



REPUBLIC OF KENYA



KENYA LAW
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**Oranga v Prime Steel Mills Limited (Cause 785 of 2016)
[2022] KEELRC 1744 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 785 OF 2016**

JK GAKERI, J

MAY 12, 2022

BETWEEN

JOSEPH OPIYO ORANGA CLAIMANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim dated 16th February 2016 and filed on 6th May 2016 alleging unfair termination of employment by the Respondent and prays for:
 - i. A declaration that the Respondents dismissal of the Claimant from his employment was unlawful and hence null and void
 - ii. Severance pay Kshs.14,220
 - iii. Pay in lieu of notice Kshs.14,220
 - iv. Unpaid overtime for a total of 5,040 hours Kshs.447,930
 - v. Pay in lieu of leave day not taken Kshs.28,400
 - vi. 12 months' salary for unfair dismissal Kshs.170,400
 - vii. Certificate of Service
 - viii. Interest on (iv)
Total Kshs.675,450
2. The Claimant case is pleaded as follows:



3. The Claimant avers that he was employed by the Respondent as a Plate Mason on 26th December 2012 at Kshs.380/= per day which rose to Kshs.474/= by the time he left employment. That he worked diligently and continuously for 32 years until he was terminated.
4. It is the Claimant's averment that the casual employment graduated to a term contract under section 37 of The Employment Act. That he was not given a formal employment contract by the Respondent and was also not given the statement of disciplinary rules.
5. It is averred that on 12th October 2015 the Respondent unlawfully terminated the Claimant's services without giving a reason. That those whose names were not on the notice board should not report to work thereafter. That the termination was in violation of the provisions of the Employment Act, 2007.
6. It is the Claimant's case that he used to work for overtime but was not paid. That his working hours were 7 a.m. to 7 p.m. inclusive of public holidays and had no rest day and was not issued with a Certificate of Service or a notice of termination.

Respondent's Case

7. The Respondent filed its response to the Statement of Claim on 9th November 2018. It denies having employed the Claimant in 2012 and admits that the Claimant was a casual employee from 29th July 2015 to 2nd August, 2015 and his employment did not qualify for conversion under Section 37 of the Employment Act. That the Claimant was not entitled to a formal contract or statement of disciplinary rules since he was a casual employee.
8. In the Respondent's case that the Claimant was paid on daily basis and was terminated at the close of the day without notice and was paid for the hours worked including overtime. That he worked for the Respondent for five consecutive days and was not entitled to a Certificate of Service. The Respondent prays for dismissal of the claim with costs.
9. The Claimant responded to the response to the statement of claim on 9th April 2019 averring that he was not paid terminal dues.

Claimant's Evidence

10. The Claimant adopted the witness statement and was cross examined.
11. The statement recaptures the contents of the statement of claim. On cross-examination the Claimant confirmed that he was engaged on 26th December 2012 but had evidence to establish the same. The same applies to the alleged 3½ years of service. It was the Claimant's evidence that he was an employee of the Respondent from 26th December 2012 to 2nd October 2015.
12. The Claimant denied knowledge of Jokali Handling Services and denied having worked for it. On re-examination the Claimant testified that remuneration was in cash and would sign for it on a weekly basis.

Respondent's evidence

13. RW1, Godfrey Oduor adopted the witness statement and was cross-examined. In his evidence in chief, the witness stated that the Respondent paid salaries through bank accounts. It was his testimony that Jokali Handling Services had been contracted by the Respondent to provide labour to the Respondent, that the Respondent was not open for business on 26th December 2022 or on other public holidays. That the company would typically be closed for business from 23rd December to 3rd January every year.



14. The witness testified that the pay sheets for Jokali Handling Services for the period 29th July 2015 to 4th August 2015 had the name of the Claimant as the first on the list and he had been paid overtime. They also showed that was not at work from 23rd September to 29th September 2015.
15. On cross-examination, the witness confirmed that he had no evidence of a contract between the Respondent and Jokali Handling Services. That the company had a disciplinary code.

Claimant's Submissions

16. The Claimant identifies six issues for determination which can be compressed to two:
 - i. Whether the Claimant was an employee of the Respondent from 26th December to 2nd October 2015;
 - ii. Whether termination of the Claimant's employment was unlawful and unfair.
17. As to whether the Claimant was an employee of the Respondent from 26th December 2012 to 2nd October 2015 reliance is made on the Claimant's evidence that he produced a statement issued by the NSSF showing that he was a member and the Respondent remitted his contributions of Kshs.400/= from June 2014 to April 2015, a period of 11 months and that no contribution were being made before June 2014. Section 2 of the *Employment Act* is relied upon for the definition of an employee.
18. It is submitted that the Claimant was an employee of the Respondent and was paid for services rendered for 2 year and 10 months as a casual employee.
19. The decision in *Salas Mutwiri v Haggai Multi- Cargo Handling Services Ltd* [2013] eKLR is relied upon to buttress the submission.
20. Similarly, Section 12 of the *Employment Act* is cited to reinforce the Claimant's testimony that he was not issued with any disciplinary rules after employment.
21. As regards termination of the Claimant's employment, it is submitted that the Claimant reported to the work place on 2nd October 2015 but was informed by the Respondent that there was no work for him. That no prior notice of termination was issued and no reason was given thus the termination was unfair. Reliance is made on Section 41 of the *Employment Act* to urge that the prescribed procedure was not complied with in the termination of the Claimant's employment.
22. It is further posited that the Respondent had failed to discharge its burden of proof under Section 45 of the *Employment Act*. The sentiments of the Court of Appeal in *Five Forty Aviation Limited v Erwan Lanoë* [2019] eKLR are relied upon to urge the import of Section 45 and 41 of the *Employment Act* to underline the submission that termination of the Claimant's employment was unfair and unlawful.
23. As regards the reliefs sought, it is submitted that the Claimant is entitled to the one month's salary in lieu of notice, payment for untaken leave, overtime and severance pay under section 40(I)(g) of the *Employment Act*.
24. The Court is urged to grant the reliefs sought.

Respondent's submissions

25. The Respondent identifies four issues for determination including costs:
 - i. Whether Claimant was employed by the Respondent;
 - ii. Whether the Claimant was a casual employee;



- iii. Whether the claimant is entitled to the remedies sought.
26. As to whether the Claimant was employed by the Respondent, the Respondent submits that the alleged date of employment, 26th December 2012 was a public holiday and RW1 testified that the Respondent was typically closed between 24th December and 1st January. That the Claimant had no documentary evidence to demonstrate the date of employment. The NSSF statement relied upon show that the Claimant worked for the Respondent from 1st July 2014 to 30th June 2015. A duration of about one year.
27. That the pay sheets for casual employees of Jokali Handling Services show that the Claimant worked for it between 29th July 2015 and 2nd August 2015.
28. It is submitted that the Claimant led no other evidence to show that he was an employee of the Respondent.
29. As to whether termination of the Claimant was unfair it is submitted that RW1 testified that the Claimant was engaged as a casual worker and the Respondent paid its employees through their bank accounts.
30. It is the Respondent's contention that the Claimant transited from the Respondent to Jokali Handling Services as attendance sheets show and was not terminated as alleged.
31. Reliance is made on the provisions of Sections 45 and 47(5) *Employment Act* to urge that the Claimant voluntarily left the Respondents employment and joined Jokali Handling Services to whom the Respondent had outsourced labour services. That the termination of employment was not unfair and no evidence had been led.
32. As regards reliefs, it is urged that the declaration should be issued as the Claimant and the Respondent separated mutually and lawfully. That he had not served for a complete year to earn severance pay. That he was a casual employee not entitled to one month's notice. That he did not work for one (1) year to earn leave.
33. It is the Respondent's submission that no compensation is due to the Claimant.

Analysis and determination

34. The issues for determination are whether the Claimant was:
- i. An employee of the Respondent
 - ii. Whether termination of the Claimant's employment was unfair
 - iii. Whether the Claimant is entitled to the reliefs sought.
35. As to whether the Claimant was an employee of the Respondent, the first point of call are the provisions of the *Employment Act* 2007. Specifically, Section 2 which states that
- “employee means a person employed for wages or a salary and includes an apprentice and indentured learner.”
36. Although the Claimant testified that he was employed on 26th December 2012, at a daily wage of Kshs.380/= which had risen to Kshs.474/= by the time he left he led no evidence of these allegations other than copy of an illegible NSSF statement which both parties agree showed that the Respondent paid NSSF contributions from June 2014 to May 2015. The copy in Court does not qualify to be



- document or evidence at all. There is no evidence to show that the Claimant was engaged or indeed worked for the Respondent from 2012.
37. Puzzlingly, whereas the Claimant confirmed on cross-examination that he worked for 3½ years, the submissions state that the duration was two years and ten months. Interestingly the Claimant's name appears on the payslips and attendance sheets of casual employees of Jokali Handling Services. For instance, the pay sheet for 29th July 2015 which show that the Claimant was paid. Attendance sheets show that the Claimant did not report to work from 23rd September 2015 to 29th September 2015.
 38. RW1 testified that the Respondent paid salaries through bank accounts and had sub-contracted Jokali Handling Services to employ persons to work for it.
 39. From the evidence on record, it is unclear as to when the Claimant transitioned from the Respondent to the sub-contracted company. However, the movement appear to have taken place after April 2015 but before July 2015.
 40. Although the Claimant denied knowledge of Jokali Handling Services he could not explain how his name appeared in its attendance sheets and payslips.
 41. From the NSSF statement relied upon by the parties, there is agreement that the Claimant was an employee of the Respondent from 1st June 2014 to the end of June 2015 when NSSF contributions stopped being made a period of about one (1) year.
 42. There is no evidence on record that the Claimant was an employee of the Respondent before 1st June 2014 and after 30th June 2015.
 43. For the foregoing reasons, it is the finding of the Court that the Claimant was an employee of the Respondent from June 2014 to June 2015.
 44. As to whether termination of the Claimant's employment was unfair the court will in the first instance examine the Claimant's evidence on the issue.
 45. The Statement of Claim states that on or about 2nd October 2015, the Respondent unlawfully and unfairly terminated the services of the Claimant. That on reporting to work on that day, he was informed that those whose names were not on the notice board should not report to work again.
 46. An identical allegation is repeated in the witness statement. The Respondent denied these allegations averring that the Claimant was a casual worker whose engagement was terminable at the close of the day without notice.
 47. The Claimant led no evidence of what was on the notice board, who directed him there or who communicated the information to him and in what manner. There is no evidence on whether there was any notice on the notice board and what its contents were.
 48. The Claimant makes no allegation against any officer of the company for having communicated the information about the alleged list on the notice board. In addition, he does explain what action he took to verify the information or inquire from any officer of the Respondent including his supervisor.
 49. Neither the Statement of Claim nor the witness statement make reference or identifies any officer of the Respondent. It requires no gainsaying that the burden of proof of the alleged unfair dismissal rests on the Claimant.
 50. Without clear evidence on how the alleged termination of employment took place and attribution of fault or wrongdoing on the part of an employee or officer of the Respondent, the Court is satisfied that



the Claimant has not discharged the burden of proof that he was dismissed by the Respondent and that his dismissal was indeed unfair as ordained by the provisions of the Employment Act.

51. Section 47(5) of the Act provides that:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

52. The essence of burden of proof is clearly articulated by Sections 107 and 108 of the Evidence Act.

53. Section 107 provides that:

1. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

54. Section 108 of the Evidence Act is categorical that:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

55. The final issue for determination is whether the Claimant is entitled to the reliefs sought in the statement of claim.

56. Having found that the Claimant failed to establish that his contract of employment was unlawfully terminated, he is not entitled to the reliefs prayed for.

57. In the final analysis the claim is dismissed with orders that parties bear their own costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF MAY 2022

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 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.

DR. JACOB GAKERI

JUDGE

