



**Ologi v Prime Steel Mills Limited (Cause E905 of 2018)
[2024] KEELRC 384 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 384 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E905 OF 2018
MA ONYANGO, J
FEBRUARY 29, 2024**

BETWEEN

CHARLES OTIENO OLOGI CLAIMANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his statement of claim on 8th June, 2018 pleaded inter alia as follows: -
 - a. The Claimant was employed by the Respondent as an ungraded artisan on or about 8th February, 2014 at a monthly salary of Kshs.16,260/=
 - b. The Claimant averred that he served the Respondent with utmost diligence and faithfulness until 1st August,2015 when he was unfairly and unlawfully terminated.
 - c. The Claimant averred that there have never been any complaints, written or oral, touching on Claimant’s output and the parties had a good employer-employee relationship.
 - d. The Claimant further averred that there was no notice to show cause and neither was he given time to respond to any accusations that the Respondent may have had against him.
 - e. The Claimant averred that he was constrained to seek legal services of Advocates who drew a demand letter which was neglected constraining him to move to court.
 - f. The Claimant averred that the Respondent did not pay his terminal benefits and other entitlements payable to him including house allowance, underpaid wages and overtime.
2. The Claimant in the upshot prayed for the following against the Respondent:
 - a. Notice pay Kshs.16,260.00/=



- b. Annual Leave Kshs.15,584.00/=
 - c. House Allowance Kshs.37,878.00/=
 - d. Underpayment Kshs.12,431.40/=
 - e. Overtime for
 - i) Saturday Kshs.43,288.60/=
 - ii) Sundays Kshs.50,864.00/=
 - f. Severance pay Kshs.7,260.00/=
 - g. Compensation for wrongful dismissal/unfair termination Kshs.195,120.00/=
 - h. Costs of the suit and interests on present court rates.
3. The Respondent did not file any defense and upon application by the Claimant the court on 16th September, 2019 certified the suit ready for hearing as an undefended claim. The court further directed that in view of the fact that the suit was undefended the same be disposed of by way of pleadings, witness affidavits and written submissions.
 4. The Claimant filed a witness affidavit sworn on 24th February 2022 and written submissions also dated 24th February 2022.
 5. Vide an application dated 7th February 2022 the Respondent prayed for stay of proceedings pending hearing and determination of the said application; setting aside of the orders certifying the suit ready for hearing as an undefended claim and enlargement of time for filing its response to the Statement of Claim.
 6. The Respondent's application which was filed under certificate of urgency, was heard ex parte on 8th February 2022 and Counsel for the Respondent Mr. Mutoro directed to take a date at the registry for inter partes hearing of the application then serve the same upon the Claimant. The application was however never fixed for hearing. No further action was taken on the file by the parties who also failed to attend court on several dates fixed by the court registry for mention of the case until 18th March 2022 when only the Claimant appeared in court for mention when summoned by the court.

Evidence

7. In his Statement of Claim and witness statement both dated 8th June 2018 and in his witness affidavit dated 24th February 2022, the Claimant avers that at all times material to this suit he was employed by the Respondent a limited liability company incorporated in Kenya with its head office in Nairobi and steel mills in Kitengela. He avers that he was first employed by the Respondent on 8th February 2014 as an ungraded artisan.
8. The Claimant further avers that he worked for the Respondent with utmost diligence and faithfulness until 1st August 2015 when his employment was terminated unlawfully and unfairly. The Claimant avers that he was never issued with any show cause letter nor given an opportunity to respond to any accusations against him.

Claimants' Submissions

9. The Claimant filed written submissions dated 24th February, 2022. The Claimant submitted that there was no notice or warning and he did nothing to warrant the summary dismissal hence the



- termination was unfair and unlawful in terms of section 45 of the *Employment Act* and thus entitled to compensation as per section 49(1) (c) of the *Employment Act*.
10. On the issue of minimum wage, the Claimant relied on section 48 of the *Labour Institutions Act* to submit that an employee is entitled to the statutory minimum rates and terms of employment where he has been subjected to inferior terms by the employer. For emphasis he relied on the decision in *Irungu Githae v Mutheka Farmers Co-operative Society Limited* (2019) eKLR.
 11. On the issue of house allowance the Claimant submitted that over the years the courts have calculated house allowance at 15% of the salary or wage of an employee and relied on the case of *Ebrahim Ochieng & 2 Others v Chemelil Sugar Company Limited* (2014) eKLR.
 12. The Claimant prayed for 12 months compensation for unfair and unlawful termination as he remains unemployed and suffering. He prayed for the sums tabulated in his claim amounting to Kshs.490,804.40/=.
 13. On the issue of costs, the Claimant submitted that they follow the event unless court orders otherwise for good reason which must be given and relied on the case of *SCK in Jabir Singh Rai & 3 others vs Tarlochan Singh Rai & Others* (2014) eKLR.

Determination

14. The Respondent having not filed a reply to the Claim and having been aware of the same as demonstrated by its filing of the application dated 7th February 2022, the averments are uncontroverted. Further in the draft Response to Statement of Claim filed with the Respondent's application as annexure "RG 2" thereof, it does not deny that a relationship of employer/employee existed between the Claimant and the Respondent. The only issue for the determination of the court is therefore whether the Claimant is entitled to the prayers sought.
15. Section 48 of the *Labour Institutions Act* provides that-
 - 1) Notwithstanding anything contained in this Act or any other written law—
 - (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
 - (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms
16. The Claimant stated in his witness affidavit that his employment was terminated unlawfully, without valid reason or any reason at all and that he was not given an opportunity to state his case in his defense. He was further not given notice or pay in lieu thereof. He further stated that he earned Kshs. 484 per day for 14 months and Kshs. 542 per day for 3 months. He further stated that he was not paid terminal dues when his employment was terminated.
17. In the draft Response to Statement of Claim referred to above the Respondent agrees that the Claimant stopped working on 1st August 2015 as averred by the Claimant but states that the Claimant was not dismissed but deserted duty. In the case of *Richard Maingi vs Wells Fargo Limited* 2017 eKLR the court held that dismissal on account of desertion requires that the Respondent produces evidence showing



reasonable steps were taken to contact the employee accused of desertion. In the in the instant case no such evidence has been adduced. The only inference the court can make from the evidence on record is that the Claimant was unlawfully terminated by the Respondent on 1st August 2015.

18. Having reached the finding that the Claimant's employment was unfairly terminated by the Respondent, the Claimant is entitled to notice or pay in lieu thereof. I award him his daily wage for 30 days being the sum of Kshs. (542x30) 16,260 as pay in lieu of notice.
19. The Claimant further prayed for house allowance of 15% of his basic pay. The Regulation of Wages (General) Order provides that daily and hourly rates of pay are inclusive of house allowance. Only monthly wages are exclusive of 15% house allowance. Since that Claimant was paid a daily wage it was inclusive of house allowance. He is thus not entitled to the prayer for the same which is accordingly declined.
20. The Claimant prayed for leave days. This is denied in the Respondent draft Response to Statement of Claim. However, there having not been any evidence that the Claimant took leave, I award him 1.75 days per month worked for the 14 months that he worked for the Respondent as provided in section 28(1) of the Employment Act being (1.75 x 14) x 542 being the daily rate of pay. I accordingly award him Kshs. 13,279.
21. The Claimant's other prayer was for underpayments. No evidence was adduced to prove that the Claimant was underpaid. I accordingly decline the prayer on grounds that it was not proved.
22. The same applies to the prayer for overtime which was not supported by any evidence.
23. The Claimant further prayed for severance pay. The same is payable in cases of redundancy only as provided in section 40 of the Employment Act. The Claimant having not pleaded or adduced any evidence of redundancy, the prayer has not been proved and is declined.
24. The Claimant also prayed for compensation of 12 months' salary for unfair termination. Having found that the Claimant was unfairly terminated, he is entitled to compensation under section 49 of the Employment Act. Taking into account all the factors set out in section 49(4) of the Act, it is my view that 3 months' salary is reasonable under the present circumstances. I accordingly grant the Claimant the same in the sum of Kshs. 48,780.
25. The Claimant shall have costs of the Claim and interest shall accrue at court rates from the date of judgement.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

NRB ELRC 905 OF 2018 JUDGMENT

