



**Makokha v Prime Steel Mills Limited (Cause 999 of 2016)  
[2022] KEELRC 1622 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1622 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 999 OF 2016**

**J RIKA, J**

**MAY 27, 2022**

**BETWEEN**

**ABDALLAH KUSIMBA MAKOKHA ..... CLAIMANT**

**AND**

**PRIME STEEL MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. In his Statement of Claim dated 16<sup>th</sup> February 2016, the Claimant avers that he was employed by the Respondent, as a Maintenance Helper in April 2012. He was earning a daily wage of Kshs. 395, which was later enhanced to Kshs. 444.
2. He worked for about 3 ½ years. He considered his employment to have been converted into regular employment by the time of termination, by dint of Section 37 of the *Employment Act*, 2007. He was not given valid reason to justify termination. He was not heard on any allegations.
3. He prays for Judgment on the following terms: -
  - a. Declaration that termination was unfair and unlawful.
  - b. 1-month salary in lieu of notice at Kshs. 13,320.
  - c. Overtime of 6,552 hours at Kshs. 545,454.
  - d. Unpaid leave at Kshs. 39,960.
  - e. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 159,840.  
Total Kshs. 758,574
  - f. Certificate of Service to issue.
  - g. Costs and Interest.



- h. Any other suitable remedy.
4. The Respondent filed its Statement of Response on 28<sup>th</sup> October 2016. It is conceded that the Claimant was employed by the Respondent. He absconded duty, and eventually left employment voluntarily in pursuit of greener pastures. The Respondent did not terminate his contract. The Respondent pleads also, that the Claimant was dismissed for gross misconduct. He does not merit any of the prayers. The Respondent prays the Court to dismiss the Claim with costs.
  5. Judgment had been read in favour of the Claimant on 28<sup>th</sup> September 2017. It was set aside consensually on the basis that the Respondent had not participated in the hearing leading to that Judgment. The Claimant was re-heard and closed his case, on 18<sup>th</sup> June 2021. Supervisor Godfrey Oduor, gave evidence for the Respondent on 15<sup>th</sup> October 2021 when the hearing closed. The dispute was last mentioned on 28<sup>th</sup> January 2022, when Parties confirmed filing and exchange of their Closing Submissions.
  6. The Claimant adopted his Witness Statement and Documents. His Witness Statement replicates the Statement of Claim, as summarized above. Cross-examined, he told the Court that he was employed in April 2012. N.S.S.F Statements of Account indicate he was registered in 2014. 2012 and 2013 are not captured. He was still in employment in 2012 and 2013. He received salary in cash. He was named as one of the Casual Employees, on the list exhibited by the Respondent. The hours worked are shown on the document. It is shown that overtime was paid. He was not paid. He did not leave employment voluntarily. His Supervisor Omondi was not truthful to say that the Claimant left employment voluntarily. He did not leave to join Alvin Engineering Company. He was not paid his terminal dues. Redirected, he stated that he did not resign. He was dismissed in June 2015, not January 2015. In 2012-2014, he was paid in cash. He was not paid overtime from 2015. He worked Sunday to Sunday. He was not paid all dues on termination.
  7. Oduor supervised the Claimant from July 2014 to June 2015. The Claimant was paid all his dues, including overtime. He left and went to work for other Companies. The Employees worked for 6 days a week, and rested on the 7<sup>th</sup> day. Cross-examined, Oduor told the Court that he did not have documents to show that the Claimant was a Casual Employee. He was paid Kshs. 430 for 8 hours. Overtime was about Kshs. 55 an hour. The casual pay sheet and the payroll were all the same. The Claimant was listed as a Casual Employee. His wage of Kshs. 430 daily is shown. The sheets were signed by Omondi and another Supervisor. Kevin Omondi was a departmental Supervisor. Oduor was the Senior Supervisor. The Claimant went to work for another Engineering Company. He called Oduor from there. Oduor did not have evidence to show that the Claimant worked for another Company.
  8. The issues are whether, the Claimant's contract was terminated by the Respondent, or whether he left employment voluntarily; if termination was at the instance of the Respondent, whether in was based on valid reason and fair procedure; and whether the Claimant merits the remedies sought.

### **The Court Finds**

9. The date of employment is a particular of employment, required to be given by the Employer, under Section 10 [2] [d] of the [Employment Act](#).
10. Where an Employer, in any legal proceedings fails to produce a written contract or particulars, the burden of proving or disproving an alleged term of employment, shall be on the Employer.
11. The Claimant states he was employed in April 2012. The Respondent appeared to contradict the Claimant, alleging that the N.S.S.F Statements of Account show employment was in 2014.



12. The Court must uphold the date advanced by the Claimant- April 2012, in the absence of a written contract or particulars, giving any other date.
13. In any event the Respondent admitted the contents of paragraph 3 of the Statement of Claim in its Response. Paragraph 3 gives details of employment, including the date of employment.
14. The Respondent gives contradictory statements on the manner of the Claimant's exit from employment. Paragraph 4 and 5 of the Statement of Response, is that the Claimant voluntarily left employment. The Respondent's Witness told the Court that the Claimant voluntarily abandoned his position, to look for greener pastures at another Engineering Company. At paragraph 12 of the Statement of Response however, the explanation is that the Claimant was dismissed for gross misconduct.
15. The Claimant pleads and testified that he was dismissed by the Respondent. He did not leave voluntarily. He did not abandon his position.
16. Sections 43, 45 and 47[5] of the *Employment Act*, require an Employer to justify termination. The onus was on the Respondent to establish the reason or reasons justifying termination. The Respondent did not discharge this onus, opting instead to give contradictory evidence, on who instigated termination.
17. The Court would consequently find that fair procedure was not observed as required under Sections 41 and 45 of the *Employment Act*, in terminating the Claimant's contract of employment. No valid reason was shown to justify termination, as required under Sections 43 and 45 of the *Employment Act*. Termination was unfair, meriting compensatory award.
18. He had worked for 3 ½ years in continuity and would be deemed to have been converted into regular employment, under Section 37 of the *Employment Act*, by the time of termination.
19. It is declared that dismissal of the Claimant was unfair and unlawful.
20. He is allowed 1-month salary in lieu of notice at Kshs. 13,320.
21. He has not established the prayer for overtime pay at Kshs. 545,454. He has not given a breakdown of this amount, capturing the method of calculation, and the law upon which it is founded. He concedes that the Casual Employees' Pay Sheet, captures his name and overtime paid. The prayer for overtime pay is declined.
22. He did not specify the number of annual leave days claimed. He just pleads a figure of Kshs. 39,960. It is not explained through his Evidence or Pleadings. It is undocumented. It is rejected.
23. He had worked for 3 ½ years. His record was not blemished. He did not play a role, in the decision to terminate his contract of employment. He expected to go on working. He was on an open-ended contract. He is allowed the prayer for compensation for unfair termination, equivalent of 3 ½ months' salary at Kshs. 46,620.
24. Certificate of Service to issue.
25. Costs to the Claimant.
26. Interest allowed at court rates, from the date of Judgment, till payment is made in full.

### **In Sum, It Is Ordered**

- a. Termination was unfair.



- b. The Respondent shall pay to the Claimant, notice at Kshs. 13, 320 and compensation at Kshs. 46,620 – total Kshs. 59,940.
- c. Certificate of Service to issue.
- d. Costs to the Claimant.
- e. Interest allowed at court rates from the date of Judgment till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.**

**JAMES RIKA**

**JUDGE**

