



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 7 OF 2013

BETWEEN

KENYA ENGINEERING WORKERS UNIONCLAIMANT

VERSUS

NARCOL ALUMINIUM ROLLING MILLS LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Joseph Omolo, Industrial Relations Officer, appearing for the Claimant Union

Mr. Khangram and Mr. Ondego Advocates instructed by A.B. Patel & Patel Advocates for the Respondent

ISSUE IN DISPUTE: LOCKOUT

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. The Claimant Union filed its Statement of Claim on the 4th February 2013. It seeks the following orders:-
 - a. The Respondent to open its doors to 90 Employees, to resume their duties unconditionally.
 - b. The Respondent is ordered to pay each Employee Kshs. 50,000 as disturbance allowance.
2. On 17th June 2013, the Claimant filed a Supplementary Memorandum, reiterating its position in the originating Statement.
3. The Respondent filed a Notice of Preliminary Objection challenging the validity of the Claim, on 13th March 2013. This was disposed of in a Ruling made by then Trial Judge, Hon. Radido Stephen, dated 7th June 2013. The Respondent filed its substantive Response through a Statement filed on 16th September 2013.

4. The Claimant opened its case on 5th September 2013. 3 Employees Messrs. Koyoko Jerenimus Andere, Masoud Mwangangi Katuthi, and Robert Williams Onchwangi testified on this date, bringing the Claimant's case to a close. The Respondent called 4 Witnesses: Personnel Officer Bernard B. Juma, Storekeeper Eric Obiero Ambale, Employee Stephen Mwanja Kingoo, and Administrative Assistant Gabriel Ochieng Nang'ori. All testified on the 2nd March 2015 when the hearing closed. Parties subsequently filed Closing Submissions, underlined by the Parties' Representatives, in brief presentations made before the Court on the 25th June 2015.

The Claim

5. Mr. Koyoko Jerenimus testified he was employed by the Respondent on 1st March 2003. He ceased work on 15th January 2013, after working for 10 years. He worked for this period without having problems with the Respondent.

6. Problems arose when he joined the Claimant Union. The Respondent through Mr. Gabriel Ochieng' Nang'ori, wrote to Koyoko on 14th January 2013, asking him to withdraw his membership of the Union. He declined the demand, and was relieved of his job on the following day, the 15th January 2013. Employees who gave in, by writing letters withdrawing their memberships were retained. Koyoko was told by the Respondent to go to his Trade Union, and be employed there.

7. Koyoko testified he was paid for 2 days worked before the lockout. He had worked without problems, and had no warning in his file. He wishes to be reinstated without loss of salary and other benefits.

8. He told the Court on cross-examination that he had loose contracts with the Respondent. The contracts were renewable. He did not attach the contracts to the Statement of Claim. Workers, whether regular or casual, can join a Trade Union. Gabriel Ochieng' drafted the letter for the Employees on withdrawal from the Union.

9. Mr. Masoud Mwangangi Katuthi was employed by the Respondent in the year 2000. He served for 13 years. He was locked out by the Respondent on 15th January 2013, on the ground that he had joined the Claimant Union. The Human Resource Manager drafted a letter requiring Katuthi to forfeit his membership of the Union. Katuthi refused to do so, and had his contract terminated as a result. His employment record was clean. He fell into financial difficulties after the lockout. His Children were kept out of School, and his house locked for non-payment of rent. He desires reinstatement.

10. He testified on cross-examination that he joined the Trade Union on 29th October 2012. On 15th January 2013, he was denied access to the workplace. It is not true that the Employees were engaged in a strike. The Labour Officer did not visit the Factory and advise Employees to go back to work. The Labour Officer visited the premises, but did not talk to the Employees. The Witness had been issued a written contract by the Respondent. He did not attach it to the Statement of Claim. The draft letter requiring the Employees to resign from the Union was written by Gabriel Ochieng'. The Witness did not see Gabriel write the letter, but explained he was familiar with Gabriel's handwriting, and could therefore tell it was Gabriel, who drew the letter. Katuthi testified his name was in the Check-Off Lists; the signature against his name was not his signature. The Witness reiterated on redirection that the signature in the Check-Off Forms was not his. "Someone," he stated, " must have signed on my behalf."

11. Mr. Robert Williams Onchwangi was employed by the Respondent in the year 2002. He worked for the Respondent for 11 years. He told the Court he left employment on 15th January 2013, in circumstances same as his Co-Grievants. There was no strike at the Factory on the day, the Witness testified on cross-examination. The Labour Officer Mr. Katana visited the Factory. The Employees worked on casual terms initially. They were thereafter placed on 3 months' contracts, before reverting to casual terms. He did not attach a copy of his contract to the Statement of Claim.

The Response

12. Mr. Bernard B. Juma testified no Employee was locked out. There was a disturbance, when the Union submitted the Check-Off Forms. There was a strike. The Court ordered the Labour Officer to investigate and make a report. The strike was declared illegal. Mr. Juma testified in answer to questions posed by the Claimant's Representative that the Respondent received the Check-Off Forms from the Union around 14th January 2013. In the morning the Workers were on strike. 5 Workers incited the rest to strike. The Labour Officer visited the Factory on 16th January 2013. He advised the Workers to return to work, as theirs was an illegal strike. There was no return-to work formula. On 16th January 2013, the Respondent supplied raw material to all its departments. The furnace was loaded. The Workers decided to leave of their own volition. They were not locked out. They sabotaged the Respondent's Business. Juma explained on redirection that there were aluminum ingots in the furnace. Workers roll them, and supply to the other departments. On this day nothing could go on. The furnace could have been damaged. The Labour Officer found the strike to be illegal. The Parties agreed before the Labour Officer to have the Workers return to work. That was why the Respondent supplied the raw material.

13. Mr. Eric Obiero Ambale, the Storekeeper, confirmed Workers went on strike on the 15th January 2013. They were addressed by Management and the Labour Officer. They were asked to return to work. Ambale did not belong to the Trade Union. His name however, was included in the Check-Off Forms, with a forged signature shown against his name. He never joined the Union. The identity card number was not given against his name. He testified on cross-examination that some of the Workers agreed to resume work, while others abandoned their positions.

14. Mr. Stephen Mwanja King'oo told the Court he, like Ambale, is employed by the Respondent. His name was entered in the Check-Off Lists submitted by the Claimant. He did not subscribe to the Claimant Union. His signature was forged. He did not know who signed the Forms. His identity card number was not indicated. He emphasized when questioned by Mr. Omolo for the Union, that he has never signed Check-Off Forms. He was shown the Forms by the Human Resource Officer. Workers were asked by the Labour Officer to resume duty. Some did so, others left employment.

15. Mr. Gabriel Ochieng' Nang'ori testified the Workers were not locked out. They went on strike. He was not able to say why they went on strike. The Labour Officer was called in. He declared the strike illegal. On 16th January 2013, some of the Workers resumed work. Others did not. The shift had 20 Workers. 5 of them did not work. They left the Factory. On 24th January 2013, a group of them in the company of some journalists and other strangers camped outside the Factory. They were shouting and threatening the Workers inside the Factory who were working.

16. On cross-examination, Gabriel denied that the Respondent wrote letters compelling the Workers to resign from the Union. He did not know who called the strike. The Labour Officer was called when the Workers created disturbance at the gate on the 24th January 2013. Redirected, Gabriel testified he showed the Workers the Check-Off Lists submitted by the Union. They disputed the names and signatures when advised they were to be deducted trade union dues. He advised them if they did not wish to have the deductions made, they should resign. That is how the draft resignation letter came about. No-one was victimized. Gabriel did not know which of the Workers wrote resignation letters. Many disowned the signatures alleged to be theirs, on the Check-Off Forms.

Submissions

17. The Claimant submits the Parties have a Recognition Agreement. The Workers have the right to join the Trade Union under the Constitution of Kenya, the Labour Relations Act [Section 4] and the ILO Conventions [87 and 98]. The problem between the Parties arose after the Respondent received Check-Off Forms, authorizing deduction of trade union dues. The Managing Director was unhappy. He ordered his Manager Mr. Juma, not to allow any Worker who did not resign from the Trade Union, into the Factory. There was no strike at the Factory at all. The Workers should resume duty as ordered by the Court. The Labour Officer was one-sided. He could not negotiate the ending of a strike and return to work without the Union. He cannot have met Union Representatives at the shop floor level, as the Union had not elected any. There are no Casual Workers at the Factory. Mr. King'oo and Mr. Ambale were not truthful

in holding the signatures on the Check-Off Forms were not theirs. The Claimant prays the Court to allow the Claim.

18. The Respondent submits the Closing Submissions filed by the Claimant contain fresh documents which should be disregarded. Relying on the case of ***KUDHEIHA v. North Coast Beach Hotel Limited [2014] e-KLR***, the Respondent submits the introduction of the fresh documents this way, is in abuse of the process. It is submitted further that the Claimant Union acted deceitfully by forging signatures of Workers for inclusion in the Check-Off Forms. "Such dishonest conduct must be deprecated and frowned upon," submits the Respondent. The Labour Officer went to the ground on the order of the Court. His report confirmed on 24th January 2013, some Employees attempted to sabotage the Respondent's operations by leaving melted aluminum in the furnaces. The Labour Officer confirms the Respondent's position that Workers were involved in an illegal strike, and properly terminated. The Respondent prays the Court to dismiss the Claim with costs paid by the Claimant, and the Claimant reprimanded for dishonest conduct.

The Court Finds:

19. The Court must first expunge the bundle of documents introduced in the record by the Claimant Union, through its Closing Submissions, filed on 11th March 2015. This is based on the holding of this Court in the case of ***KUDHEIHA v. North Coast Beach Hotel Limited***, cited by the Respondent at paragraph 18 above. Closing Submissions do not provide Parties with an avenue for introduction of fresh evidence. Unless the Parties have agreed at the closure of the hearing that such additional evidence is forwarded through the Submissions, a Party cannot just prepare bundles of fresh material on Submissions, left out during the hearing, and expect the Court to put reliance on such material. The Respondent has no opportunity of challenging such documents.

20. The Claimant, like a good number of Parties coming before this Court, seems to have confused Closing Submissions with the Submissions normally made together with the Statements of Claim, which are in the nature of Opening Submissions.

21. **Rule 17 of the Industrial Court [Procedure] Rules 2010**, requires a Party which intends to rely on a document, to identify such a document in the Pleadings or Verifying Affidavit, and avail copies to the Court and the other Party. This is a pre-trial procedure. The Claimant should have introduced the documents attached to the Closing Submissions, before the hearing of the Claim opened. **Rule 26 [1] regulates Closing Submissions**. It states that, "*upon hearing all facts and evidence and the consideration of the matters in question, the Parties may orally submit, or file written submissions, summing up their respective cases before the Court.*" Closing Submissions therefore provide a forum for summing up, not digging up fresh evidence. The Court is of the view that even in our set up, where we are reminded daily about the anti-technicality principles, there are certain fundamental procedures in the hearing of disputes which cannot be ignored. To ignore the above-stated rules would result in denying the Respondent the right to a fair hearing. ***The additional documents attached to the Claimant's Closing Submissions, are expunged from the record.***

22. The next issues in determining this dispute are these:-

- a. Were 90 Employees, Members of the Claimant Union, locked out of their workplace by the Respondent?
- b. Were they victimized for associating with the Claimant Union?
- c. Are they entitled to order for reinstatement and payment of Kshs. 50,000 as disturbance allowance?

23. There was no clear evidence given by the Claimant on the existence of a lockout. The independent investigation carried out by the Labour Office Mombasa County established the position on the ground, to be, as follows:

- a. Employees were required to resume duty on 16th January 2013. Majority of them resumed duty,

- but 5 of them deserted duty.
- b. Another 60 reported to work later and attempted to sabotage production, and left their workplace on their own volition.
 - c. At the time the Labour Officer conducted his inquiry, 1 Employee of the 85 allegedly victimized was on duty.
 - d. 16 could not be accounted for.
 - e. 65 had deserted duty, and effectively had their contracts terminated for gross misconduct.

24. There was no evidence brought before the Court to contradict these findings, and to show the presence of a lockout. "Lockout" is defined under Section 2 of the Employment Act 2007, to mean, "...the locking of a place of employment or the suspension of work, or refusal by the Employer to employ any Employees-

- a. *for the purpose of compelling any Employees of the Employer to accept any demand in request of a trade dispute;*
- b. *not for the purpose of finally terminating employment."*

25. The Claimant did not establish that the Respondent-

- **Locked its place of employment.** The Labour Office did not find any padlocks and chains at the gate, when conducting his investigations. He found a good number of Employees at work.
- **Suspended work.** Operations were on-going throughout on the relevant days, even if limited in their scope by the differences between the Employees and Management.
- **Refused to employ any Employee.** The Labour Office confirmed there were Employees who resumed duty, while a section of them opted to engage in undermining of production, and finally deserted. This cannot be evidence of an Employer refusing to employ.

26. There was no lockout, as defined in the Employment Act 2007.

27. Were the Claimant's Members victimized for joining the Claimant Union? Again the Claimant did not lead evidence that would persuade the Court to find in its favour on this question. The Check-Off Forms forwarded to the Respondent were shown by Witnesses from both sides, to be of questionable validity. Mr. Masoud Mwangangi Katuthi, 2nd Witness for the Claimant, stated both on cross-examination and redirection, that the signature against his name, was not his signature.

28. This piece of evidence from the Claimant's own Witness is significant. The Respondent called 2 other Employees, Ambale and Kingoo, who were categorical the signatures appearing against their names on the Check-Off Forms, were not theirs. The evidence from both Parties is therefore that, some other Person, not these 3 Employees, signed the Check-Off Forms.

29. Employees cannot be compelled to associate with the Claimant Union, through the will of some other Person. The signature on the Check-Off Forms is meant to be an expression of the free will of the Employee, in joining the Trade Union.

30. The Court cannot, given the evidence from both sides on the signing of the Check-Off Forms, conclude that any Employee was victimized for joining the Trade Union. The whole process of recruitment of the Employees into the Trade Union, was, tainted with lack of free will. Freedom of association is based on free will. The Labour Officer similarly faulted the Check-Off Forms, finding some of the Forms had only the surnames or first names of the Employees. Check-Off Forms must reflect the full details as appearing in the employment record, of the Employee, if they are to be relied upon as evidence of the Employee's recruitment into the Trade Union.

31. The Employees were shown to have reported back to work, and engaged in an illegal strike. They left melted aluminum in the furnace, which could have damaged the Respondent's production lines. They deserted after this. These facts were clearly proved before the Court by the Witnesses for the Respondent. The Labour Officer established there was an illegal strike, and that the Employees sabotaged production.

Why would the Labour Officer lie, as imputed by the Claimant Union, on the presence of a strike? The Respondent was justified in considering the Employees to have engaged in these acts of gross misconduct, and in reaching the conclusion that the Employees had terminated their own contracts through desertion. It was not possible for the Respondent, to hear the Employees in light of the Employee's self-caused absence from their appointed place of work.

32. The prayers for the remedies of reinstatement, and disturbance allowance, have no foundation. An Employee is not paid disturbance allowance for causing disturbances at the workplace. He is not reinstated after engaging in acts of gross misconduct and voluntarily leaving the place of employment. Furthermore, the Witnesses for the Claimant told the Court they had been working as Casual Employees, and later on, term contracts. It is not possible for the Court to order a Casual Employee is reinstated, or a term contract Employee is reinstated, without the Employee availing to the Court the term contract document. The Claimant did not explain to the Court why the contracts which its Members served under were left out of its bundle of documents. The existence of these documents was not contested. Mr. Onchwangi's evidence, is that Employees were initially employed on casual terms. Thereafter, they were engaged on 3 months' contracts. Lastly, they reverted to casual terms.

33. The Court cannot compel an Employer to reinstate an Employee, engaged on casual terms, outside the 24 hours of such casual engagement. "Casual Employee," under Section 2 of the Employment Act 2007, means an employee who is paid daily, and who is not engaged for a longer period than 24 hours at a time. If the Employees were on 3 months' contracts, again the Court would have to know what period had been served, and what period if any, remained. Reinstatement would have to be pegged to the 3 months' contract. A blanket order for unlocking the gates to the 90 employees, would mean the Court imposes a status of regular employment on the Employees, while their own evidence is that they were first casual; second, term-contracted; and third casual.

34. Finally the Court agrees with the Respondent that in light of the findings on the validity of the Check-Off Forms, a severe reprimand issued against the Claimant is merited. Employee's recruitment into the Trade Unions cannot be done through forged signatures.

IT IS ORDERED:-

- a. ***The Claim is dismissed in its entirety.***
- b. ***The Claimant Union is severely reprimanded for engaging in illegal and irregular recruitment of Employees into the Trade Union.***
- c. ***Costs to the Respondent.***

Dated and delivered at Mombasa this 24th day of July 2015

James Rika

Judge