



**Njenga v Prime Steel Mills Limited (Cause 2243 of 2016)
[2024] KEELRC 391 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 391 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2243 OF 2016
JK GAKERI, J
FEBRUARY 28, 2024**

BETWEEN

SAMUEL NJENGA CLAIMANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 2nd November, 2016 alleging unfair termination of employment by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent on casual basis on 20th February, 2013 as a Box Charger and later as Burryman, initially at Kshs.307/= per day which later rose to Kshs.374/= by the date of termination of employment and worked continuously for 2^{1/2} years.
3. The Claimant avers that on 2nd October, 2015, the Respondent terminated his employment without a reason as they were only informed that those whose names were not on the notice board should not report to work henceforth.
4. The Claimant prays for;
 - i. A declaration that the Respondent's dismissal of the Claimant from employment was unfair, unlawful and null and void.
 - ii. Severance pay Kshs.11,220/=
 - iii. Salary in lieu of notice Kshs.11,220/=.
 - iv. Unpaid overtime for 3,772 hours, Kshs.264,511.00.
 - v. Pay in lieu of leave Kshs.22,440/=



- vi. Damages for unfair dismissal Kshs.134,640/=
- vii. Certificate of service.
- viii. Costs of this suit.
- ix. Interest at court rates.
- x. Such other or further relief as the court may deem just to grant.

Respondent's case

5. It is the Respondent's case that the Claimant rendered services discontinuously from 1st July, 2014 to 30th June, 2015 and was not entitled to an employment contract as he was engaged on casual basis.
6. The Respondent avers that the Claimant quit voluntarily on 30th June, 2015 and took up employment with Jokali Handling Services which was providing labour to the Respondent.
7. It is the Respondent's case that the Claimant was paid for all the hours worked.
8. The Respondent denies having terminated the Claimant's employment or owing him anything and prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

9. The Claimant admitted that his National Social Security Fund statement showed that he worked for the Respondent from 1st July, 2014 to 30th June, 2015 and it was the only document he had on the duration he worked for the Respondent.
10. That he worked for Prime Steel Ltd (Respondent) throughout and Jokali Handling Services was not his employer at any time.
11. The witness maintained that his employment was terminated by the Respondent as per the notice board where names were displayed and denied having joined Jokali Handling Services.
12. He denied having been paid all his dues.
13. On re-examination, the Claimant testified that the NSSF statement on record had the names of both companies and he was employed on February 2013 as evidenced by the NHIF card on record.

Respondent's evidence

14. Mr. Godfrey Oduor confirmed that the Claimant quit employment on 30th June, 2015. That Jokali Handling Services provided the Respondent with employees and paid for their services.
15. He admitted that he had no evidence to prove that the Claimant was consulted when his services were transferred to Jokali Handling Services which he admitted took place.
16. That he did not issue a termination notice and had no evidence to show that the Claimant quit employment.
17. On re-examination, the witness testified that Jokali Handling Services was a contractor and supplied labour and casual employees were aware that they had been transferred to Jokali Handling Services.
18. That all the Claimant's dues were paid before Jokali Handling Services took over.



Claimant's submissions

19. Counsel isolated six issues ranging from duration of employment, issuance of the disciplinary rules by the Respondent, termination of the Claimant's employment as well the Claimant's entitlement to salary in lieu of notice, leave days and overtime.
20. On the 1st issue, counsel submitted that evidence showed that the Respondent was remitting NSSF deductions and the Claimant was its employee from 20th February, 2013 to 2nd October, 2015.
21. That the Claimant was unaware of how Jokali Handling Services had come in as shown by the NSSF statement, counsel relied on the sentiments of the court in *Joash Oyaro Mosegere V Prime Steel Mills Ltd (2021) eKLR* where the court relied on the 3 Judge Bench decision in *Wrigley Company EA Ltd V Attorney General & others*.
22. Counsel urged that since the Claimant rendered services to the Respondent continuously for about 2 years and 7 months, his employment transitioned from casual to a contract of service by virtue of the provisions of Section 37 of the *Employment Act, 2007*.
23. As regards the issuance of disciplinary rules on employment as provided by Section 10 of the *Employment Act, 2007*, counsel submitted that none were issued and was thus uninformed on redress of grievances.
24. On termination of employment, counsel urged that the events of 2nd October, 2015 left no doubt that the Claimant was not informed of the reason for termination contrary to the provisions of Section 41 of the *Employment Act, 2007* and no disciplinary process was invoked.
25. Counsel relied on the sentiments of Mbaru J. in *Jane Samba Mulala V Ol Tukai Lodge Ltd (2013) eKLR* on poor performance as were the sentiments of the Court of Appeal in *Janet Nyandiko V Kenya Commercial Bank Ltd (2017) eKLR* on the essence of compliance with the provisions of Sections 41 and 45 of the *Employment Act, 2007*.
26. On the reliefs sought, counsel urged that the Claimant was entitled to the one (1) month's salary in lieu of notice by virtue of Section 35(1) and 36 of the *Employment Act, 2007* as no termination notice was given, leave days for the duration serviced and overtime.

Respondent's submissions

27. As to whether the Claimant was an employee of the Respondent, counsel urged that based on the NSSF statement, the Claimant worked for the Respondent between 1st July, 2014 and 30th June, 2015 as no other document was availed or a witness to corroborate the Claimant's allegations.
28. On termination, counsel for the Respondent relied on the provisions of Section 45(2) and 47(5) of the *Employment Act, 2007* to submit that the Claimant was an employee of Jokali Handling Services as at the date of the alleged termination of employment and did not discharge the burden of proof and no unfair termination of employment had taken place.
29. On the reliefs sought, it was submitted that the Claimant was not entitled to any of the prayers sought.

Findings and determination

30. The issues that commend themselves for determination are;
 - i. Whether the Respondent terminated the Claimant's employment or he quit.



- ii. Whether the Claimant is entitled to the relief sought.
31. Before delving into the aforementioned issues, it is essential to dispose of the peripheral but significant issue of the Claimant's employment history and relationship with the Respondent.
32. The Claimant testified that he joined the Respondent on 20th February, 2013 as a casual Box Charger and later as a Burryman.
33. The Respondent tendered no evidence to contradict this testimony and RWI confirmed that the Respondent did not give the Claimant a written contract and had no record to show that the Claimant ever worked for the Respondent notwithstanding admission that the Claimant worked for it from 1st July, 2014 to 30th June, 2015 allegedly discontinuously but adduced no shred of evidence to prove the discontinuity.
34. An attendance register would have established the alleged discontinuity effortlessly. The Respondent had no such concrete evidence.
35. Strangely, the Respondent tendered no documentary evidence on the Claimant, not even of any sum of money paid or leave.
36. Significantly, CWI testified that it was the Respondent who directed them to register with the National Health Insurance Fund and National Social Security Fund, evidence the Respondent did not controvert.
37. Equally, the Respondent's witness merely relied on the Claimant's NSSF statement to testify that he worked for it from July 2014 to June 2016.
38. Having failed to prove that the Claimant's services were discontinuous, or that he was not its employee from 2013, the Respondent has no basis to allege that the Claimant remained a casual employee throughout his employment.
39. Indeed, under paragraph 11(d) of the Response to the Statement of Claim dated 16th September, 2019, the Respondent admits that the Claimant took all his leave days and was thus not entitled to pay in lieu of leave not taken.
40. Needless to belabour, casual employees have no leave days.
41. Even assuming that the Claimant only worked from 1st July, 2014 to 30th June, 2015, a duration of 11 months, which the Respondent has failed to demonstrate was discontinuous, the Claimant's employment had by 30th June, 2015 transitioned from casual to term by virtue of the provisions of Section 37(1) of the *Employment Act*, 2007 which provides that;
- Notwithstanding any provisions of this Act, where a casual employee –
- a. Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month or
- b. Performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more. The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1)(c) shall apply to the contract of service.
42. From the foregoing, it is the finding of the court that as at the date of separation, the Claimant was not a casual employee.



43. A closely related issue is who the Claimant's employer was, in particular as at the date of separation.
44. The Claimant's testimony is consistent that he joined the Respondent in 2013 and the two separated in October 2015. He denied that Jokali Handling Services was his employer.
45. The Claimant rejected the suggestion that he left the Respondent and joined Jokali Handling Services.
46. Although the Respondent's witness testified that it had contracted Jokali Handling Services to provide labour, he did not explain how their relationship impacted on existing employees as it provided no evidence of having outsourced its labour to Jokali Handling Services or any other 3rd party.
47. From the evidence on record, it is unclear to the court how Jokali Handling Services name found its way into the Claimant's NSSF records.
48. It would appear as if the Respondent outsourced its labour without consulting and concurrence of its existing employees.
49. How could the employees have transitioned to Jokali Handling Services without a formal agreement of employment or express concurrence?
50. The Respondent tendered no evidence on how the shift was realized bearing in mind that there was no discontinuity in the Claimant's employment after 30th June, 2015.
51. In *Wringley Company (EA) Ltd V Attorney General & 2 others* (2013) eKLR, where a three judge bench comprising Nduma Nderi, Linnet Ndolo and Nzioki Wa Makau JJ considered the issue of outsourcing, the learned judges articulated the essentials of a credible outsourcing as follows;
 - a. "Ordinarily, employers are not expected to outsource their core functions;
 - b. An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
 - c. An employer will not be permitted to transfer the services to an outsourcing agency without the express acceptance of each affected employee and in all such cases the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
 - d. Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise."
52. As the Respondent adduced no evidence to demonstrate that it outsourced its labour to Jokali Handling Services and the Claimant accepted the arrangement, it is the finding of the court that the Claimant was an employee of the Respondent throughout his employment.
53. As to whether termination of the Claimant's employment was unfair or he quit employment, parties have adopted opposing positions with the Respondent maintaining that the Claimant quit employment on 30th June, 2015.
54. The Respondent's witness, however, could not explain how the alleged quitting occurred and how the Respondent discovered that the Claimant had quit and what it did as the Claimant's employment lacks any discontinuity from 1st July, 2014.
55. If the Respondent's evidence is to be believed, the Claimant quit the Respondent, joined Jokali Handling Services and resumed work immediately yet RWI tendered no evidence to prove that the Claimant was privy to any arrangement between the Respondent and the Jokali Handling Services.



56. The unauthenticated two sheets of paper under the name Jokali Handling Services which RWI never made reference to or explain what they demonstrated are of no effect.
57. In his undated written statement, the Claimant testified that he was a diligent employee and served the Respondent continuously for about 2¹/₂ years before his employment was terminated.
58. On cross-examination, he confirmed that for the entire duration of employment, he worked for the Respondent until 2nd October, 2015 when the Respondent informed them that those whose names were not on the notice board should not report to work henceforth.
59. The Respondent's witness tendered no evidence to controvert the Claimant's testimony as regards the names on the noticeboard.
60. Strangely, the witness testified that he joined the Respondent in 2012 and could not explain how the Respondent communicated with its employees. He did not deny that there was a noticeboard or that no names were displayed.
61. The Claimant's account of the sequence of events sounds more credible.
62. In a nutshell, the Claimant's evidence that his employment was terminated by the Respondent for no reason and the mandatory procedure was not complied with remains uncontroverted.
63. As exquisitely captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*;

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
64. The foregoing sentiments echo the requirements of the provisions of Section 41, 43 and 47(5) of the *Employment Act, 2007* on the burden placed on the employer to establish that it had a valid and fair reason for the termination and conducted it in accordance with a fair procedure.
65. Having failed to demonstrate how the Claimant quit its employment and what it did to ascertain his whereabouts to resume duty and having further failed to controvert the Claimant's testimony on unfair termination of his employment, the Respondent has failed to discharge its burden of proof to show that termination of the Claimant's employment was fair within the meaning of Section 45 of the *Employment Act, 2007*.
66. The court finds neither evidence that the Claimant quit his employment nor that his employment was fairly terminated by the Respondent.
67. As regards the reliefs sought, the court proceeds as follows;
 - i. Declaration
68. Having found that the Respondent has failed to prove that termination of the Claimant's employment was fair, a declaration that it was unfair is merited.
 - ii. Severance pay
69. The Claimant tendered no evidence of entitlement to severance pay as he was not declared redundant. Needless to emphasize, severance pay is only payable in a redundancy under Section 40(1)(g) of the *Employment Act, 2007*.



- The prayer is declined.
- iii. Pay in lieu of notice
70. The Respondent provided no evidence of having given the Claimant the requisite notice under Section 35(1) of the *Employment Act*, 2007 or payment in lieu of notice under Section 36 of the Act.
- The prayer is merited and is awarded, Kshs.11,220/=.
- iv. Unpaid overtime 3772 hours
71. This claim lacks particulars as the Claimant tendered no evidence of his entitlement to overtime. Particulars of the days involved would have demonstrated that he worked overtime.
- The prayer is declined.
- v. Payment of leave not taken
72. The Claimant adduced no evidence of the outstanding leave days.
- The prayer fails for want of particulars and is declined.
- vi. Certificate of service
73. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.
- vii. 12 months compensation
74. The Claimant is entitled to compensation for the unfair termination of employment by the Respondent.
75. In assessing the quantum of compensation, the court has considered that;
- i. The Claimant was an employee of the Respondent for a very short duration.
- ii. The Claimant did not contribute to the termination of employment.
- iii. The Claimant did not express his wish to continue in the Respondent's employment or appeal the decision.
76. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair, Kshs.33,600/=.
77. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. Pay in lieu of notice Kshs.11,200/=.
- c. Equivalent of 3 months gross salary Kshs.33,600/=.
- d. Costs of this suit.
- e. Interest at court rates from date of judgment till payment in full.
- f. Certificate of service.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI



JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

