



REPUBLIC OF KENYA



KENYA LAW
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**Omwoyo v Western Steel Mills Limited & another (Cause 254 of 2017)
[2025] KEELRC 527 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 527 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 254 OF 2017
MA ONYANGO, J
FEBRUARY 20, 2025**

BETWEEN

GEOFFRY ONSANDO OMWOYO CLAIMANT

AND

WESTERN STEEL MILLS LIMITED 1ST RESPONDENT

VERO INVESTMENTS LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claim herein was instituted vide Memorandum of Claim dated 25th September, 2017 as amended vide an Amended Memorandum of Claim dated 19th July 2021. In the Amended Memorandum of Claim the Claimant seeks the following reliefs against the Respondents jointly and severally: -
 - a. A declaration that the termination process carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law
 - b. Payment of sums of money claimed in the Amended Memorandum of Claim.
 - c. Costs and interests
 - d. Any other relief that the Court may deem fit and just to grant
2. The Claimant's case is that he was employed by the 2nd Respondent as a General Laborer at the 1st Respondent's premises from 4th July 2016 to 19th May 2017 when his employment was unlawfully and without any justifiable cause terminated without being paid his dues.
3. The Claimant particularized the unlawfulness of the termination of his employment as follows:
 - i. The termination was without any fair valid reason
 - ii. The termination was not in accordance with fair procedure



- iii. No leave pay was given
 - iv. He was not given one months' salary in lieu of notice
 - v. He was not paid overtime
 - vi. He was not compensated for unfair termination
4. The Claimant contended that owing to the unfair and unlawful termination, he is entitled to terminal benefits which he itemized to be:
- i. One month pay in lieu of notice.....Kshs. 12,600
 - ii. Compensation for unfair termination.....Kshs. 151,200
 - iii. Pro rata leave.....Kshs. 7,350
 - iv. Overtime dues.....Kshs. 81,415
 - v. Service pay/Gratuity.....Kshs 6,300
 - vi. Unpaid public holiday worked.....Kshs. 874
- Total.....Kshs. 260,739
5. In its Reply to the Amended Memorandum of Claim filed in court on 29th September 2021, the 1st Respondent denied that the Claimant was its employee and averred that the claim for unlawful termination is baseless. The 1st Respondent urged the court to dismiss the Claimant's claim with costs.
6. The 2nd Respondent despite being properly served with summons to enter appearance dated 26th July 2017, did not participate in this suit.
7. The suit was heard on 19th September 2023 where the Claimant testified on his behalf and the 1st Respondent called one witness in furtherance of its case. At the close of the hearing parties were directed to file written submissions. The Claimant's submissions were filed on 8th November 2023 while the 1st Respondent's submissions were filed on 7th November 2023.
8. The Claimant testified as CW1 and adopted his undated witness statement filed on 21st November 2017 as his evidence in chief. He testified that he was employed by the 1st Respondent in July 2016 and was dismissed from employment in May 2017 after he sought permission to go to hospital. The Claimant stated that he worked from 7am to 7pm with one-hour lunch break for the whole week and was paid Kshs. 525 per day. He further asserted that he worked on public holidays and was not paid overtime. That he was further not paid house allowance.
9. It was the Claimant's testimony that the 2nd Respondent was remitting his NSSF dues but his salary was paid by the 1st Respondent into his DTB bank account.
10. On cross examination, the Claimant denied entering into an employment contract with the 2nd Respondent and maintained that he was the 1st Respondent's employee. The Claimant stated his number was 5047. When referred to the paysheet of 11th May 2017 to 17th May 2017 of the 1st Respondent's supplementary list, he confirmed the no 5046 and 5048 appeared in the list but 5047 was missing.
11. The 1st Respondent on its part called Michael Chege Njuguna its Human Resource Manager who testified as RW1. He adopted his witness statement dated 6th June 2023 as his evidence in chief. He also adopted and relied on the documents filed by the 1st Respondent in support of its case.



12. It was RW1's evidence that the Claimant was an employee of the 2nd Respondent as evidenced by the Claimant's NSSF statement and the Claimant's employment contract dated 7th October 2016. RW1 told the court that the 1st Respondent had a contract agreement with the 2nd Respondent for supply of work force but the said workers worked under the 2nd Respondent.
13. On cross-examination, RW1 stated that the agreement between the 1st and the 2nd Respondent was for provision of manpower and the workers, although working in the 1st Respondent's premises, were paid by the 2nd Respondent.

The Claimant's Submissions

14. In his submissions, the Claimant framed the issues for determination to be;
 - i. Whether the Claimant was employed by the 1st or the 2nd Respondent
 - ii. Whether the Claimant is entitled to the reliefs sought.
15. It is the Claimant's submission that he was working for the 1st Respondent in the 1st Respondent's premises and that he was never informed about the 1st Respondent's engagement with the 2nd Respondent until he took his NSSF statement which showed that he was working for the 2nd Respondent.
16. According to the Claimant, the 1st Respondent produced an Agreement between itself and 2nd Respondent which agreement was not known to the Claimant since he was working at the premises of the 1st Respondent with the knowledge that he was employed by the 1st Respondent. In this regard, it is the Claimant's contention that the documents produced by the 1st Respondent's witness were always under the custody of the 1st Respondent but he was not informed who his employer was, a clear indication that the 1st and 2nd Respondent were one and the same. The Claimant thus submitted that the 1st Respondent should be held 100% liable for the claim.
17. On the reliefs he sought in his Amended Memorandum of claim, the Claimant submitted that he should be granted dues as tabulated as he had proved his case on a balance of probabilities.

The 1st Respondent's Submissions

18. On its part, the Respondent crystallized the issues for determination as follows:
 - i. Whether there ever existed any employer-employee relationship between the Claimant and the 2nd Respondent.
 - ii. Whether the 1st Respondent could terminate an inexistent employer-employee relationship.
 - iii. Whether the Claimant was unlawfully dismissed.
 - iv. What reliefs are available to the Claimant.
 - v. Who should pay the costs of this claim.
19. On the first issue, the 1st Respondent submitted that it contracted Vero Investments Limited to provide it with labour and manpower. That the 2nd Respondent would hire workers, enter into contracts with them, pay their statutory deductions and even dismiss them. According to the 1st Respondent, the Claimant expressly acknowledged at the hearing and in the submissions that his punch number was 5047. The 1st Respondent submitted that from the 2nd Respondent's paysheet produced by the 1st



Respondent, the punch numbers of the employees of the 2nd Respondent ranged between 5046- 5060 a clear indication that the Claimant was the 2nd Respondent's employee.

20. On the second issue, the 1st Respondent submitted that it is trite law that only the hiring authority can dismiss its employee. The 1st Respondent submitted that since the 1st Respondent had never employed the Claimant, it could not have terminated the Claimant's employment.
21. With regard to the issue whether the Claimant was unlawfully dismissed, the 1st Respondent submitted that since there was no employer-employee relationship between the Claimant and the 1st Respondent, the Claimant cannot claim to have been terminated unfairly, unlawfully or illegally by the 1st Respondent.
22. On the fourth issue in relation reliefs available to the Claimant, the 1st Respondent submitted that the Claimant having failed to prove that there existed an employer-employee relationship between him and the 1st Respondent, he is not entitled to any reliefs.
23. The court was urged to dismiss the Claim against the 1st Respondent with costs.

Determination

24. Upon considering the pleadings herein, the evidence of the parties, the submissions and the authorities cited, I find that the issues for determination are: -
 - i. Whether the Claimant was an employee of the 1st or 2nd Respondent
 - ii. Who between the 1st and 2nd Respondent is liable for the unfair dismissal of the Claimant from employment
 - iii. Whether the reliefs sought should issueWhether the Claimant was an employee of the 1st or 2nd Respondent
25. In his Amended Memorandum of Claim, the Claimant pleaded that he was employed by the 2nd Respondent to work in the 1st Respondent's premises. However, in his oral testimony before court and in his submissions, the Claimant contended that he was employed by the 1st Respondent. It was his testimony that he was always an employee of the 1st Respondent and only came to learn of the contract between the 1st Respondent and the 2nd Respondent when he went for his NSSF statement and realized that he was working under the 2nd Respondent.
26. The 1st Respondent on the other hand disputed the existence of an employment relationship between itself and the Claimant. According to the 1st Respondent, the Claimant was employed by the 2nd Respondent to work in the 1st Respondent's premises but was remunerated by the 2nd Respondent. The 1st Respondent asserted that the Claimant entered into an employment contract with the 2nd Respondent.
27. Section 2 of the [Employment Act](#) defines an employee as: -

“a person employed for wages or a salary and includes an apprentice and indentured learner”.



28. An employer is defined as

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

29. A contract of service is defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

30. From the evidence on record, it is clear that the 1st Respondent contracted the 2nd Respondent to provide workforce to the 1st Respondent and that the workers were employed and remunerated by the 2nd Respondent. This is confirmed by the Employment Contract and the NSSF Statement of Account attached to the 1st Respondent’s list of documents dated 11th March 2019 which confirms that the Claimant was an employee of the 2nd Respondent and not the 1st Respondent as alleged.

Who between the 1st and 2nd Respondent is liable for the unfair dismissal of the Claimant from employment

31. Having found that the Claimant was not an employee of the 1st Respondent, it follows that the 2nd Respondent is solely liable for the unfair dismissal of the Claimant as the Claimant’s evidence that he was unfairly dismissed from employment was not rebutted. The Claimant is therefore entitled to his terminal benefits.

32. The 2nd Respondent having been properly served and having failed to respond to the Claim, judgment is hereby entered for the Claimant against the 2nd Respondent as particularized below:

i. One month pay in lieu of notice

The Claimant is awarded (525x30) Kshs. 15,750 under this head.

ii. Compensation for unfair termination

The Claimant worked for the 2nd Respondent for slightly over nine months. Taking into account all the relevant factors under section 49(4) of the *Employment Act*, I award the Claimant 2 months’ salary as compensation in the sum of Kshs. 31,500.

iii. Pro rata leave

The Claimant is awarded pay in lieu of leave at 21 days per year for 9 months being 15.75 days (525x15.75) at Kshs. 8,269.

iv. Overtime dues

In his testimony, the Claimant stated that he worked for 7 days per week and from 7am to 7pm. He therefore worked for 84 hours a week instead of the prescribed 52 hours per week thereby doing 32 hours of overtime per week payable at 1.5 times the hourly rate (See rule 5 and 6 of the Regulation of Wages (General) Order reproduced below). This evidence was not challenged. The Claimant is awarded Kshs 81,415 as prayed.

Rule 5 and 6 of the Regulation of Wages (General) Order provides

5. Hours of work



1. The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week.
 2. Notwithstanding subparagraph (1) the normal working week of a person employed on night work shall consist of not more than sixty hours of work per week.
 3. No person under the age of sixteen years shall be required to work for more than six hours in any day
6. Overtime
1. Overtime shall be payable at the following rates—
 - a. for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;
 - b. for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.
 2. For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee's basic minimum monthly wage.
 3. Notwithstanding subparagraph (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks—
 - a. one hundred and forty-four hours for employees engaged in night work;
 - b. one hundred and sixteen hours for all other adult employees.

v. Service pay/Gratuity

The Prayer for service pay fails as there is evidence on record showing that the Claimant was a registered member of the National Social Security Fund to which monthly contributions was made by the 2nd Respondent.

vi. Unpaid public holiday worked.....Kshs. 874

The Claimant is awarded Kshs. 874 under this head as prayed as this evidence was not rebutted.

33. The 2nd Respondent shall bear the Claimant's costs.

DATED, SIGNED AND VIRTUALLY AT ELDORET

ON THIS 20TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO

JUDGE

