



**Likhutsa v Prime Steel Mills Limited (Cause 2050 of 2017)
[2023] KEELRC 1582 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1582 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2050 OF 2017
BOM MANANI, J
JUNE 22, 2023**

BETWEEN

MICHAEL MBUYA LIKHUTSA CLAIMANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

JUDGMENT

Introduction

1. This is a claim for unfair termination from employment. The Claimant alleges that the Respondent terminated his contract of employment without proper reason. By this action, he has moved the court for compensation.
2. The Respondent entered appearance and filed a defense. In the defense, the Respondent has denied employing the Claimant.

Claimant's Case

3. According to the Claimant, the Respondent engaged his services as an employee on 8th August 2011. It is the Claimant's case that he was not issued with a written contract of employment.
4. The Claimant avers that he worked until 22nd August 2016 when his contract was terminated. It is the Claimant's case that on the date of termination of his contract, he reported to work only for the Respondent's management to tell him that there was no more work for him.
5. During the term of his contract, the Claimant avers that he was required to work daily from 7 am to 7 pm. He also asserts that he was not granted his leave days contrary to law.
6. The Claimant asserts that his cumulative monthly salary was Ksh 15,060.00. He indicates that this sum was paid to him in quarterly installments in arrears every Saturday. The Claimant avers that the



wages were paid in cash and that he would only be required to sign in a booklet that was kept by the Respondent's management to acknowledge the payments.

7. Although he was not issued with a written contract of service, the Claimant relies on other evidence to establish existence of an employment relationship with the Respondent. For instance, he avers that the Respondent wrote to Diamond Trust Bank a letter dated 24th July 2014 introducing him to the said bank for account opening purposes. The Claimant avers that the letter acknowledged existence of an employment relation between the parties. This letter was produced in evidence as Claimant's exhibit number one.
8. It is the Claimant's case that when the Respondent terminated his contract of service, he instructed his advocates to issue the Respondent with a demand letter requiring the Respondent to admit liability for wrongful termination of the contract. The advocates are said to have issued the letter dated 14th September 2017. A copy of the letter was produced in evidence as Claimant's exhibit number two.
9. It is the Claimant's case that before the Respondent's decision to terminate the employment relation between the parties, the Claimant was not offered reasons for the decision. Neither was he subjected to a disciplinary process.

Respondent's Case

10. As was indicated in the introductory part of the decision, the Respondent filed a defense denying liability for the claim. The thrust of the defense is that the Claimant was not the Respondent's employee. Therefore, the Respondent is not liable to settle the claim.
11. The Respondent called one witness. The witness reiterated the averments in the defense to the effect that the Claimant was not an employee of the Respondent. When cross examined about the letter of introduction to the bank which the Claimant asserts, he was given by the Respondent, the witness simply said he did not recognize the letter and that the Respondent did not know where the Claimant procured it from.

Analysis

12. At the close of the case the parties agreed to file final submissions. However, as at the time of writing this judgment, only the Claimant had tendered his submissions. In my decision, I have considered the pleadings, the evidence and submissions that are on the court's record.
13. From the pleadings and evidence that was tendered the following issues fall for determination:-
 - a. Whether the parties had an employment relation.
 - b. If the answer to the foregoing is in the affirmative, whether the relation was lawfully terminated.
 - c. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Whether the parties had an employment relation

14. The Claimant asserts that the Respondent hired his services as an employee on 8th August 2011. That although the relation persisted until 22nd August 2016 when it was terminated, the Respondent did not issue the Claimant with a written contract of service.
15. The Claimant contends that notwithstanding absence of a written contract, he continued working for the Respondent for the entire period aforesaid. He indicates that for the duration of his service to



the Respondent, he was paid a monthly wage of Ksh. 15,060.00 in quarterly installments in arrears. According to the Claimant, these payments were made every Saturday of the week.

16. The Claimant also asserts that the Respondent wrote a letter to Diamond Trust Bank introducing him to the bank for account opening purposes. In the letter, the Claimant contends that the Respondent referred to him as its employee. According to the Claimant, this evidence establishes existence of an employment relationship between the parties.
17. Against this evidence, all that the Respondent did was to file a bare denial. Beyond denying that the Claimant was its employee, the Respondent did not specifically controvert the evidence tendered by the Claimant regarding existence of an employment relation between the parties. This is notwithstanding that the pleadings, witness statement and documents containing this evidence were shared with the Respondent at the time the Memorandum of Claim was served on the Respondent.
18. Further, the evidence on record shows that the Claimant's advocates issued the Respondent with a demand letter asserting that the Respondent had wrongfully terminated the Claimant's contract of service. It is noteworthy that the Respondent did not respond to the demand letter to deny its contents.
19. Despite the Claimant asserting that the Respondent wrote to Diamond Trust Bank on 24th July 2014 acknowledging him as its employee, the Respondent did not specifically challenge the authenticity of this letter. For instance, there is no suggestion in the statement of defense that the letter was a forgery. Neither is there evidence that the Respondent took up the matter regarding the authenticity of the letter with the relevant State organs. All that the defense did at the trial is to deny knowledge of the letter. This reaction by the Respondent is surprising having regard to the fact that the said letter was shared with the defense at the time of service of the pleadings on the Respondent.
20. I have considered the letter dated 24th July 2014. Prima facie, the letter is on a Letter Head bearing the Respondent's name. The letter also describes the Claimant as an employee of the Respondent. Absent cogent evidence to controvert the authenticity and content of the letter, I am convinced that it was issued by the Respondent and it is a confirmation of the employment relation between the parties.
21. I also note that the Claimant asserts that his advocates issued a demand letter to the Respondent indicating that the Respondent had unfairly terminated the Claimant's contract of service. It is true that in its pleadings, the Respondent denied receipt of the said demand letter. However, a copy of the demand was subsequently delivered to the Respondent alongside the Memorandum of Claim as part of the documents that the Claimant was going to rely on at the trial. The document was thereafter tendered in evidence on oath.
22. In his testimony, the Respondent's witness did not specifically dispute the contents of the said demand letter. As a matter of fact, the witness offered no rebuttal of the contents of the letter. Absent cogent evidence by the defense to controvert the contents of the demand letter which was tendered in evidence, I am convinced that the Respondent had an employment relation with the Claimant as asserted in the said letter.

Whether the employment relation between the parties was lawfully terminated

23. The Claimant's evidence is that on 22nd August 2016, the Respondent's management informed him that there was no more work for him. According to the Claimant, this is how his contract of service came to a close.
24. The law on termination of employment is encapsulated in sections 41, 43, 44 and 45 of the *Employment Act*. An employer may only terminate an employee's contract of service with cause. Further, before relieving the employee of his employment, the employer must take the employee



through a disciplinary process during which the employee is to be informed of the grounds for the proposed action against him and allowed an opportunity to respond to them.

25. There is no evidence that the Respondent notified the Claimant of the ground for termination of his employment. There is no evidence that the Claimant was subjected to a disciplinary process in terms of section 41 of the *Employment Act*. Absent this evidence, I arrive at the conclusion that the Respondent's decision to terminate the Claimant's contract of service was unlawful.

Whether the parties are entitled to the reliefs that they seek through their respective pleadings

26. The Claimant had served the Respondent for several years commencing 8th August 2011 and ending 22nd August 2016. By virtue of sections 9 and 10 of the *Employment Act*, the Respondent was under obligation to reduce the contract between the parties into writing. By virtue of section 10(6) of the aforesaid Act, the employer has the duty to keep the records of all the particulars set out under the said section of statute. These include details on: leave entitlements; and remuneration including overtime pay for employees.

27. Where the employer fails to reduce the contract of service prescribed under section 9 of the Act into writing and there is a dispute as to any of the terms of the contract, the burden of proof lies with the employer to prove the disputed term. In this respect, section 10 (7) of the Act provides as follows:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

28. In the case before me, it is the Claimant's case that he was subjected to overtime work of up to four (4) hours a day. He testified on oath that he was required to work from 7 am to 7 pm daily. In response to this assertion, the Respondent's witness stated that employees of the Respondent work from 7 am to 7 pm only when there is demand. Otherwise, the normal working hours run between 8 am and 5 pm. It is important to note however that there was no documentary proof provided by the defense on this issue despite the express requirements of section 10 (6) and (7) of the *Employment Act*.

29. In dealing with a similar situation the Court of Appeal in the case of Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR expressed itself as follows:-

“ In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee.”

30. In the case before me, I understand the Claimant as stating that the term of his contract relating to work hours required him to work from 7 am to 7 pm. In its defense, the Respondent appears to dispute this fact. In terms of the decision by the Court of Appeal aforesaid, it was upon the Respondent to provide records to controvert the Claimant's position on the matter. As the record shows, this was not done.

31. The Claimant has testified on oath that he was not allowed to proceed on leave for the entire period that he served the Respondent. The Respondent does not suggest that the Claimant took the leave. Rather, the position of the defense as I understand it is that this entitlement is not due to the Claimant because he was not an employee of the Respondent.

32. The court has already arrived at the conclusion that notwithstanding the Respondent's denial, the Claimant was indeed an employee of the Respondent. Therefore, absent evidence that he was granted



his leave days for the period between 8th August 2011 and 22nd August 2016, the Claimant is entitled to recover pay in lieu of accrued leave for the period. On this, I once again refer to the Court of Appeal decision in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (supra) where the court expressed itself as follows:-

“On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*.”

33. The Claimant is entitled to accrued leave pay equivalent to salary for 21 working days for every of the five years. This is approximately salary for one month for every of the five years under consideration. Therefore, the amount due under this head is Ksh. 75,300.00. This amount is granted.
34. The Claimant has also prayed for overtime pay. It is his contention that he was required to work every day of the week from 7 am to 7 pm. Although the Respondent denied this assertion, it was not its case that this amount was not due because the Claimant did not work overtime. Rather, the Respondent’s case was that the Claimant was not its employee. The Respondent did not provide evidence to show that if the Claimant was its employee, he was not entitled to the overtime that he has claimed.
35. In the earlier parts of this decision, the court has come to the conclusion that the parties had an employment relation. The Claimant testified on oath that he worked overtime and without rest days. The defense did not specifically controvert this fact. In the absence of evidence to the contrary the court arrives at the conclusion that the Claimant is entitled to overtime pay as claimed.
36. Under section 27 of the *Employment Act*, employers are required to fix work hours for employees in accordance with the law. In addition, employers are obligated to afford employees one (1) rest day in every seven (7) days of the week.
37. Section 43 of the *Labour Institutions Act* (LRA) establishes Wages Councils. These Councils issue Wage Orders in terms of sections 44 to 47 of the LRA. Under section 48 of the LRA, the Wage Orders constitute the minimum terms and conditions of employment. They have the force of law.
38. Regulation five (5) of the Regulation of Wages (General) Order, 1982 which issued pursuant to the aforesaid provisions of the LRA provides, in part, as follows in relation to work hours:-
 - a. The normal working week shall consist of not more than fifty two (52) hours of work spread over six (6) days of the week.
 - b. Notwithstanding subparagraph (1) the normal working week of a person employed on night work shall consist of not more than sixty (60) hours of work per week.
39. Regulation 6 of the Order provides that a person who works outside the set hours shall receive additional pay that is one and one-half times of the normal hourly pay for every hour worked in excess. For work performed during rest days and public holidays, the employee is entitled to twice his hourly rate for every hour worked.
40. I have considered the Claimant’s prayer for overtime pay and pay for work undertaken during public holidays against the guidelines in the Regulation of Wages (General) Order, 1982 and arrived at the



conclusion that it is within the parameters set by law. Consequently, I enter judgment for the Claimant for overtime and for rest days at Ksh. 948,780.00.

41. The Claimant has also claimed house allowance. This is an entitlement of an employee under section 31 of the *Employment Act*. In law, the employer has the option of providing an employee with either physical housing or paying him house allowance.
42. The Respondent did not controvert this claim. The position taken by the Respondent was that since the Claimant was not its employee, house allowance was not payable to him.
43. However, and as is evident from the preceding sections of this judgment, the court has returned a verdict that the Claimant was indeed an employee of the Respondent. Therefore, he was entitled to be provided with either physical housing or be paid house allowance for the time he worked for the Respondent. Absent evidence of payment of this allowance in terms of section 10 (6) & (7) of the *Employment Act* and in view of the decision in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune, I enter judgment for the Claimant for house allowance of Ksh. 135,540.00 as claimed.
44. I decline to award the Claimant severance pay as this is only payable under the redundancy procedure under section 40 of the *Employment Act*. The Claimant's employment was not lost on account of redundancy.
45. Under section 35 of the *Employment Act*, the Claimant was entitled to notice of 28 days before his contract was terminated. There is no evidence that he was issued with this notice or paid salary in lieu thereof in terms of section 36 of the Act. In the premises, I award the Claimant Ksh. 15,060.00 to cover pay in lieu of notice.
46. I award the Claimant interest on the amounts awarded herein at court rates from the date of this judgment.
47. I award the Claimant costs of the case.
48. This award is subject to the applicable statutory deductions.

Summary of the Award

- a. The court finds that there was an employment relation between the parties to this action.
- b. The court finds that the Respondent unfairly terminated the said employment relation.
- c. The Claimant is awarded Ksh. 75,300.00 to cover accrued leave days.
- d. The Claimant is awarded Ksh. 948,780.00 to cover overtime pay to include work undertaken during the Claimant's rest days.
- e. The Claimant is awarded Ksh. 135,540.00 to cover accrued house allowance.
- f. The Claimant is awarded Ksh. 15,060.00 to cover pay in lieu of notice.
- g. The claim for severance pay is declined.
- h. The Claimant is awarded interest on the amounts awarded herein at court rates from the date of this judgment.
- i. The Claimant is awarded costs of the case.
- j. This award is subject to the applicable statutory deductions.



DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

