

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 146 OF 2019

ARTI ISSAR.....CLAIMANT
VERSUS
PRIME STEEL MILL LIMITED.....RESPONDENT

JUDGMENT

The suit was filed by the Claimant against the Respondent by memorandum of claim on 6/3/2019 seeking the following reliefs:-

- 1) A declaration that the Respondent had a duty to provide a sound and safe environment for the employment of the Claimant and the Respondent failed to provide this to the Claimant.
- 2) Special damages Kshs. 12,000.00
- 3) General damages for pain and suffering
- 4) Compensatory damages for breach of the Claimant's constitutional rights and freedoms specifically the right to fair labour practices;
- 5) Damages for unlawful constructive termination of employment Kshs. 350,000 x 12 months = Kshs. 4,200,000.00
- 6) Cost and interest

The Claimant (CW1) adopted a witness statement dated 15/2/2019 as his evidence in chief. CW1 testified that he was employed by the Respondent on 13/12/2017 as Principal Head of Human Resources by an employment contract dated 1/12/2017 valid for a period of 2 years. That he was on 3

months' probation. That he worked diligently until the 25th May 2018 when the Respondent summoned the Claimant to a meeting without notice and indicated that the meeting was meant to be for review of the work during probation.

That the Claimant declined to have the review of performance being done by an officer to whom the Claimant did not report and the 3-month probationary period had lapsed on 2nd March 2018 since the employment contract was effective 30th December 2020.

That during the tenure of the employment, the Respondent failed to provide a safe work environment and the Claimant on 2nd May 2018 slipped and fell resulting to injuries to his left leg. That the Claimant was treated at Mashal Hospital and was found to have a:

- (a) Fracture of the left ankle
- (b) Permanent disability – 40%

That on 29th May 2018, the Respondent wrote a letter terminating the employment of the Claimant on grounds that the Claimant had not succeeded in the probationary review.

That the termination was unlawful and unfair. That no proper appraisal of his performance was done. That the probationary period had ended. That the Claimant was entitled to serve remaining contract term.

That the Claimant be granted the reliefs sought.

The Claimant produced copy of a claim form for personal accident from Jubilee Insurance and copy of a medical certificate from MP. Shah hospital indicating the fracture of the left ankle and 40% personal disability.

In terms of the contract of employment placed before court, the Claimant earned Kshs. 350,000.00 per month and was to be provided with a company car and medical insurance as per the company norms.

That the contract was effective 2nd January 2018 and was to expire on 30th December 2020. The contract is signed by the Claimant and one Jateen Patel for the Chief Executive Officer of the Respondent.

The contract had conditions of employment.

The contract before court does not provide for a probation period and provides for two months written notice of termination. The Claimant was entitled to 21 days annual leave.

The letter of termination of employment is dated 29th May 2018 and was with effect from 29th June 2018 a period of one month termination notice and the Claimant was to be paid in lieu of that notice and for 31 days worked in May 2018.

In the letter, the Respondent stated that the Claimant's probation period had ended and the performance review conducted on 25th May 2018 was unsuccessful due to reasons brought to the attention of the Claimant in the

review meeting. The Claimant was found to be a non-performer and reasons for that are set out in the letter.

The Claimant's advocate served the Respondent with a demand letter and notice of intention to sue dated 7/8/2018

Response to statement of claim.

The Respondent filed a response to the statement of claim dated 22/7/2019 in which the Respondent denied all the particulars of claim admitting that the Claimant was its employee as the Head of Human Resource and that her termination was reasonably justified and procedural. The Respondent admitted that the Claimant was employed by a contract of employment dated 1/12/2017 which was accepted on 13/12/2017. That the contract was for a two-year period effective 2nd January 2018 to 30th December 2020 at a monthly salary of Kshs. 350,000.00 per month.

The Respondent admits that the Claimant was placed on a three months' probation period but denies that the probation period ended on 2nd March 2018. The Respondent avers that the termination of the employment of the Claimant was for poor work performance following a review at the end of the probationary period and prays that the Claimant be dismissed with costs.

Ms. Akinyi, Advocate for the Respondent, cross-examined the Claimant at length. Claimant said the appointment was on a 3-month probation which had ended by the time of termination.

Claimant insisted that he had no notice of performance review. That no proper review was conducted. Claimant admitted that she collected her dues and signed a certificate dated 16/7/2018. That the certificate indicated that she was not to make a claim against the Respondents arising from the employment but said that she was under duress so as to get paid and so signed the documents to get the money.

The Claimant said that at the time of termination she was suffering injury gotten at the work place and she was never compensated and that she had produced the claim form and medical certificate. That she had been given six (6) weeks sick off and her duties had been handed over to her subordinate.

DETERMINATION

The Respondent did not call any witness to contradict the testimony by the Claimant. The parties filed written submissions which the court has considered together with the uncontradicted testimony by the Claimant.

The issues for determination are:

- (a) Whether the Claimant has proved the case for unlawful and unfair termination.
- (b) Whether the Claimant is entitled to the reliefs sought

At the outset the court finds that it has no jurisdiction to entertain the Work Injury claim which ought to have been filed before the Director (OSH) under the Work Injury Benefits Act. The decision of the Supreme Court in the case of ***Law Society of Kenya versus Attorney General and another***

Petition 4 of 2019 [2019] held that the courts have no original jurisdiction to entertain Work Injury Claims and stated as follows:-

“In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute... we opine that it is best that all matters are finalized under section 52 aforesaid.”(Emphasis added).

In the case of **Directorate of Occupational Safety and Health Services versus Safety and Health Services versus National Labour Board and another [2019] KLR (Supreme Court constitutional Petition No. 12 of 2019** the Supreme Court clarified that the Director of the Directorate of Occupational Safety and Health Services (DOSHS and not the ELRC holds original jurisdiction to determine claims arising under WIBA. The court stated at paragraph 56.

“The provisions of the Work Injury Benefits Act vest exclusive original jurisdiction to adjudicate on compensation claims under the Act in the Director of Occupational Safety and Health

Services. The Employment and Labour Relations Court has jurisdiction only on appeal from the decisions of the Director or for enforcement of awards issued by the Director.”

The court therefore dismisses the claim for compensation and special damages by the Claimant arising from the work injury.

With regard to the termination, the contract of employment placed before court between the parties had no provision for probationary period. The Claimant however admitted that he worked under 3 months probation which ended on 2nd March 2018. That she was not assessed and/or her work performance was not renewed during the probationary period. The termination of the Claimant by the Respondent states that the Claimant was still under probation on 29th May and was outrightly unlawful as it was for no valid reason established in terms of section 43 of the Employment Act 2007, since the Respondent was labouring under the false believe that the Claimant was still serving probation until 25th May 2018 when it purportedly, summoned the Claimant for alleged probationary performance review. The said exercise was without notice and was not properly conducted so as to constitute a valid reason for termination of the employment of the Claimant who was not under probation as at that date.

The termination was unfair and violated section 41, 43 and 45 of the Employment Act 2007. The Claimant is entitled to compensation in terms of section 49(1)(c) and 4 of the Act.

The alleged commitment not to bring any claims against the Respondent was repudiated by the Claimant stating that she was made to sign a clearance certificate and she was under duress to sign the same in order to be paid her terminal benefits. The Respondent did not adduce any evidence to contradict that credible evidence by the Claimant.

In this regard, the Claimant had a two-year fixed contract which was to end on 30th December 2020. The Claimant's employment was unlawfully curtailed on 29th May 2018 and was yet to serve about 19 months of the contract. The Claimant suffered loss and damage arising from the curtailed legitimate expectation to work and earn income. The Claimant had good employment with good salary. The Claimant was not compensated for the loss. The Claimant suffered serious injury at the work place and the court finds it to be an aggravating factor that the Respondent did not facilitate compensation of the Claimant for the damage suffered in the cause of employment but instead terminated her employment unlawfully.

The court relies on the case of **Naimas Khamis versus Oxford University Press E.A Ltd 2017 KECA 480 KLR** where the Court of Appeal held that;

“The above finding settles the cross appeal which is bereft of merits but we have to address the crux of this appeal being the issue of damages awarded. The appellant's beef is, damages awarded for the procedural errors where she was not accorded a fair hearing were manifestly low, while the respondent contends that it should not have been issued at all. Section 49(1) provides that:-

“Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour

officer may recommend to the employer to pay to the employee any or all of the following-

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." (emphasis added) ...We are not persuaded the learned Judge erred at all in arriving at the conclusion he did by awarding of 5 months' salary.

The factors under section 49(4) to be considered in making the award includes; the circumstances in which the termination took place, the extent, if any, to which the employee caused or contributed to the termination, the employee's length of service with the employer and the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination. The Court considers the above factors and awards the

Claimant the equivalent of five (5) months' salary for the unlawful and unfair termination of employment in the sum of Kshs (350,000 x 5) = **Kshs. 1,750,000** in compensation.

In the final analysis judgment is entered in favour of the Claimant against the Respondent as follows:-

(a) Compensation for unlawful termination of employment in the sum of **Kshs. 1,750,000.**

(b) Unpaid one month salary in lieu of notice since the contract provided for two (2) months notice in the sum of Kshs. 350,000.00.

Total Kshs. 2,100,000.00

(c) Interest at court rates from date of judgment till payment in full.

(d) Costs of the suit.

For the avoidance of doubt, the other special and general damages claimed in the suit are dismissed for lack of jurisdiction and lack of merit.

Dated at Nairobi this **30th Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Kariuki for Claimant

Mr. Anyoka for Respondent

Mr. Kemboi – Court Assistant