



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1998 OF 2012**

**ANTHONY MUTUA KIILU .....CLAIMANT**

**VERSUS**

**ATHI RIVER STEEL PLANT LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant herein Anthony Mutua Kiilu has filed suit against the Respondent Athi river Steel Plant Limited alleging constructive termination of his employment. He prays for the following remedies;

1. A declaration that termination of his employment was unlawful.
2. Payment of terminal benefits in the sum of Shs.247,242 made up of notice, leave and service gratuity.
3. Compensation for unfair termination at 12 months' salary.
4. Interest and costs.

The Respondent filed a Statement of Response in which it denies the Claimant's allegation and alleges that the Claimant absconded duty.

The case was heard on 12<sup>th</sup> July 2013. Mr. Makokha instructed by Namanda & co. Advocates appeared for the Claimant while Ms. Nyaraita instructed by Mwangi & Guandarua Advocates appeared for the Respondent.

The Claimant testified on his behalf while Christopher Wangui, the Human Resources Officer testified on behalf of the Respondent.

The parties thereafter filed written submissions.

In summary the claimant testified that he was employed by the Respondent on 1<sup>st</sup> February 2008 as a mason and worked until 5<sup>th</sup> October 2011. On that day he had reported for work as usual. At lunch time the supervisor Mr. Guta informed them that a director had called a meeting. At the meeting the director observed that work was not moving fast. The director gave the workers a target which was not humanly possible and told them that people who could not meet the target can leave. The director also demanded records of work done from 2<sup>nd</sup> January 2011. The Claimant did not have records and was told by the Director to leave. He went to the Labor Officer who promised to call a meeting but never did so.

The Respondent witness RW1 testified that the Claimant was not dismissed. That the director used to meet with masons every year to set targets and in 2009, had agreed on a target of 200 feet at foundation, 150 feet for ground level and 80 feet above chest level. In 2011 the target was set at 300 feet, 150 feet

and 80 feet respectively for foundation, ground level and above chest level. On 5<sup>th</sup> October 2011 there was another meeting where apparently no agreement was reached. The employees approached him after the meeting the director and demanded that the agreement be reduced into writing. RW1 told them to see him the following day the 6<sup>th</sup> October 2013. However the masons did not report to work, but RW1 received a telephone call from the District Labour Officer Athi River informing him that his people (meaning the masons) were at the Labour Office. RW1 advised the District Labour Officer to agree on a day for a meeting with the masons at the factory premises. They agreed to hold the meeting on 15<sup>th</sup> October 2011. At the meeting the masons were represented by 2 colleagues chosen by them. These were Richard Musembi and Musyoki Kanoo. After the meeting a record of what had been agreed on was produced and the masons went back to work. Some masons, among them the Claimant, did not agree with what was recorded and did not go back to work.

RW1 further testified that the Claimant was paid in lieu of leave every year. The Respondent attached discharge forms signed by the Claimant for the years for 2009, 2010 and 2011.

I have carefully considered the pleadings, the oral testimonies of the witnesses and the written submissions and my opinion the issues in dispute are as follows;

1. Whether the Claimant was constructively terminated or absconded duty.
2. Whether the Claimant is entitled to any of his prayers.

**1. Was the Claimant constructively dismissed or he absconded duty**

In his testimony the Claimant stated that at the meeting held with the Director on 5<sup>th</sup> October 2011, the Director said **“the people who cannot meet his target can leave”** and further that the director asked them to produce records of work done from January 2011 and when he said he did not have the records the director told him to leave. He further testified that all the masons went to see the Labour Officer on 6<sup>th</sup> November 2011. The Labour Officer told them he will call them for a meeting. Under cross examination he stated that when they went to the Labour Office he remained outside and did not hear what the Labour Officer said. He later returned his overall to the workplace on the same day.

For an employee to prove a claim for constructive dismissal he must prove a situation in the workplace which has been created by the employer and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. He must prove that the employer’s action amounts to a repudiation of the employment contract.

In the present case the Claimant returned his uniform the same day the masons went to the District Labour Officer, and after the officer promised to call a joint meeting with the employer. This clearly shows he had no intention to go back to work or to attend the meeting to be called by the Labour Officer.

I find that the Claimant has not proved that he was constructively dismissed.

**2. Whether the Claimant is entitled to his prayers.**

The Claimant has claimed for 1 month’s salary in lieu of notice, payment in lieu of untaken leave and service gratuity.

Having found that the Claimant was not constructively dismissed, he is not entitled to notice and I dismiss the claim for the same.

The Claimant in his testimony admitted that he was paid in lieu of annual leave in 2009, 2010 and 2011. Any claim before 2009 would be time barred as the Claim had been outstanding for more than 3 years by the time of filing this claim. The Claimant also did not explain how he was paid for the last 3 years consistently when he was not paid for previousHasH

Years. He did not produce any evidence of having made any claim for the previous years. For these reasons I find the Claimant has not proved that he is owed any unpaid leave for the period prior to 2009 and dismiss the claim.

On the claim for service gratuity, the Claimant admitted that he was a member of NSSF. He did not demonstrate that his employment terms provided for payment of service gratuity outside the provisions of section 35(5) as read with section 35(6) of the Employment Act.

The Claim is therefore dismissed.

The upshot is that the Claimant's case against the Respondent is dismissed in its entirety with no orders for costs.

Read in open Court this 7<sup>TH</sup> day of NOVEMBER 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Ms. Akhaabi** \_\_\_\_\_ for Claimant

**Ms. Oyagi h/b for Mr. Thuita** \_\_\_\_\_ for Respondent