



**Olima v Prime Steel Mills Limited & another (Cause 2411 of 2016)  
[2023] KEELRC 873 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 873 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2411 OF 2016  
SC RUTTO, J  
APRIL 14, 2023**

**BETWEEN**

**GAD BARASA OLIMA ..... CLAIMANT**

**AND**

**PRIME STEEL MILLS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOKALI HANDLING LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through a Memorandum of Claim filed on 24<sup>th</sup> November, 2016, and subsequently amended on 8<sup>th</sup> March, 2021, the claimant avers that he was employed by the respondent from February, 2010 as a general labourer and later as a machine operator. That he worked continuously and to the satisfaction of the respondent. That on 9<sup>th</sup> September, 2015, he was accused by his immediate supervisor, Mr. Kidero of disobedience and defiance and thereafter ordered him to go home and never return again. According to the claimant, the respondent's action of chasing him away from his work premises amounted to summary dismissal which he has termed as unfair, unlawful and inhumane. It is against this background that the claimant seeks several reliefs being notice pay, compensatory damages and payment in lieu of leave not taken.
2. The 1<sup>st</sup> respondent opposed the claim and contended that it only engaged the claimant as a casual worker on 1<sup>st</sup> February, 2010. That it is also aware that sometimes in August, 2015, the claimant worked for the 2<sup>nd</sup> respondent which it had subcontracted for provision of labour services. That the claimant was not its employee and it is not aware of the circumstances leading to his termination as alleged. Consequently, the 1<sup>st</sup> respondent has asked the court to dismiss the claim with costs.
3. The 2<sup>nd</sup> respondent did not enter appearance nor file a defence in response to the Claim.
4. The matter proceeded for part hearing on 12<sup>th</sup> July, 2022 and subsequently on 7<sup>th</sup> November, 2022 when the 1<sup>st</sup> respondent had the opportunity to present its case.



### **Claimant's case**

5. The claimant testified in support of his case and to start with, he sought to adopt his witness statement together with his bundle of documents to constitute his evidence in chief.
6. It was his testimony that he was employed by the 1<sup>st</sup> respondent with effect from February, 2010. That he just learnt about the existence of the 2<sup>nd</sup> respondent and had never met anyone from the said company purporting to employ him. He maintained that he was working for the 1<sup>st</sup> respondent and the person purporting to terminate him from employment was from the 1<sup>st</sup> respondent company.
7. It was his evidence that he used to report to work from 8 am to 4 pm. That on 5<sup>th</sup> September, 2015, his immediate supervisor, Mr. Kidero told him that he was being paid a lot of money hence he should be reporting to work at 7am and leaving at 7 pm.
8. That therefore, on 6<sup>th</sup> September, 2015, he reported to work at 7 am and upon being asked by the head of department, Mr. Bima why he had reported early, he informed him that he was acting on the instructions of Mr. Kidero. That Mr. Bima told him to report at the usual time being 8 am and that he was answerable to him.
9. That on 9<sup>th</sup> September, 2015, he reported to work at 8 am and Mr. Kidero approached him and accused him of disobedience and defiance and ordered him to go home and never to return again. That his efforts to explain to him the reason he reported at 8 am fell on deaf ears.
10. That he was never given any notice of termination or any reason for dismissal. That further, he was never issued with any termination letter and efforts to enquire about his employment status and his terminal dues have been futile.

### **1<sup>st</sup> Respondent's case**

11. The 1<sup>st</sup> respondent presented oral evidence through Mr. Godfrey Oduor who testified as RW1. He described himself as a supervisor and for starters, he adopted his witness statement and the documents filed on behalf of the 1<sup>st</sup> respondent to constitute his evidence in chief.
12. It was RW1's evidence that the 1<sup>st</sup> respondent only engaged the claimant as a casual labourer for one day. That the 1<sup>st</sup> respondent had subcontracted labour from third party companies and some of the subcontracted companies have employees working within its premises. That he had perused some of the documents handed over to them by their subcontracted companies and established that sometimes in August, 2015, the claimant took up casual employment with Jokali Handling Services, the 2<sup>nd</sup> respondent which has been subcontracted by the 1<sup>st</sup> respondent for provision of labour services.
13. That the claimant is therefore not entitled to the reliefs sought as it engaged him for one day.

### **Submissions**

14. It was submitted on behalf of the claimant that nobody was called from the 2<sup>nd</sup> respondent to confirm his employment. That the claimant was therefore an employee of the 1<sup>st</sup> respondent on a balance of probability. That the claimant had acquired the status of a permanent and long term employee hence was entitled to not only due process but also to legitimate reasons before termination. That the 1<sup>st</sup> respondent failed to prove both the substantive reason for dismissal and due process.
15. On the other hand, the 1<sup>st</sup> respondent submitted that no document in the form of an employment contract or pay slip or NSSF statement or casual labour card was adduced to prove that the claimant



worked for the 1<sup>st</sup> respondent continuously since the year 2010. That the claimant did not prove that it was in the employment of the 1<sup>st</sup> respondent in September, 2015. Placing reliance on the provisions of Section 47(5) of the *Employment Act*, it was submitted by the 1<sup>st</sup> respondent that no unfair termination has been proved by the claimant.

### **Analysis and determination**

16. Having considered the issues arising from the pleadings, the evidence on record as well as the rival submissions, the Court is being called to resolve the following questions: -
- a. Who was the claimant's employer at the material time?
  - b. Whether the claimant was unfairly and unlawfully terminated from employment.
  - c. Is the claimant entitled to the reliefs sought?

### **Who was the claimant's employer at the material time?**

17. The claimant stated in his testimony that he was employed by the 1<sup>st</sup> respondent. On the other hand, the 1<sup>st</sup> respondent has disputed the existence of any employment relationship with the claimant save that it engaged him as a casual labourer for one day being 1<sup>st</sup> February, 2010. The 1<sup>st</sup> respondent further averred that it utilizes outsourced labour from third party companies and that it established that the claimant took up casual employment with the 2<sup>nd</sup> respondent sometimes in August, 2015.
18. In support of its case, the 1<sup>st</sup> respondent exhibited a pay slip apparently issued by the 2<sup>nd</sup> respondent, bearing the name of the claimant. The 1<sup>st</sup> respondent further exhibited a clock time analysis in respect of the claimant for the month of August, 2015, from the 2<sup>nd</sup> respondent company. It is instructive to note that the claimant did not dispute the said evidence particularly, his pay slip.
19. The only evidence adduced by the claimant to prove that he worked for the 1<sup>st</sup> respondent is the casual labour card in respect of 1<sup>st</sup> February, 2010. Beyond that period, there is no other evidence to prove the existence of an employment relationship with the 1<sup>st</sup> respondent.
20. In light of the evidence exhibited by the 1<sup>st</sup> respondent, I am led to conclude that it is more than probable that at the material time, the claimant was an employee of the 2<sup>nd</sup> respondent and not the 1<sup>st</sup> respondent. Indeed, this could be the reason why the claimant amended his Memorandum of Claim thus joining the 2<sup>nd</sup> respondent in the suit.
21. It is therefore evident that at the material time, being 9<sup>th</sup> September, 2015, when the claimant alleges to have been terminated, he was an employee of the 2<sup>nd</sup> respondent.
22. Indeed, having been disowned by the 1<sup>st</sup> respondent from the word go, it was incumbent upon the claimant to prove that he was indeed its employee at the material time. In this regard, his employment relationship with the 1<sup>st</sup> respondent on 1<sup>st</sup> February, 2010 does not count. What matters is his employment at the material time.
23. If I may add, outsourcing of labour is now an accepted business strategy. It is an arrangement where a company decides to contract out the supply of services to another enterprise, which then carries out the work using its own employees and sometimes, equipment. Therefore, it would not be unusual if in fact, the 2<sup>nd</sup> respondent was contracted by the 1<sup>st</sup> respondent under a similar arrangement hence the employees so engaged, render services to the 1<sup>st</sup> respondent but are in actual sense, employees of the 2<sup>nd</sup> respondent.



24. Having determined that the claimant was an employee of the 2<sup>nd</sup> respondent, the case by the claimant against the 1<sup>st</sup> respondent, collapses at this point.

### **Unfair and unlawful termination**

25. It is the claimant's case that he was unfairly and unlawfully terminated from employment. Under the *Employment Act*, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. Essentially, this is the standard for determining whether an employee's termination was fair or not and in this regard, Sections 43, 45 and 41 of the *Employment Act*, are key.
26. Substantive justification entails proof of the reasons which resulted in an employee's termination. In line with this, Section 43(1) of the *Employment Act*, requires an employer to prove the reason or reasons for the termination of an employee, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of Section 45.
27. In addition, Section 45 (2) (a) and (b) of the *Employment Act* provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
28. In the instant case, the Court has established that the 2<sup>nd</sup> respondent was the claimant's employer, hence it was bound to prove the reasons for which it disengaged with the claimant. That further, such reasons were fair, valid and related to his conduct, capacity or compatibility; or based on its operational requirements.
29. As the 2<sup>nd</sup> respondent neither entered appearance nor filed a Response to the Claim, such reasons, if at all, were not provided to the Court. Indeed, it can very well be said that such reasons, if any, are unknown. It thus follows that the Court is not in a position to evaluate whether such reasons meet the threshold under Section 45 (2) (a) and (b) of the *Employment Act*.
30. This essentially means that the 2<sup>nd</sup> respondent did not discharge its burden under Sections 43(1) and 45(2) (a) & (b) of the *Employment Act* hence I arrive at the inescapable conclusion that the claimant's termination was unfair.
31. With regards to the question of procedural fairness, an employer is required to prove that an employee's termination was undertaken in line with fair procedure. The specific requirements of what constitute a fair process are set out under Section 41(1) of the *Employment Act*. This procedure entails notifying the employee of the reasons for which it is considering termination and thereafter granting him or her the opportunity to be heard prior to being terminated from employment.
32. As the 2<sup>nd</sup> respondent did not tender any Response nor participate in the hearing, there was no evidence that the claimant was subjected to the process contemplated under Section 41 of the *Employment Act*. Indeed, there was no evidence that the claimant was heard prior to his termination. In light of the provisions of Section 45(2) (c) as read together with the mandatory provisions of Section 41 of the *Employment Act*, the respondent was bound to subject the claimant to a fair process prior to termination. Anything short of that rendered the termination unlawful.
33. In the circumstances, I cannot help but find that the 2<sup>nd</sup> respondent is at fault for want of procedure hence the claimant's termination was unlawful.
34. The total sum of my consideration is that the claimant's termination was both unfair and unlawful in terms of Sections 41, 43 and 45 of the *Employment Act*.



### **Appropriate Reliefs**

35. As the Court has found that the claimant's termination was unlawful, he is awarded one (1) month's salary in lieu of notice.
36. Having found that the claimant's termination was unfair and unlawful, the Court awards him compensatory damages equivalent to six (6) months of his gross salary.
37. As the 2<sup>nd</sup> respondent did not tender any evidence in form of the claimant's leave records as per its obligation under Section 74(1) (f) of the Employment Act, the claimant is entitled to payment for untaken leave days. However, pursuant to Section 28(4) of the Act, this will be limited to 18 months preceding his exit from employment.

### **Orders**

38. In the end, I enter Judgment in favour of the claimant against the 2<sup>nd</sup> respondent and he is awarded: -
  - a. One month's salary in lieu of notice being the sum of Kshs 16,000.00.
  - b. Compensatory damages in the sum of Kshs 96,000.00 which sum is equivalent to 6 months of his gross salary.
  - c. Unpaid leave for 18 months being Kshs 16,800.00.
  - d. The total award is Kshs 128,800.00.
  - e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
39. The 2<sup>nd</sup> respondent shall also bear the costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of April, 2023.**

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Mr. Namada

For the 1<sup>st</sup> Respondent Mr. Mutoro

For the 2<sup>nd</sup> Respondent No appearance

Court Assistant Abdimalik Hussein

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 had 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.

