



**Nyane v Western Steel Mills Ltd & another (Employment and Labour Relations Cause 156 of 2017) [2024] KEELRC 13396 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13396 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 156 OF 2017  
MA ONYANGO, J  
DECEMBER 11, 2024**

**BETWEEN**

**RICHARD DERICK NYANE ..... CLAIMANT**

**AND**

**WESTERN STEEL MILLS LTD ..... 1<sup>ST</sup> RESPONDENT**

**JOKALI HANDLING SERVICES LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Vide his Memorandum of Claim dated 5<sup>th</sup> August 2016 and filed in Court on 5<sup>th</sup> December 2016, the Claimant avers that he was unfairly terminated from employment by the Respondents and was not paid his terminal benefits.
2. The Claimant states that the 2<sup>nd</sup> Respondent was the employing agency of the 1<sup>st</sup> Respondent and that he was employed by the Respondents sometimes in April 2015 as a general worker on permanent basis terms.
3. It is the Claimant's case that on being employed as a general worker, he was assigned duties on the pressing machine where he served the Respondents with dedication and commitment only to be summarily dismissed from employment sometimes in April 2016.
4. The Claimant particularized the terminal dues and damages owed to him by the Respondents as follows: -
  - a. Unpaid house allowance for the year 2015 and 2016 Kshs 37,800
  - b. Annual leave dues for 2015 Kshs 18,900
  - c. Annual leave dues for 2016 Kshs 18,900



- d. Service benefits Kshs 7,875
  - e. One month salary in lieu of notice Kshs 18,900
  - f. 12 months compensation for unfair termination Kshs 226,800
  - g. Unpaid public holidays Kshs 69,300
  - h. Unpaid days off Kshs 6,300
  - i. Overtime dues Kshs 106,310
  - j. NSSF remittance Kshs 1,300
  - k. NHIF remittance Kshs 3,120
  - l. Loss of future earnings Kshs 3,628,800  
Total Kshs. 4,144.305.88
5. According to the Claimant, the termination of his employment by the Respondents was unlawful, unprocedural, irregular, unfair and in total violation of section 45(2) of the [Employment Act](#). He sought for the following reliefs:
- i. A declaration that the summary dismissal of the Claimant from his permanent employment, by the Respondents was malicious, unlawful, unfair, unprocedurally and a fundamentally violated the Rights of the Claimant;
  - ii. A declaration that the Claimant was entitled to House allowance.
  - iii. A declaration that the Claimant is entitled to one-month salary in lieu of annual leave.
  - iv. A declaration that the Claimant is entitled to National Social Security Fund deductions for the 11 months worked.
  - v. A declaration that the Claimant is entitled to National Hospital Insurance Fund (NHIF), for the 11 months worked.
  - vi. A declaration that the Claimant is entitled to his dues, compensation, damages, and benefits as a result of wrongful dismissal from the employment as calculated herein.
  - vii. A maximum compensation of 12 months
  - viii. Damages and Terminal Dues as per the calculations under paragraph 13.
  - ix. Loss of Earning of salary for a period of 16 years that the Claimant would have worked until the statutory retirement age of 60 years.
  - x. A Certificate of Service as per section 51 of the [Employment Act](#);
  - xi. Costs and Interests of this suit from the date of filing until its full determination.
  - xii. The claim be allowed in entirety.
6. The 1<sup>st</sup> Respondent in its Response to Statement of Claim dated 2<sup>nd</sup> June 2023 and filed in court on 27<sup>th</sup> June 2023 denies having employed the Claimant as alleged in the Statement of Claim. It averred that



since there exists no employment relationship between it and the Claimant, it could not have violated the specific provisions of the *Employment Act* cited by the Claimant.

7. The 2<sup>nd</sup> Respondent did not participate in these proceedings.

### **Claimant's Case**

8. The Claimant testified on 11<sup>th</sup> October 2023 as CW1 and reiterated the averments he made in his Statement of Claim. He however clarified that he was employed in April 2015 and was summarily dismissed from employment in April 2016 without any lawful reason.
9. CW1 told the court that during the course of his employment, he worked for 12 hours a day and was not paid overtime; that he never proceeded on leave; was not paid a house allowance and that the Respondents despite deducting NSSF dues, did not remit the same in April and May 2015 and in April 2016.
10. CW1 testified that he was not issued with an employment contract until in 2016 when he signed an employment contract but was not given a copy. He maintained that he was employed by the 1<sup>st</sup> Respondent and supervised by a Mr Victor. He also mentioned that a Mr. Barasa was the Human Resource Officer. That Victor and Barasa were employees of the 1<sup>st</sup> Respondent. He urged this Court his allow Claim as prayed.
11. On cross examination CW1 stated that he went to look for work at the 1<sup>st</sup> Respondent's company and later signed an employment contract with the 1<sup>st</sup> Respondent's representatives. He told the court that he was paid by the 2<sup>nd</sup> Respondent.
12. During re-examination, the Claimant stated that when he was employed, he worked with the 2<sup>nd</sup> Respondent and later, he worked under the 1<sup>st</sup> Respondent. It was his evidence that the company was originally known as Jokali and that it changed its name to Western Steel Mills.

### **Respondent's Case**

13. The 1<sup>st</sup> Respondent called its Human Resource Officer, Michael Njuguna who testified as RW1. He adopted his witness statement recorded on 27<sup>th</sup> June 2023 and relied on the documents filed by the 1<sup>st</sup> Respondent as his evidence in chief.
14. RW1 told the court that the 2<sup>nd</sup> Respondent is an independent contractor who was engaged to provide manpower to the 1<sup>st</sup> Respondent and that the responsibility of engaging employees rested on the 2<sup>nd</sup> Respondent who in this case employed the Claimant and paid him his salaries including remitting the NHIF and NSSF deductions to the relevant statutory bodies.
15. Upon being cross examined by counsel Nabasange, RW1 maintained that the 2<sup>nd</sup> Respondent is not the 1<sup>st</sup> Respondent's agent, but is an independent contractor who employs its employees directly. He explained that the 1<sup>st</sup> Respondent has a contract with the 2<sup>nd</sup> Respondent to provide the 1<sup>st</sup> Respondent with labour and that the 2<sup>nd</sup> Respondent is an independent body with power to employ and terminate the services of its employees.
16. It was the 1<sup>st</sup> Respondent's case that from its records, the Claimant was never its employee. RW1 however admitted that Mr. Barasa was an employee of the 1<sup>st</sup> Respondent at some point.



## **The submissions**

17. The Claimant's submissions were filed on 20<sup>th</sup> November 2023. In those submissions, the Claimant maintained that the 1<sup>st</sup> Respondent was liable for the unfair termination of the Claimant for reasons that the 1<sup>st</sup> Respondent's witness, on cross examination, admitted that one Barasa was its employee and the Claimant had in his testimony averred that he worked under Mr. Barasa. On this basis, the Claimant submitted that although the 2<sup>nd</sup> Respondent deployed the manpower, that manpower was under the control and management and for the benefit of the 1<sup>st</sup> Respondent. In support of this position, the Claimant cited the case of David Njuguna Ngotho v Family Bank Limited & Another (2018) eKLR and Karanja v Phoenix of EA Assurance Co Limited (1991) eKLR.
18. It is the Claimant's submission that the 2<sup>nd</sup> Respondent employed the Claimant on behalf of the 1<sup>st</sup> Respondent hence both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are to be held liable jointly and severally for the unfair dismissal of the Claimant.
19. The 1<sup>st</sup> Respondent on its part filed its submissions on 10<sup>th</sup> November 2023 and maintained that it never employed the Claimant. It contended that the Claimant in his testimony before the court acknowledged that he was employed by the 2<sup>nd</sup> Respondent but was assigned duties in the 1<sup>st</sup> Respondent's premises. The 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent, an independent contractor, was contracted by the 1<sup>st</sup> Respondent to provide hiring services and that the relationship was like any other relationship in a contract for service.
20. The 1<sup>st</sup> Respondent submitted that under the contract for service, the 2<sup>nd</sup> Respondent would provide required manpower to the 1<sup>st</sup> Respondent depending on the workforce required and it would in turn remunerate the 2<sup>nd</sup> Respondent.
21. According to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent being the employer, was in charge of remunerating its employees by paying their salaries and making the necessary deductions which action is proof that at no pointy did the employees switch to be the 1<sup>st</sup> Respondent's despite working in the 1<sup>st</sup> Respondent's premises.
22. The 1<sup>st</sup> Respondent submitted that the Claimant has failed to sufficiently prove that he was employed by the 1<sup>st</sup> Respondent. In this regard, it is the 1<sup>st</sup> Respondent's submission that the Claimant can only get recourse from the 2<sup>nd</sup> Respondent if he was indeed unlawfully terminated.
23. The 1<sup>st</sup> Respondent urged the court to strike out the Claimant's claim with costs to it.

## **Determination**

24. Upon considering the pleadings herein, the evidence of the respective parties, the submissions and the authorities cited, I find that the issues for determination are: -
  - i. Whether the Claimant was an employee of the 1<sup>st</sup> or 2<sup>nd</sup> Respondent
  - ii. Whether the 1<sup>st</sup> Respondent is liable for the unfair dismissal of the Claimant from employment
  - iii. Whether the reliefs sought should issue
25. The Claimant pleads that he was employed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly. The 1st Respondent has vehemently denied that it had an employment relationship with the Claimant. According to the 1<sup>st</sup> Respondent, the Claimant was employed by the 2<sup>nd</sup> Respondent to work in the 1<sup>st</sup> Respondent's premises but was remunerated by the 2<sup>nd</sup> Respondent.



26. The Claimant on his part maintained that during the course of his employment, he worked under direct supervision of the 1<sup>st</sup> Respondent's agents and as such the 1<sup>st</sup> Respondent is liable for the actions of the 2<sup>nd</sup> Respondent in terminating his employment unlawfully.
27. It is trite that employment claims must be premised on an employment relationship capable of enforcement.
28. An employee is defined by Section 2 of the *Employment Act*, 2007 as:

“a person employed for wages or a salary and includes an apprentice and indentured learner”.
29. 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”
30. 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
31. From the evidence on record, the 1<sup>st</sup> Respondent contracted the 2<sup>nd</sup> Respondent to provide manpower to the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent would in turn remunerate the 2<sup>nd</sup> Respondent.
32. Although the Claimant avers that he was working under the direct supervision of the 1<sup>st</sup> Respondent, no evidence was tendered in court in support of this position. I therefore find that the 2<sup>nd</sup> Respondent was the employer of the Claimant.
33. The 1<sup>st</sup> Respondent's witness informed the court that it is the 2<sup>nd</sup> Respondent who employed the Claimant and the one that terminated the Claimant's employment.
34. The 2<sup>nd</sup> Respondent having been properly served and having failed to respond to the Claim, judgment is hereby entered for the Claimant against the 2<sup>nd</sup> Respondent as particularized below:
  - a. Unpaid house allowance

This is not payable as the Claimant was paid a daily wage which is inclusive of house allowance
  - b. Annual leave

The Claimant is awarded pay in lieu of leave at 21 days per year for 2 years (525x21x2) Kshs. 22,050
  - c. Service pay

The Claimant is awarded service pay at 15 days per year for 2 years (525x15x2) Kshs. 15,750
  - d. Pay in lieu of notice

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

The Claimant having worked for 2 years and taking into account all the relevant factors under section 49(4) of the *Employment Act*, I award the Claimant 4 months salary as compensation in the sum of Kshs. 63,000
  - f. Public holidays 11 days per year



I award the Claimant (11x2x525 at double rate of pay) Kshs. 23,100

g. Unpaid days off

The Claimant is awarded Kshs. 6,300 as prayed.

h. Overtime

The Claimant is awarded Kshs. 106,310

i. NSSF

The Claimant having claimed service pay is not entitled to NSSF

j. NHIF

The Claimant did not prove that NHIF was deducted from his salary and not remitted to NHIF.

k. Loss of future earnings

The Claimant is not entitled to pay for future earnings as this is not provided for in the *Employment Act*

35. The 2<sup>nd</sup> Respondent shall meet costs due to the Claimant.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 11<sup>TH</sup> DAY OF DECEMBER 2024**

**MAUREEN ONYANGO**

**JUDGE**

