



**Musembi v Tononoka Rolling Mills (Cause 669 of 2016)
[2022] KEELRC 4058 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4058 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 669 OF 2016**

M MBARŪ, J

JUNE 30, 2022

BETWEEN

ALEXANDER MUSEMBI CLAIMANT

AND

TONONOKA ROLLING MILLS RESPONDENT

JUDGMENT

1. On January 1, 2006 the respondent employed the claimant as Tongs man at a wage of ksh.11, 200 and a letter of appointment issued.
2. The claimant worked until September 31, 2015 when the respondent terminated employment.
3. The claim is that employment terminated unlawfully and unfairly for the reasons that the there was no notice, hearing or payment of terminal dues. The respondent failed to remit statutory due of NSSF and claim the following dues;
 - a. Notice pay ksh.11,200;
 - b. Severance pay for 46 months;
 - c. Underpayments ksh.23,125;
 - d. Leave for 8 years ksh.62,720;
 - e. 12 months compensation ksh.134,000;
 - f. Certificate of service; and
 - g. Costs.
4. The claimant testified that the respondent had two shifts and he was in the night shift. There were normal abscond due to Kenya Power and power blackouts which would result in a shift off or repairs.



5. In October, 2015 the claimant was on his usual night shift which he finished and left for home. This was the pay day and at 3pm while at home he learnt that wages were being paid and he decided to go to the work premises to confirm. He learnt that there were errors on the payroll and no pay. When the claimant reported to his shift, he was told that there was no work. That the day shift employees had gone on strike and he was not allowed back to work against.
6. The claimant testified that the respondent failed to pay his terminal dues. There were NSSF deductions and where he asked for a statement, he learnt that the respondent had not remitted his dues for several months. He had not organised the strike which happened during the day and he was in the night shift. Several other employees were also dismissed.
7. In response, the respondent's case is that the claimant was a casual worker depending on availability of work on diverse periods between the years 2006 to 2015. There was no continuous employment and the casual work was intermittent and ended in December, 2015.
8. There was no termination of employment. Casual jobs were no longer available. The claimant's final dues were paid in December, 2015 being service, NSSF sums were remitted whenever due and the claims made should be dismissed with costs.
9. In evidence the respondent called Elsa Atieno Okumu the human resource manager and testified that the claimant was employed as a casual in the year 2006 and in the year 2014 he signed a contract and remained in employment until he initiated a strike in the year 2015. The claimant was on night shift but was found in the premises during the day during the strike. He was paid his terminal dues.
10. During the strike, the claimant and other employees went and switched off the machines which caused great harm and damage to the respondent. The respondent investigated the matter and established the the claimant was involved in the strike. He was called for his final dues but his phone was switched off.
11. The NSSF statement has gaps since the claimant was not in the full time employment of the respondent and the dues were only paid when he was at work. The respondent would be forced to lay off employees during power cuts, repairs or maintenance and over which the respondent had no control and did not require the services of the claimant.
12. No notice issued to the claimant following the intuition of a strike. The incident report was filed. Summary dismissal was justified.
12. The respondent filed work records.

Determination

13. On October 7, 2015 the respondent paid the claimant his final dues amounting to ksh.24, 123.
14. On October 1, 2015 an incident report had been filed to the effect that on September 30, 2015 at 2PM some employee had left there places of work razing some issues concerning September 2015 salaries and this resulted in stoppage of production. The employee had stopped production and moved out of the production area without informing the supervisor or the foreman. That there was an agreement between management and the employee that production should never stop and the employees involved included the claimant and others and it was recommended that disciplinary action be taken.
15. The claimant testified that he was in the night shift but on September 30, 2015 he heard that salaries were being paid and he decided to go to the premises but there was an error and there was no payment.
16. The claimant was therefore at the work premises at a time he was supposed to be off shift. During such time there was agitation for non-payment of wages. This resulted in stoppage of production. This was



not the shift the claimant ordinarily worked under. The responsible employees involved in stoppage of production were those in the day shift.

17. Where the claimant as an employee of the respondent as a casual worker and he was involved in acts of gross misconduct, summary dismissal was justified subject to him being accorded the right to a hearing. Such is the nature of employment relations at the shop floor and in accordance with Section 41(2) of the *Employment Act*, 2007 that;

(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. Whatever misconduct or gross misconduct the claimant had committed, the due process of the law demanded that he be accorded a hearing however short the notice was. The fact of being a casual employee or not, any work place misconduct should be addressed procedurally.
19. The summary dismissal of the claimant in this case is not justified and the same is found unfair.
20. The claimant was on the casual employees list save, he continued to offer his labours to the respondent over a period of time for that could not be said ended each day.
21. An employee who works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more is a protected employee with rights and benefits under the *Employment Act*, 2007 pursuant to the provisions of Section 37 thereof.
22. The respondent has filed evidence of payment of final dues to the claimant for the period of October 1, 2014 to December 31, 2014; and pay for October, 2015. The wage paid in October, 2015 is for a full month.
23. The claimant was a protected employee with rights and benefits under the law.
24. On the finding that there was unfair termination of employment, notice pay is due based on the last wage at ksh.13, 949. In the final dues paid and included in the wages paid in October, 2015, provision for notice pay was added.
25. Compensation is hereby awarded at one month's gross wage all at ksh.13, 949.
26. On the claim for severance pay for 46 months worked, such remedy is only available in a redundancy which was not the case here.
27. On the claim for leave pay for 8 years, in the payment statement for October, 2015 there is tabulation of 3.5 days as due. Such put into account, the work records filed over the years, no leave day were due unpaid.
28. The claim for unremitted NSSF dues was amended and cancelled save the claimant testified that he is entitled to such payments unremitted to the statutory body. Indeed, statutory dues are owed to the statutory body and where not paid, the claim should be service pay and not the unremitted amounts.
29. Accordingly, the claimant is awarded ksh.13, 949 in compensation. Other claims fail. Each party shall bear own costs.



DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

