



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1169 of 2011

**KENYA ENGINEERING WORKERS UNION.....
CLAIMANT**

VERSUS

AUTO SPRING MANUFACTURERS LIMITED.....RESPONDENT

Rika J

CC. Elizabeth Anyango

Mr. Joseph Omolo for the Claimant;

M/s Adawo instructed by Mungai Kalande & Co. Advocates for the Respondent

AWARD

1. This claim was instituted by the Claimant Union on behalf of three of its members, Albert Gavala, Timothy Maingi and Evans Kimani Maina, hereinafter referred to as the Grievants. The Statement of claim was received in Court on 15th July 2011.
2. The Respondent filed its Statement of Response on 29th August 2011, through the Law Firm of Mungai Kalande and Company Advocates. Mr. Joseph Omolo, the Claimant's Industrial Relations Officer, made his oral submissions in Court on 5th October 2012. The Respondent filed written submissions, highlighting on 16th October 2012 through M/s Adawo, when the proceedings closed.
3. The Claimant told the Court that the Respondent is an Engineering Company. The parties have a Recognition Agreement, and have concluded several Collective Bargaining Agreements. On 5th April 2011, casual employees Albert Gavala and Patrick Muinde, were assigned the duty of loading a truck, by Mitan Desai, the Respondent's Financial Manager.
4. They performed their duty. The truck was thoroughly inspected by Mr. Desai, and gate pass given to Fahim Harun by Desai. Harun served as the Assistant Head of Department. These officers confirmed that the truck ferried the correct assignment from the factory.
5. On reaching the gate, the driver was recalled by Harun on the instructions of Desai. After driving back to the factory, Gavala and Timothy Maingi were asked by Desai to offload the truck. It was

discovered there were 5 extra leaves which had no mark. No-one was shown to have loaded the extra leaves to the truck. The management then asked the two Grievants to proceed with the Driver, and deliver the goods to the various companies which had ordered them.

6. On 6th April 2011 the Grievants were summoned by the Human Resource Manager. They were asked to record statements on the presence of 5 extra leaves in the consignment for delivery the previous day. The Grievants refused to record statements, and asked their employer to instead, call in the Police to investigate all the 10 employees of the company who were present at the loading.

7. The Human Resource Manager directed the Grievants to return to their duties. On 8th April 2011, Evans Kimani and Timothy Maingi were advised not to report to work after 11th April 2011. No reasons were supplied to them by the Respondent. Gavale reported on 11th April 2011, but at the close of the day, was issued with a letter of termination of employment. He was told that the Management had lost trust in him.

8. The Claimant arranged to meet the Respondent in consultation, but the Respondent rejected all attempts at consultation. The Claimant was compelled to report a formal trade dispute to the Minister for Labour. A Conciliator was appointed. The Conciliator found in favour of the Grievants, recommending that the permanent employee Gavala, be reinstated and the other 2 who were casuals be paid their terminal benefits as per the Law. The Claimant accepted the recommendation, while the Respondent did not. The conciliator gave a certificate of disagreement under section 69 of the labour Relations Act, 2007, paving the way for adjudication at the Industrial Court.

9. Mr. Omolo told the Court that Albert Gavala was employed on 1st July 1991 as a machine attendant at the rate of Kshs.1,027 per month. On the date of termination, he earned Kshs.13,336, and house rent allowance of Kshs.3,100 per month. Timothy Maingi was employed on 6th March 2006 as a general worker, at a rate of Kshs.205 per day. Evans Kimani was employed in 2004 as a general worker, and earned Kshs.409 per day as of the date of termination. Out of the 10 employees who were on duty on 5th April 2011, only the three employees had their contracts terminated. Loading was done under the supervision of Desai. The gate pass was issued. Gavala had no disciplinary warnings for 19 years worked. Maingi and Kimani had also served honestly, and merited conversion to regular terms of employment, under section 37 of the Employment Act 2007.

10. The Respondent had not demonstrated valid reason, or reasons, in terminating the Grievants' contracts of employment. The Claimant prays the Court:-

(a) Find termination was unfair;

(b) Reinstatement all the 3 Grievants to their duties, without loss of benefits; and

(c) Alternatively, Respondent to pay each Grievant 12 months' salary as compensation.

11. The Respondent concedes it has granted the Claimant Union Recognition, and that parties have concluded several Collective Bargaining Agreements. The 3 Grievants were among 10 employees assigned to load a truck by Desai on 5th March 2011. Desai supervised the exercise. The Grievants loaded the truck, and Desai ordered the truck to transport the goods. The gate pass was given to Fahim Harun by Desai, with confirmation that the truck was full.

12. After some minutes, Desai was alerted that the truck had been loaded with extra goods which were not marked for transit out of the Respondent's premises for that day. He contacted Harun, with the instructions that the truck reverts to the premises. The truck returned, and on offloading, it was found that the truck had been loaded with 5 extra spring rear main leaves. All the loaders denied responsibility for the extra load.

13. The Respondent carried out investigations, and discovered the employees who were responsible

for the theft that occurred on 5th March 2011. The 3 Grievants were asked to record statements on 6th April 2011. They refused to do so. Evans Kimani and Timothy Maingi worked as casual employees, and were advised not to report to duty as from 11th April 2011. They were paid their dues. Gavala was issued with the letter of termination dated 11th April 2011, which gave the reasons for termination. He committed an offence to the substantial detriment of the employer's property contrary to section 44 (g) of the Employment Act 2007. The Management lost trust in him. He was asked to return on 14th April 2011 to collect his dues. The dispute was referred to the Minister. The Conciliator made recommendations. These were not acceptable to the Respondent, as it had lost trust in the Grievants due to their acts of gross misconduct. Reinstatement could not be considered in any event, as Gavala was paid full terminal benefits.

14. The Grievants had a duty to protect and safeguard the employer's property at all times. They vandalized their employer's goods. They loaded unmarked goods. They denied responsibility, and refused to record statements. They refused to co-operate with the investigator. The CBA did not have any clause on 12 months' salary compensation. Under Clause 20, the employer could terminate the employee's employment without issuing a warning letter. Termination in all the 3 cases was fair and lawful. The Respondent urges the Court to dismiss the claim.

The Court Finds and Awards:-

15. The main facts in this dispute are not contested. The Grievants worked for the Respondent as loaders. On 5th April 2011, they were among 10 employees, who loaded a truck with spring rear main leaves. The consignment was destined for delivery to various customers. It is not disputed that the exercise was supervised by Desai, Financial Manager of the Respondent; that Desai authorized the transportation out of the company premises; that a gate pass was issued; that the truck was recalled; and upon offloading, was found to have ferried 5 un-authorized spring rear main leaves. It is agreed that the Grievants were asked to record statements, and that they declined. The dates of employment, termination and the rate of wages, were not contested.

16. Albert Gavala was uncontestedly a permanent employee. The Claimant argues that Timothy Maingi and Evans Kimani were casual employees, who by dint of their years of service, ought to have been converted as regular employees, and treated as regular employees under Employment Act 2007. Maingi was employed on 6th March 2006 as a general worker. On the date of termination, he had worked for 5 years. Evans Kimani was employed in 2004 as a general worker. He served for a total of 7 years. The Court is in agreement with the Claimant that the two employees had put in sufficient number of years to merit conversion to regular terms. The Court hereby declares the two employees to have been regular employees under section 37(4) of the Employment Act 2007.

17. Did the Respondent have valid reason or reasons for its termination decision? The 3 Grievants were suspected of involvement in the attempted theft of 5 extra spring rear main leaves. They were asked to record statements on investigation and declined to do so, advising their employer to call in the Police. It is the finding of the Court that there were valid reasons for the decision taken by the employer:-

(a) The Grievants were among loaders who were involved in the loading of the employer's goods to the truck on 5th April 2011. There were 5 extra spring rear main leaves that were loaded without the authority of the employer. The employer had reasonable and sufficient grounds to suspect the Grievants of having committed a criminal offence against or to the substantial detriment of the employer, or employer's property. This ground was well founded under section 44 (4) (g) of the Employment Act 2007.

(b) The Grievants were instructed to record statements, to assist the Respondent in getting to the bottom of the matter. This was a lawful and proper command which was within the scope of the Grievants to obey, issued by their employer. They refused to obey the instruction, petulantly advising their employer to call in the Police. Employees have no justification in directing their employers on how workplace offences should be investigated. The Respondent had a second valid ground in justifying

termination under section 44 (4) (e) of the Employment Act 2007.

18. The Conciliator failed to appreciate the rights and obligations of employers and employees under the Employment Act 2007. What was the recommendation that the Respondent should have issued warning letters to the other 10 employees based on, and of what relevance was this to the issue in dispute? How could the Conciliator conclude that the Management failed to do a proper investigation, while the 3 Grievants refused to record statements and co-operate with the investigator? The offences committed by the Grievants under section 44 (4) of the Employment Act 2007 were completely ignored by the Conciliator, and the Respondent had good reason to reject the recommendations. Once an employee refuses to subject himself to the investigatory and disciplinary hearing procedure, he forfeits the right to claim he was not properly investigated or heard. In this dispute, the Grievants refused to record statements, a simple task that may have resulted in their absolution, and assist the Respondent in unearthing the persons behind the scheme. The Respondent, quite commendably commuted a case of summary dismissal to one of regular

termination, where all terminal dues were paid to the Grievants. ***IT IS HEREBY ORDERED:-***

- (a) Termination was fair;***
- (b) Claim is rejected in its totality; and***
- (c) No order on the costs.***

Dated and delivered at Nairobi this 27th day of February 2013

James Rika
Judge