



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR REALTIONS COURT**

**AT MOMBASA**

**CAUSE NO. 393 OF 2016**

**GILBERT MUNGA KHASO.....CLAIMANT**

**VERSUS**

**STEEL MAKERS LTD.....RESPONDENT**

**J U D G M E N T**

1. The claim herein was instituted by the Claimant on 31<sup>st</sup> May 2016 vide a Memorandum of Claim dated 30<sup>th</sup> May 2016. The Claimant pleaded, inter-alia:-

- a) that he (the Claimant) was employed by the Respondent herein on or sometime in January 2000 to September 2014 as a Welder and Fitter, and retained continuous employment for the period of employment.
- b) that during the period of his continuous and uninterrupted employment, the claimant was paid various amounts by the respondent, more specifically Ksh.766 per day as at the time of termination of employment.
- c) that the Claimant was never issued with a written contract of employment.
- d) that the Claimant worked diligently with dedication and with little or supervision, working six days a week most times upto 12 hour a day, and maintained good and cordial relations with the Respondent.
- e) that the Respondent wrongfully and unlawfully summarily terminated the Claimant's employment on or about September 2014 for alleged shortage of raw materials.
- f) that termination of the Claimant's employment was abrupt and in contravention of Labour Laws as the reason given for termination of employment was not reason enough to sack the Claimant; and there was no discussion between the Claimant and the Respondent prior to the termination.
- g) that the Respondent refused and/or neglected to pay the Claimant his dues despite several demands being made.

2. The Claimant prayed for the following reliefs:-

- a) a declaration that the Respondent engaged in unfair labour practices.
- b) one months' notice pay (ksh.766x26) =ksh.19,916.
- c) payment in lieu of annual leave(s) accrued (21 daysxksh.766x15.75 years served)=253,354.50
- d) maximum compensation for wrongful dismissal and unfair termination of employment (ksh.766x26 daysx12 months) =ksh.238,992.
- e) Certificate of Service.
- f) costs of the suit and interest.

**g) any further entitlement that the Court may deem fit to grant or that (which) may be proved at the hearing.**

3. The Claimant also filed the following documents together/along with the Memorandum of Claim:-

a) The Claimant's witness statement dated 30<sup>th</sup> May 2016.

b) Index and List of Documents dated 30<sup>th</sup> May 2016, listing and annexing a demand letter dated 18<sup>th</sup> April 2016 and a bundle of NSSF/NHIF statements/Data Summary.

4. The Respondent filed Response to Memorandum of Claim on 30<sup>th</sup> March 2017, dated 22<sup>nd</sup> March 2017, and pleaded, *inter- alia*:-

a) that the Claimant was employed as a casual employee whose services the Respondent engaged occasionally on a day to day basis as and whenever (there) was work to do, and that such employment started at the beginning of each day and terminated at the end of each respective day worked.

b) that the Claimant did not work for 14 years as from January 2000, but his employment was intermittent and depended on availability of materials for production.

c) that the Respondent did not dismiss the Claimant in September 2014, but rather declined to take him up on casual employment on that day owing to non-availability of sufficient materials for production for that and the following days until when sufficient materials would be available.

d) that the Claimant was paid wages for the days he had worked.

e) that by the very casual nature of the (Claimant's) employment which was intermittent and on a day to day whenever there was work to do, it was incapable of issuance of notice of termination.

f) that the Claimant sought employment whenever he wanted to and stayed away whenever it suited him, and issues of taking leave were entirely within the Claimant's absolute discretion; over which the Respondent had no control.

g) that the issue of compensation for unfair termination does not arise in the circumstances of the Claimant's casual employment.

h) that the Respondent did not breach or infringe any of the Labour Laws, either as alleged in the Memorandum of Claim or at all.

5. The Respondent also filed the following documents:-

a) A witness statement by one Charles Mutinda, dated 22<sup>nd</sup> March 2017.

b) A list of witnesses dated 22<sup>nd</sup> March 2017.

c) A notice to the effect that the Respondent's copies of documents, if any, would be filed and furnished with leave of the Court at least 15 days prior to the pre-trial conference.

6. There is no indication on record that the Respondent ever sought leave to file any copies of documents, and no such documents are shown to have been filed.

7. When the matter came up for hearing before me on 27<sup>th</sup> October 2021, Counsel for the Respondent sought, and was granted leave to file and serve an amended Response to the Claim, documents and any necessary witness statements within seven days of the order. I gave corresponding leave to the Claimant to amend his pleadings within ten days of service, and fixed the suit for hearing on 7<sup>th</sup> December 2021, with a rider that no application for adjournment would be entertained.

8. The Respondent never utilized the leave granted to it, and did not file any documents pursuant to the said leave. As a result, the Claimant did not file any further and/or amended pleadings.

9. When the suit came up for hearing on 7<sup>th</sup> December 2021, only the Claimant and his counsel attended Court. There was no appearance on the part of the Respondent and/or its Counsel. Hearing proceeded in their absence on the said date (7<sup>th</sup> December 2021).

10. The Claimant adopted his witness statement referred to in paragraph 3 of this Ruling as part of his testimony and produced the documents referred to in the said paragraph as exhibits. The Claimant further testified:-

a) that he worked for twelve hours shift, day and night and worked six or seven days a week.

b) that he never took leave, and was never paid in lieu.

c) that the Claimant was working as a welder, and was not affected by lack of materials in the company.

d) that the Claimant was unlawfully terminated, and unfairly so, as he was not given any notice or paid his dues.

e) that he (the Claimant) was not informed of anything wrong that he had done, having worked for the Company for fourteen years.

f) that the manner of termination was unfair as the Claimant went home after work and the following day he was told to go home and would be called. That when he went back he was not allowed in.

g) that he was earning ksh.766 per day, and worked continuously for fourteen years. He prayed that he be granted the reliefs sought.

11. The Claimant closed his case, and the Respondent's case was marked as closed. The Claimant was granted fourteen days to file and serve written submissions. I fixed the suit for mention on 18<sup>th</sup> January 2022 to confirm filing of submissions and to fix a date for judgment.

12. On 18<sup>th</sup> January 2022, however, I declined to fix a date for judgment as counsel for the Claimant had not filed an affidavit of service on service of both the claimant's written submissions and a mention notice on the Respondent. I fixed the matter for a further mention on 9<sup>th</sup> February 2022 and directed Counsel for the Claimant to serve notice on the Respondent.

13. On 9<sup>th</sup> February 2022, I fixed the matter for judgment on being satisfied that notice had, indeed, been served on the Respondent's counsel on record.

14. Upon considering the pleadings filed herein and the unchallenged/unrebutted evidence adduced by the claimant, issues that fall for determination are as follows:-

**a) whether termination of the Claimant's employment was unfair.**

**b) whether the Claimant is entitled to the reliefs sought.**

15. On the first issue, the Claimant pleaded and testified that he was employed by the Respondent as a Welder in January 2000 and retained continuous and uninterrupted employment until September 2014, earning a daily wage of ksh.766 as at the time of termination of employment. This was neither rebutted and/or controverted by the Respondent.

16. Section 45(3) of the Employment Act, 2007 provides as follows:-

*“ an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”*

17. The Claimant, having been in continuous employment by the Respondent for fourteen years was, and still is, seized of the right to complain that he was unfairly terminated. Section 41 of the Employment Act provides in mandatory terms:-

*“(1) subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language that the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4), hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection(1) make.”*

18. Sections 45(1) & (2) of the Employment Act on the other hand provides:-

*“(1) No employer shall terminate the employment of an employee unfairly.*

*(2) A termination of employment by an employer is unfair if the employer fails to prove:-*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason*

*(i) related to the employee's conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure.”*

19. In the present case the Respondent never attended Court for hearing of the Claimant's claim, and never demonstrated in any way that the mandatory procedure set out in Section 41 of the Employment Act was complied with and/or undertaken by the Respondent, who was the

employer. Further, it was never demonstrated by the Respondent that the reason for termination of the Claimant's employment was valid. I find and hold that termination of the Claimant's employment by the Respondent was procedurally and substantially unfair.

20. In the case of WALTER OGAL ANURA –VS- TEACHERS SERVICE COMMISSION [2013] eKLR, the Court of Appeal observed that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness. That Section 43 of the Employment Act obligated an employer to prove the reasons for termination of employment and where the employer failed to do so, the termination was deemed to have been unfair.

21. On the second issue, it is my finding that the Claimant is entitled to compensation for unfair termination of employment. The Claimant is also entitled to payment of one month's salary in lieu of notice.

22. The prayer for payment in lieu of accrued leave days is, however, declined. A claim for payment in lieu of accrued leave days is in the nature of a claim for special damages. The same must be specifically pleaded and proved. In the present case, the Claimant did not plead and/or set out any such claim in his statement of claim. He only included a prayer for payment in lieu of accrued leave days. Parties will forever be bound by their pleadings as presented to Court. Evidence is usually tendered to prove that which has been specifically pleaded.

23. Consequently, judgment is hereby entered for the Claimant against the Respondent as follows:-

a) One months' salary in lieu of notice.....ksh.19,916

b) Ten month salary being compensation for unfair

termination of employment(19,916X10).....199,160

Total            218,320

24. The Claimant is also awarded costs of the suit and interest at Court rates.

25. The Respondent is hereby ordered to issue a Certificate of Service to the Claimant pursuant to Section 51(1) of the Employment Act, 2007. This should be done within thirty days from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF MARCH 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Miss Wanyama for Claimant

No appearance for Respondent