

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E727 OF 2023

JAMES NDARU MURIUKI.....
CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....
.....RESPONDENT

JUDGMENT

Introduction

1. In a Statement of Claim dated 7th September, 2023 and filed on even date, the Claimant sued the Respondent alleging unfair and unlawful termination of employment. He seeks the following reliefs: -
 - i. A declaration that the Respondent's actions and/or treatment of the Claimant amounts to unfair termination of the employment contract;
 - ii. A declaration that the Respondent's failure to issue the Claimant with an appointment letter and/or confirm his employment either on contract and/or permanent and pensionable terms was discriminatory and therefore unconstitutional for want of Articles 27 and 41 Constitution of Kenya, 2010
 - iii. Compensation and terminal dues amounting to Kshs.3,558,240/-
 - iv. General damages for breach of contract

- v. Costs of the suit and interests.
2. In a response dated 14th April, 2024, the Respondent acknowledged that it employed the Claimant, but that he absconded duty in blatant breach of the terms of his employment contract.
 3. The matter proceeded for hearing on 22nd October, 2024 with the Claimant testifying in support of his case. The Respondent's case was subsequently heard on 6th March, 2024, when one Mr. Joseph Njuguna Maina testified in support of the Respondent's case.
 4. Submissions were filed for both parties and which have been duly considered.

The Claimant's Case

5. The Claimant states that he was employed by the Respondent as a machine operator around 15th July 2009 at a monthly salary of Kshs.10,000.
6. It is his case that he was never given a written contract and remained a casual worker throughout his employment. He avers further that his salary was paid in cash or sometimes through bank remittance.
7. The Claimant states that the Respondent did not provide safety gear, protective clothing, tools, transport, or medical treatment.

8. It is his case that he never took his annual leave or paternity leave as required by law. He avers that the Respondent failed to confirm his employment or issue an appointment letter, denying him union rights and related benefits.
9. The Claimant states that the Respondent's actions were illegal, discriminatory, and violated fair labour practices under the Employment Act, 2007, International Labour Standards, and Article 41 of the Constitution of Kenya (2010).
10. It is the Claimant's case that he was terminated from the service of the Respondent on or about 28th February 2021, unlawfully, unfairly, and without due procedure.
11. On cross-examination, the Claimant told the court that on the day of his termination, he was a little late to work and when he arrived, he was chased away.
12. He confirmed again on cross-exam, that the Respondent remitted his NSSF deductions intermittently. He states that he did not produce any documents to show when the remittance was done and when it was not.
13. It is his case that he was employed as a casual labourer in 2009, but he never stopped working until his termination. He confirmed that he worked for five days a week and that he was paid for days worked.

14. The Claimant prays that his claim be allowed and he be awarded the reliefs sought.

The Respondent's Case

15. The Respondent states that it employed the Claimant until 5th July 2019, when he requested for sick leave due to illness. It avers that the Claimant was granted permission to leave, but never returned to work afterward, and the Respondent did not hear from him again until 13th October 2023, when he filed this claim.

16. It is the Respondent's case that efforts to trace or contact the Claimant through colleagues failed, and that the Respondent later learned that the Claimant had gone upcountry and did not return.

17. It avers that the Claimant had no telephone, making communication impossible. It is its position that the Claimant's case is an afterthought and an abuse of court process.

18. The Respondent avers that the Claimant was a member of NSSF, and the Respondent made regular contributions, hence he is not entitled to service pay. It states further that the Claimant's demand for unpaid leave is unsupported by evidence, as he retired and received all terminal benefits.

19. The Respondent states that the Claimant's claim for non-payment of retirement benefits is unfounded, malicious, and an abuse of court process.

20.The Respondent's witness (RW1) told court that the Claimant voluntarily retired and was paid his terminal dues. The same witness told this court that the Claimant deserted duty. It is his evidence that the Respondent contacted the Claimant through colleagues, and not through his last known address.

21. RW1 confirmed that the Claimant was employed on 15th July, 2009 and that NSSF remittances for June, 2012, August, and September, 2019 were not made.

22.It is RW1's evidence that the Claimant was not issued with a letter of employment and was similarly not terminated by letter. He further told court that he did not have records indicating that the Claimant took leave.

23.The Respondent prays that the Claimant's suit be dismissed with costs.

Analysis and Determination

24.Upon careful consideration of the pleadings, evidence, testimony and the parties' submissions, the following issues arise for determination: -

- a) Whether the Claimant's rights were violated
- b) Whether the Claimant was unfairly terminated
- c) Whether the Claimant is entitled to the remedies sought.

Whether the Claimant's rights were violated

25.The Claimant's contention is that he was employed by the Respondent as a machine operator on or about 15th July 2009, and that he was never given a written contract and he remained a casual worker throughout his employment. It is his assertion that he was terminated from the service of the Respondent on or about 28th February 2021.

26.The Respondent through its witness (RW1) confirmed that the Claimant was employed on 15th July, 2009, and that he was not issued with a letter of employment.

27.Section 9 (1) of the Employment Act, 2007, demands that every employer issues an employee a written contract for employment lasting more than three months. Further Section 37(1) provides that where a casual employee works continuously for one month or more, or works regularly and intermittently for three months or more, the employment is automatically converted into a term contract, entitling the employee to the rights of a regular employee.

28.Section 10(7) of the same law further provides that where an employer fails to produce a written contract in a dispute, the burden shifts to the employer to disprove the employee's claims. In the case of ***Empire feeds Ltd V Kinqou (Appeal 6 of 2020) [20221 KEELRC1501 EELRC 1501 KLR*** the court stated thus:-

“The Appellant (Employer) was under an obligation to prove by way of evidence that the Respondent (Employee) was

engaged intermittently and not for a continuous period exceeding three months. In absence of proof to the contrary, the contract of service of the Respondent assume permanency and was deemed to be one where wages are paid monthly".

29. The NSSF statement produced in evidence is prove that the Claimant worked continuously from 2009 to 2019, which is an entire 11 years served as a casual labourer, and as he correctly submitted, there is nothing showing that he was issued a contract of employment in the entire period.

30. By this fact alone, the law deems the Claimant as having been a regular employee, and not a casual labourer as the Respondent would want to believe.

31. Further, by keeping him as a “casual” for over a decade, the Respondent circumvented the Claimant’s statutory rights, such as leave, notice, and social security benefits. It is further my considered view, that based on the prolonged exploitation and denial of basic employment rights, the Respondent’s conduct amounted to a violation of Article 41 on fair labour practices. In the case of ***Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2013] eKLR*** , the court held that denial of employment rights contrary to the Employment Act also constitute violation of Article 41 of the Constitution.

32. In the premise, I hold that the Respondent violated Section 9 of the employment Act and Article 41 of the Constitution.

Whether the Claimant was unfairly terminated.

33. The Claimant's assertion is that he was terminated from the service of the Respondent on or about 28th February 2021, unlawfully, unfairly, and without due procedure. It is his position that he was simply asked to leave work and on reporting the following day, he was directed to leave and not return, and instead wait to be recalled back to duty which did not happen.

34. On the termination, the Respondent engaged in double speak to say the least. At one point, its position was that the Claimant was allowed leave which he took and never returned. It is also its argument that the Claimant absconded duty, while at the same time, it asserts that the Claimant voluntarily retired.

35. The impression this left on the mind of the court, is that the Respondent did not keep any records and which again was confirmed by their witness who told court that the only record it had was the daily work attendance register and nothing else. For this reason, it did not know when and how the Claimant left its service.

36. A termination of employment is unfair where the employer fails to adhere to the tenets of fair process provided for under Section 41 of the Employment Act, 2007, and to

further meet the requirements of Sections 43, 45 and 47(5) on the reason(s) for termination of employment which reasons must be valid, fair and justified.

37. In the case of **Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR**, the court had this to say on procedural fairness:-

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

38. It is not disputed that the Claimant was neither issued with a show cause letter, a termination notice nor heard prior to

the termination. The Respondent's witness told court that the Claimant was not terminated by letter, corroborating his position that he was simply asked to leave.

39. In the circumstances, the court finds and holds that the Claimant's employment was unfairly terminated.

Whether the Claimant is entitled to the reliefs sought
Compensation

40. The Claimant served the Respondent for a period of 11 years. His rights were violated in not being issued with an employment contract and for serving as a casual labourer for that entire time. The court however notes that the Claimant could easily have secured comparable employment and mitigated his losses.

41. For the reasons foregone, I deem an award of 9 months' salary as compensation for the unfair termination sufficient, and is hereby awarded.

Terminal dues

42. The Claimant listed a long list of claims under this head, most of which were not proved. Although the court is alive to the fact that the Respondent bears the obligation of keeping employee records, the Claimant similarly was under duty to prove his claims such as the days he worked on holidays, prove of under payment amongst others.

43. It is also evident from the Claimant's own testimony that he was paid for the days worked, and since his was a casual

service, house allowance would not be calculated separately.

44. The Claims for annual leave, tools allowance and paternity leave fall under what Section 90 of the Employment Act describes as continuing injury which ought to have been claimed within a year of the termination. The Claimant was terminated in February, 2021 and this suit lodged in September, 2023. The claims are thus statute barred.

Conclusion

45. In whole, the Claimant's claim succeeds in terms of the following orders:-

- a) A declaration that the Respondent violated the Claimant's rights both statutory and Constitutional.
- b) That the Respondent shall pay the Claimant 9 months' salary as compensation for unfair termination at Kshs.90,000/=
- c) Leave pay at Kshs.6000/-
- d) The Respondent shall bear the costs of the suit and interest thereon, from the date of this judgment until payment in full.

46.Orders accordingly.

**SIGNED, DELIVERED AND DATED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 13TH DAY OF NOVEMBER,
2025.**

**C. N. BAARI
JUDGE**

Appearance:

Ms. Cherotich present for the Claimant

N/A for the Respondent

Ms. Esther S - C/A