



**Mwashighadi v Steel Structures Limited (Cause 1088 of 2016)  
[2023] KEELRC 483 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 483 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1088 OF 2016  
K OCHARO, J  
FEBRUARY 24, 2023**

**BETWEEN**

**MATHIAS MAZOZO MWASHIGHADI ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. Through a Memorandum of Claim dated the 7<sup>th</sup> June 2016, the Claimant instituted a claim against the Respondent seeking the following reliefs;
  - a. A Declaration that the Respondent’s action of dismissing the Claimant from employment was unlawful, unfair and un-procedural.
  - b. A sum of Ksh 1,401 895 as particularized in paragraph 6.
  - c. Damages for the loss of salaries and allowances from the 30<sup>th</sup> September 2014 to date until the determination of the claim herein at the claimant’s gross salary at the figure of 13,740 per month.
  - d. Certificate of service.
  - e. Cost of the suit.
  - f. Interest on (b) (c) and (e) above at the court’s rate.
  - g. Any other relief the court may deem fit to grant.
2. The Memorandum of the Claim was filed together with the Claimant’s witness statement and the list of documents that he intended to place reliance on as documentary evidence in support of his case.



3. Upon being served with the summons to enter appearance, The Respondent did enter appearance on the 8<sup>th</sup> July 2016, and filed a Reply to the Memorandum of Claim on the 18<sup>th</sup> July 2016. In the memorandum of reply, the Respondent denied the Claimant's cause of action, and his entitlement to the reliefs sought.
4. Subsequent to the close of the pleadings, the matter was heard inter-partes on merit. The Claimant's case was heard on the 28<sup>th</sup> April 2022 while the Respondent's case was heard on the 23<sup>rd</sup> May 2022.
5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.

### **The Claimant's case**

6. The Claimant stated that he was employed by the Respondent on the 13<sup>th</sup> October 2008 as a casual labourer at a salary of Ksh 8,808 per month which had raised to Ksh 13,740 per month by the time of the termination of his employment.
7. The Claimant averred that on or about the 30<sup>th</sup> September 2014, the Respondent terminated his services without any lawful cause.
8. The Claimant contended that he had always carried out his duties for which he was employed diligently and that the termination was actuated by malice and was in breach of the employment contract.
9. It was the Claimant's case that the Respondent's action was actuated by malice is revealed by the fact that he was; not given any warning letter, never taken through a disciplinary hearing whereat he was accorded an opportunity to defend himself; not notified of the Respondent's intention to terminate his employment and the reasons forming basis thereof; and lastly, not paid his terminal dues contrary to the stipulations of the employment contract. The Respondent failed to issue him with a certificate of service.
10. It was the Claimant's position that as a result of the said termination of the employment, his family suffered emotionally and financially, as he was their sole bread winner.
11. The Claimant contended that as a result of the said unlawful termination, he is entitled to a sum of Kshs. 1,401,895 as calculated hereunder;
  - i. One month's salary in lieu of notice-----Ksh 13,740.
  - ii. Unpaid salaries for the 5 days in September 2014...Ksh 3,345.
  - iii. Leave not taken for the 8 years/unpaid leave allowance...Ksh 109,920.
  - iv. 12 Months' salary compensation for the unfair termination....Ksh 164,880
  - v. Severance pay for 8 years.....Ksh 109,920.
  - vi. Exemplary damages.....Ksh 1000,000
  - vii. Damages for unlawful termination of services from the date of the determination of the claim at the claimant's gross salary at a figure of Ksh 13,740 per month.
12. In his evidence in chief, the Claimant reiterated that he was employed on the above stated date and that at the time of the termination, he had worked for the Respondent for a period of 8 years. He further stated that the demand letter by his counsel dated 12.1.2016, and the filing of the matter herein,



was done fifteen and twenty months, after the termination respectively. The delay was as a result of impecuniosity on his part.

13. The Claimant asserted that the manager, steel metal department, Mr. Mburu, called and directed him never to get back to work. Clarifying why he has only claimed compensation for five days worked yet he alleges that his termination was on 30<sup>th</sup> September 2014, he testified that he had an advance salary for fifteen days, the any claim. Other 10 days were weekend days on which wouldn't make a claim.
14. He further testified that the Respondent duly made remittances to the relevant Government authority. However, he didn't understand why they made a remittance in the month of October 2014.
15. The Claimant stated that during the currency of his employment he never proceeded for leave as whenever he asked for the same, the respondent never granted him the opportunity to proceed for the same.

### **The Respondent's case**

16. The Respondent presented its case through its witnesses, Mr. F.K.Njenga., its Divisional Director Human Resource and Mr. Morris Muthee Ndunda an Administration Assistant. Mr. F.K. Njenga testified that the Claimant got into the employment of the Respondent as a casual labourer on 8<sup>th</sup> December, 2008. As such a labourer he would be engaged on, an on and off basis.
17. The witness further stated that the Claimant deserted duty on the 26<sup>th</sup> September, 2014. Having left his job in this manner he did, he cannot be heard to claim for general damages of any relief or at all.
18. Cross examined, the witness stated that the Claimant worked for the Respondent as a labourer for a period of 6 years. The respondent didn't give him any formal letter of engagement. The witness stated that he was not in a position to explain why the Claimant was never given a letter of employment.
19. The Respondent didn't have a check in -check out, register. It only had a weekly attendance register. The register was prepared by the supervisor. Mr. Karanja was the Claimant's supervisor. In the register, there was no field for employees' signature.
20. The witness stated that the Claimant was not invited for a disciplinary hearing. The Respondent didn't make any communication to him. Mr. Mburu, was the in charge of the department where the Claimant was stationed. The witness stated further that he was not in a position to comment whether or not Mr. Mburu did dismiss the Claimant, as he alleges.
21. The record that the Respondent has filed before court, only relates to the period 22-24 September 2014.
22. In his testimony in re-examination, the witness stated that he wouldn't explain much on the Claimant's records as that was the preserve of another department.
23. The evidence of the other witness was largely a repeat of the evidence of Mr. Njenga . It will not be desirable to rehash it here.

### **The Claimant's submissions.**

24. The counsel for the Claimant submitted that the Respondent's witness Mr.Morris Muthee Nunda testified that the claimant deserted duties on the 30<sup>th</sup> September 2014 while RW2 stated that he did on the 26<sup>th</sup> September 2014. This is a material contradiction, and indicative that the witnesses were out to mislead the Court.



25. It was submitted that the said witnesses' testimony that the Respondent didn't communicate to the Claimant after the alleged desertion, and that the Claimant was neither invite<sup>4</sup>d for a disciplinary hearing nor accorded an opportunity to be heard shows that the termination of his employment was unfair.
26. It was further argued that the Claimant having established that the termination was unfair, he is entitled to compensation in form of damages for unfair termination. He advances this submission upon the premise that whenever a party sustains a loss by reason of a tort or breach of contract, under common law he should get compensation in damages.
27. On the relief of exemplary damages, the Claimant submitted that an award of Ksh 1,000,000 shall suffice. He relied on the Trinidad and Tobago court of Appeal in Aron Torres vs Pont Lisa's Industrial Port Development Corporation Ltd (2005), and the judicial decision in the case of Chirau Ali Mwakwere vs Royal Media Services Ltd (2004).

### **Respondent's submissions.**

28. The Respondent filed its written submissions distilling four issues for determination thus;
  - i. Whether the Respondent was to continue paying the Claimant after he absconded his duties.
  - ii. Whether there was any unlawful termination by the Claimant's employment with the Respondent.
  - iii. Whether the reasons for termination are said to be fair.
  - iv. Whether there were any damages suffered by the Claimant.
29. For the first issue, the Respondent's counsel submitted that they could not have continued to pay the claimant since he had absconded duty and already moved to another job.
30. It was further submitted that the Claimant did fail to discharge the legal burden imposed on an employee asserting un fair termination, under section 47(5) of the [Employment Act](#) 2007. He didn't establish that the termination was unfair.
31. Submitting on second proposed issue, the Respondent stated that the Claimant absconded. The record tendered by it before this Court demonstrates that. The Claimant's assertion that the record was doctored is one without any evidence in support. Since the Claimant absconded duty, the Respondent had a just reason to terminate his employment.
32. There is no doubt that the Respondent made a remittance for the Claimant's NHIF contribution for the month of October 2014. The remittance was done on the 7<sup>th</sup> October 2017. Upon this premise, it was argued that if indeed the Claimant's employment was terminated as alleged by him, the Respondent could not have had any reason to make remittance.
33. One the third issue, on whether the termination was fair, it was submitted that the Claimant deserted his duties, signifying an intention of being not keen to return to his job. It cannot be safely asserted therefore that the termination of his employment was unfair. Reliance was placed on the case of Judith Atieno Owuor vs Sameer Agriculture and Livestock Limited (2020) eklr.
34. On the reliefs sought by the Claimant, it was submitted that he is not entitled to the same as his employment was not unlawfully terminated.



35. It was further submitted that by virtue of the roll out of the employment and the schedule thereof, the Claimant was always given leave days off as and when they fell due. In the event that he didn't utilize the same, he cannot be heard to claim it this late in the day. In any event, he cannot be entitled to the same for the whole period he worked with the Respondent but for only eighteen months.

#### **Analysis and determination.**

36. From the pleadings by the parties herein, their evidence on record as well as the submissions by their counsels the following issues present themselves for determination thus;
- i. What was the nature of the Claimant's employment with the Respondent.
  - ii. Whether the termination of the Claimant was substantively and procedurally fair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
  - iv. Who should shoulder the costs of the suit

#### **What was the nature of the Claimant's employment with the Respondent?**

37. The Claimant contended that he first came into the employment of the Respondent as a casual Labourer. On this, the Respondent agreed. Further, the parties took a common stand, that notwithstanding the manner in which the Claimant came into the employment, he worked for the Respondent for a period of approximately six years. The tone of the parties' evidence, that the Claimant worked continuously in his said employment. Section 2 of the [Employment Act](#) defines a casual employee as a person whose terms of the Employment provides for his employment at the end of each day and who is not engaged for longer period than twenty fours at a time.
38. By dint of section 37 of the [Employment Act](#), casual employment may be converted to a term contract if the work has been continuous for a month or the work performed by the casual and cannot be completed within a period of three months. In a nut-shell where a person engages in casual labour continuously for a month, the law considers the labourer as an employee with a term contract, whose wages are deemed to be paid monthly in accordance with section 35(1) (c) of the Act.
39. No doubt the Claimant's employment converted by operation of the law, availing him all the protection and expansive rights obtaining in the [Employment Act](#).

#### **How did the termination of the Claimant's employment occur?**

40. It was the Claimant's case that his employment came into termination when his supervisor Mr. Mburu dismissed him verbally, directing him never to report back to work. The Respondent asserted and its witnesses testified that the Claimant deserted his employment. Notable, then, that the parties have taken a diametrically opposite direction on how the Claimant's employment determined. In a situation like is here, the Court has to have recourse to the pleadings for that is where the parties have set the agenda for the proceedings, and the evidence of the parties to resolve the 'stalemate.'
41. Mr. Morris Muthee Nduda, the 1<sup>st</sup> Respondent's witness asserted that had a discussion with the Claimant and from the discussion it emerged that the Claimant had gotten a better job elsewhere and was consequently not keen to continue working for the Respondent. The witness does not mention when this discussion took place, where it took place and where the Claimant had decided to relocate to for greener pastures. In the circumstances of the matter, the assertion was too general to aid the Respondent's case. Specifics on these material matters were necessary.



42. According to the Claimant, one Mr. Mburu was at the centre of the termination of his employment. The Respondent's witnesses both stated that Mr. Mburu was the in charge of the department where the Claimant was stationed. In cross examination the witnesses stated that they were not in a position to tell whether or not Mr. Mburu did dismiss the Claimant. Mr. Mburu would have been the ideal witness to testify to rebut the Claimant's on the manner of termination. The Respondent didn't give evidence why this crucial witness didn't testify.
43. Further, it is now trite law that an employer is not to just assert that his or her employee's employment came to an end because he deserted duty. The employer making the assertion must be able to demonstrate to Court the efforts he made to trace the employee with an aim of notifying him that his or her continued absence from work will attract a disciplinary action against him or her, absent from duty without authority, being one of those actions of an employee that falls under the catalogue of those that amount to gross misconduct capable of attracting a summary dismissal sanction. All that the Respondent's witnesses did was to make a general statement that it communicated with the Claimant. There was no evidence on, when, how and what.
44. By reason of the premises, I hold that the Claimant's employment was terminated in the manner he explained to court Mr. Mburu, his supervisor dismissed him.
- Whether the termination of the Claimant's employment was substantially and procedurally fair.
45. Having found that the Claimant's employment was terminated when his supervisor directed him as hereinabove indicated, I now turn to consider whether there was fairness in the termination. The [Employment Act](#) provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee. The procedure is mandatory, and it embodies three components, the information/ notification component- the employer must notify the employee of his or her intention to terminate the employee's employment and the grounds attracting the intention. Second, the hearing component – the employer must accord the employee an adequate opportunity to make a representation on the grounds. This component also avails the Claimant, the right to accompaniment, either by a colleague, where he or she is not a member of a trade union or a union representative, where he or she is a member. Lastly, the consideration component, the employer must consider the representations made by the employee, and the colleague or representative of the union as the case may be, before making the decision.
46. It is so clear and evident on the record and as confirmed by the Respondent's witnesses, the claimant was never issued with a notice in writing nor called for a disciplinary hearing. All the three components were absent in the process that led to termination of the Claimant's employment.
47. Respondent acted in total disregard of section (35) (1) (c) of the [Employment Act](#), which required it to terminate the Claimant's employment by giving a one month's salary or pay in lieu of the notice.
48. The Respondent alleged that the separation between the Claimant and it, occurred when the latter deserted duty. This court has found as it has hereinabove that the version is not convincing. This being so, this Court hesitates not to conclude that the Respondent failed to discharge its legal burden under section 45 of the Act, by demonstrating to the requisite standard that the reason for the termination was valid and fair. Therefore, the termination was without substantive justification.
49. Having found that the claimant's termination was both procedurally and substantively unfair, the court is now called to determine whether he is entitled to the reliefs sought.



### **One month's salary in lieu of notice.**

50. Section 36 of the *Employment Act* provides that either of the parties to a contract of service to which section 35(5) applies may terminate the contract without notice upon payment to other party of the remuneration which would have been earned or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provision of the section. The Claimant was not issued with a 28 days' notice as stipulated under section 35(1)(c) and in view of this the claimant is entitled to Ksh 13,740 salary in lieu of notice.

### **Unpaid salaries for 5 days in the month of September 2014.**

51. The Claimant's testimony on the unpaid salary for the said days, in my view was solid and unshaken. Therefore, I find that he is entitled for the sum sought under this head, Kshs. 3,435.

### **Compensation for unpaid leave days for six years.**

52. The Claimant claimed for Ksh 109,920 as compensation for leave days that he was never accorded an opportunity to utilize for the six years. An employee is entitled to leave and any leave not taken should be compensated for by pay in lieu thereof. The Respondent as the owner of records of his employees did not place before this Court any such record from which one would discern that contrary to what the Claimant was asserting, he on such and such day proceeded for his leave. I find that he is entitled to the compensation but not to the extent sought. The Court notes the provisions of section 90 of the *Employment Act*, regarding limitation of action on employment matters. Considering the stated date of termination of the Claimant's employment, and the time of filing this suit, this court can only grant compensation to an extent of one year's unpaid for leave days, Kshs. 9,618. 12

### **Compensation for unfair termination, 12 months' gross salary.**

53. A 12 months' salary compensation for unfair termination was sought by the Claimant. The authority to award this relief stems from section 49 of the *Employment Act* 2007 and the same is awarded depending on the circumstances of each case. I have considered the circumstances of this matter, the fact that the Claimant's employment was terminated without a valid and fair reason, the fact that procedural fairness was not present in the termination, the length of period he was in the employment of the Respondent, and that there is no evidence that he contributed to the termination, and conclude that he is entitled to the compensatory relief, seven months' gross pay, Kshs. 96, 180.

### **Severance pay.**

54. By dint of the provisions of section 35 [5] of the *Employment Act*, service pay is not payable to an employee who was a member of one of those schemes stipulated thereunder, among them, the National Social Security Fund. There is evidence, as can be discerned from the Claimant's own documents that he was a member of the NSSF. He cannot therefore be allowed to pursue service pay.

### **Exemplary damages.**

55. The Claimant sought Ksh 1000,000 as exemplary damages for the unfair termination. As held in the celebrated case of *Rookes vs Barnard* [1964] I ALL ER 367, an award of exemplary damages is granted in exceptional cases, thus, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant's conduct had been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff. None of these ingredients was in existence in the matter before this court. The principles enunciated in *Rookes vs*



Barnard were followed by the cases of Haria Industries vs P.J. Products Limited, [1970] E.A. 367 and in Obongo & another vs Municipal Council of Kisumu, [1971] E.A.91. For this reason the claimant did not meet the required threshold and an award of exemplary damages sought is hereby declined.

56. The Claimant sought further damages for loss of salaries and allowances from 30<sup>th</sup> September 2014 until the determination of this claim at his gross salary, Ksh. 13,740 per month. I find no basis for the claim under this head, I see no evidence by the Claimant that was geared towards establishing his entitlement to the same. Further, in the scheme of the remedies under the Employment Act, the relief as sought falls under none of them.
57. The Respondent is hereby condemned to pay the costs of this suit.
58. In the upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms;
- a. A declaration that the termination of the claimant was both procedurally and substantively unfair.
  - b. Salary in lieu of notice.....Ksh 13,740.
  - c. Unpaid salaries for the 5 days in September.....Ksh 3435.
  - d. 7 months' salary compensation.....Ksh 96,180
  - e. Compensation for untaken leave days.....Ksh 9,618.
  - f. Interest at the court rates on the above granted sums from the date of this judgment till full payment.
  - g. Costs of this suit.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2023.**

**Ocharo Kebira**

**Judge**

**In the presence of:**

**Mr Okao for the Claimant**

**Mr Anyoka for the Respondent**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.



**Ocharo Kebira**

**Judge**

