for overtime payment.

On cross examination he confirmed from the records of employment that he was paid cash in lieu of leave plus overtime but he maintained that he was never shown the particulars of the payment whenever he signed for the same. That he did not know whether he was a casual. He confirmed that he was paid salary, overtime and leave at the end of 2005, 2006, 2007 but contended that he never went for leave in 2006 yet his record showed zeros leave days paid.

That on 28/7/2011 he was terminated. He denied ever going to work drunk otherwise he would have been given warning letters. He also denied absconding work. He denied ever going to work place on 4/10/13 to participate in a strike.

RW1 is the HR Manager for the respondent at Mombasa branch since 2004. He confirmed that all the claimants were previously employed by the respondent. That they all participated in an illegal strike on

4/10/2011 and were dismissed. That they were raising various grievances which had been discussed in March 2011 including cold water because of the circumstance at Mombasa. That they were also demanding for protective gears, wage increase and overtime.

That the respondent under the guidance of the Labour Officer ensured that all the aforesaid grievances were addressed. That on 4/10/2011 there was to be a meeting between workers, a Mr. Kariuki from the Nairobi Head Quarters to address their grievances. That before the time for the meeting, the workers switched of the machines and became unruly and started to chant. That they removed and roughed up the management officers and threw them out of the main gate. That they called in the police who rescued them and returned calm after ordering the workers to go outside the main gate.

That at 9.00am a meeting was held by union officials and workers representatives. That after some time twenty workers were found guilty of misconduct and were dismissed while the rest continued with their work. The innocent ones however acted in solidarity with the other colleagues. That when they were called into work they refused. They were then dismissed summarily. That before 2004 to 2008 the workers were all casuals and in July 2008 she started to pay monthly salaries. That from January 2009 to July 2010 the company was shut down and reopened in August 2010. That during the period of the shut down, the employees were not in service.

That the respondent used to close down on 22nd or 23rd December every year. That overtime was only paid if an employee worked beyond 52 hours per week regardless how many hours he worked. That they company never opened on public holidays. He maintained that overtime pay rate was 1 ½ times the normal pay. That the claimants leave per year was 21 days but the respondent used to pay in lieu of leave not taken.

That 5th claimant worked until July 2011 when he was injured and hospitalized and the bill settled by the respondent. That he resumed work and was given light duties but left without notice after three days. That he deserted work as such he cannot demand dues. That as at 4/10/13 he was no longer an employee of the respondent.

That on 28/7/2011 the foreman reported that the 7th claimant left for lunch and failed to return to work until he was called by phone and came back appearing drunk. That he gave him a warning letter but the claimant refused to sign for it forcing him to call the secretary to remove him from the gate. That he insulted the RW1 in front of nurse and security officers of the company. That on 4/10/11 they paid all the claimants all their dues.

On cross-examination he admitted that there was attendance register but he did not produce in court to prove the exact days worked. He could not prove that the claimants never worked on Sundays and public holidays but he was categorical that there was no working on public holidays. That from 2004 – 2008 the workers were casuals and when the law changed they converted them to permanent staff. That there was no employee charged by police or dismissed for their misconduct and there was never any disciplinary hearing on the strike of 4.10.2011. That certificate of service was given to some of them. That all workers were entitled to 21 days leave per year and labour officer used to inspect every year. That 5th claimant was injured in July 2011 and sued for compensation. That the striking workers were given option to return to work but the claimants never returned even to collect certificate of service but some other workers returned and were given their jobs back. After the close of the hearing the witnesses, parties filed written submissions.

I have carefully read the pleadings and considered the evidence and the submissions by the counsel and I am satisfied that the court has jurisdiction to determine the dispute before it by dint of Section 12 of the Industrial Court Act.

The issues for determination are:

- a. **whether the claimants were unlawfully terminated.**
- b. **Whether the claimants are entitled to any remedy.**

To answer the first issue the court has considered the evidence addressed by all the witnesses in which it is agreed that there were spending grievances at the work place. That the grievances concerned conditions and terms of service for the claimants and were due for discussions in a meeting scheduled for 4/10/2011 at 9.00 a.m. That on the said 4.10.2011 early in the morning at around 7.00 am trouble started at the work place starting with switching off of machines and workers assembling together followed by assault and insults of management staff. That calm only returned after police officers were called in and removed all the workers out of the gate.

That a meeting was convened and the claimants were identified for disciplinary actions for their misconduct but all the workers refused to resume work in solidarity with the claimants. That, was in my view a strike because the workers withdrew their labour to agitate for better conditions and terms of service. They included 5th and 7th claimants who had earlier left service and therefore no longer employees according to RW1. The claimants witnesses in their testimony agreed on the foregoing summary of events except that they deny that there was any strike. I disagree with them on that last denial. The court is however satisfied, and it so finds that there was a strike on 4/10/2013 which paralyzed operations of the company in such a serious way that it forced the respondent's Director to travel from Nairobi to Mombasa to address the situation.

The claimants witnesses testified that they were told that fresh recruitment was to be done and they were given offer to return but they were never engaged. The RW1 maintains that it is the claimants who never returned because some striking workers returned and are still working. This court observes that the evidence on record show that the respondent was intending to continue employing the claimants but the latter withdrew their labour and scuttled a meeting scheduled for 4/10/2011 to address the workers outstanding grievances. Credit should be given to the respondent for the good and consistent keeping of employment records for the claimants. Consequently the court finds that the claimants were guilty for breach of contract through gross misconduct when they held an illegal strike, insulted and assaulted the management staff.

The strike was illegal and unprotected because even if it was for a lawful cause the same breached the law because it was not preceded by any conciliation process followed by a 7 days written notice to the respondent and the Labour Minister under the Labour Relations Act. In such a situation the employer would be entitled to take disciplinary action against the employee after the due process. In this case however the court is satisfied that it is the claimants who terminated their services by refusing to return to work.

As regards 5th and 7th claimants the court is satisfied that their services were terminated on different date and circumstances from the other claimants and they did not prove on a balance of probability that the termination was unfair as contemplated under Section 47 of the employment Act. Consequently and in view of the finding of the court on the first issue and in consideration of the detailed employment records produced by the defence, the court finds that the claimants are not entitled to all the prayers sought except for service pay. The court therefore enters judgments for each claimants against the respondent in respect of their respective prayer for service pay under paragraph 7 of the amended statement of claim with interest from October 2011. That the calculation of the service pay shall exclude the period of one year when the respondent was not operating between January 2009 to July 2010. Under section 37 of Employment Act the claimants had become entitled to be converted to permanent staff with benefits of service pay on termination. Each claimant service pay is assessed as follows:

1. 1st claimant (½ x6x10500).....	31,500
2. 2nd claimant (½ x4x12600).....	25,200
3. 3rd claimant (½ x6x9750).....	29,250
4. 4th claimant (½ x3x9750).....	14,625
5. 5th claimant (½ x1x9750).....	4,875
6. 6th claimant (½ x2x9750).....	9,750
7. 7th claimant (½ x6x9750).....	29,250
8. 8th claimant (½ x6x19300).....	57,900
9. 9th claimant (½ x6x9750)	29,250

10.10th claimant ($\frac{1}{2} \times 1 \times 9750$).....	4,875
11.11th claimant ($\frac{1}{2} \times 4 \times 11664$).....	23,328
12.12th claimant ($\frac{1}{2} \times 5 \times 10500$).....	<u>26,250</u>

286,053

The awarded pay shall also be subjected to taxation if they fall within the taxable brackets. The claimants will have 1/3 costs of the suit.

Signed, dated and delivered this 6th September 2013

ONESMUS MAKAU

JUDGE