



**Orero v Prime Steel Mills Ltd (Cause 1190 of 2015)
[2022] KEELRC 3987 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3987 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1190 OF 2015
JK GAKERI, J
SEPTEMBER 27, 2022**

BETWEEN

JOSEPH MALACHI ORERO CLAIMANT

AND

PRIME STEEL MILLS LTD RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim dated July 7, 2015 and filed on July 8, 2015 alleging unlawful termination of services and non-payment of terminal dues.

The Claimant's Case Is Pleaded As Follows;

2. The claimant avers that he was employed by the respondent in February, 2010 as a general worker at Kshs 13,600/= per month until May 5, 2015 when he was unlawfully and unprocedurally terminated from employment.
3. It is the claimant's case that he served the respondent diligently.
4. The claimant states that his work involved putting scrap metal into a box for purposes of being put in the furnace. That on December 9, 2012, he was promoted to the position of mason helper.
5. The claimant avers that on May 5, 2015, he was supposed to be in a night shift and the plate mason was absent.
6. That the supervisor, Mr Christopher Ngatana requested the claimant to fill in the position of plate mason and carry on the duties of the night. The claimant avers that as he was not trained for the job, he was hesitant to act as the plate mason. That he was afraid of injuries by boiling metal.
7. It is the claimant's averment that on May 6, 2015, he was informed by the human resource department that his employment had been terminated for failing to perform his duties as instructed.



8. The claimant contends that he was not given an opportunity to be heard and had to leave the premises immediately.
9. The claimant prays for;
 - i. Housing allowance Kshs 217,000/=
 - ii. Hours worked on days of rest Kshs 109,868/=
 - iii. Public holidays Kshs 15,890/=
 - iv. Overtime
 - v. NSSF due Kshs 10,000/=
 - vi. Daily milk Kshs 93,000/=
 - vii. One month salary *in lieu* of notice Kshs 13,600/=
 - viii. Service for years worked Kshs 47,595/=
 - ix. Damages Kshs 163,000/=
 - x. Certificate of service
 - xi. Costs of this claim plus interest.

Respondent's Case

10. The respondent denies having employed the claimant in February, 2010 as alleged and avers that it employed him in 2014 as a casual employee.
11. It is avered that the claimant deserted duty on October 5, 2015 and the respondent's supervisor, Mr Kelvin Omondi followed up by phone calls that went unanswered.
12. It is the respondent's case that the claimant is guilty of gross misconduct for deserting work for more than 7 days without notice to the respondent.
13. That his employment was not terminated.
14. The respondent further avers that the claimant's standard daily wage of Kshs 454.00 was paid continuously for one (1) year only as previously, he was a casual employee and took all his off days and public holidays and all hours worked were compensated.
15. That all NSSF deductions were remitted from September, 2014 to October, 2015.
16. That the respondent had not contractually agreed to provide milk to the claimant.
17. The respondent prays for dismissal of the suit with costs.

Claimant's Evidence

18. The claimant adopted written statement dated July 7, 2015 which recapitulates the contents of the memorandum of claim and was cross-examined.
19. The witness confirmed that he was requested to work as a plate mason but declined as he had not been trained. He however admitted having worked there before. That he used to work from 7 am to 7 pm or 7 pm to 7am.



20. The claimant admitted having received pay for the day's worked.
21. It was his evidence that he did not proceed on leave and had no rest day and was not given milk while others got. That he was not a member of the NSSF and his salary was not inclusive of house allowance.
22. The claimant insisted that he did not abscond duty.
23. On re-examination, the witness testified that he was not the plate mason and had not been trained as one and was not paid for overtime.

Respondent's Evidence

24. RWI, Mr Godfrey Oduor adopt the written statement dated July 24, 2020 and was cross-examined. The witness testified that the work day was 7 am to 7 pm Monday to Saturday and overtime was paid.
25. That all employees have off-days and those working in the boiler were entitled to milk.
26. Although the witness testified that the claimant had been trained as a plate mason, he had no evidence on the training.
27. It was RWI's testimony that the claimant declined to obey instructions and did not report to work days after and thus absconded duty.
28. RWI testified that the claimant's pay included house allowance.
29. On cross-examination, the witness stated that the undated letter on record confirming that the claimant was an employee of the respondent from 2010 to 2015 was from the respondent. The witness however contested the truthfulness of the contents.
30. It was his testimony that the claimant was a general worker working on a 3 month's contract renewable.
31. Puzzlingly, the witness was unsure whether the claimant's salary included house allowance.
32. That the claimant was the mason helper not the mason, that the work of a mason involved handling boiling metal and required training.
33. The witness confirmed that the claimant's failure to obey instructions amounted to misconduct and he was not given an opportunity to be heard since he absconded duty.
34. That the claimant was paid a salary for the last month he worked and was given a milk at the place of work.
35. On re-examination, the witness testified that the claimant did not attend the hearing since he had absconded duty.

Claimant's Submissions

36. The claimant identifies three issues for determination, namely;
 - i. Whether the claimant's employment was terminated by the respondent or he absconded duty.
 - ii. Whether the claimant had proved his case on a balance of probabilities and thus entitled to the reliefs sought.
 - iii. Who should bear the costs of the claim?



37. On the first issue, counsel submits that the claimant's evidence that his employment was terminated by the respondent remains uncontroverted and the defence of having absconded duty is unsupported by evidence as the alleged supervisor, Mr Kelvin Omondi. The decision in *Herman Rachami Abuya v Devki Steel Mills Ltd* (2021) eKLR is relied upon in support of the submission. The court is urged to rely on the decision and make a similar finding.
38. As regards prove of the case, it is urged that the claimant had proved his case as it is supported by the respondent's letter dated July 7, 2015 signed by one Cedric Lumidi, a former employee of the respondent.
39. Section 10 of the *Employment Act* is relied upon to urge that the employer did not issue a contract of employment and shoulders the burden to disapprove alleged terms of the contract and the claimant worked for 7 days a week.
40. It is submitted that the claimant is entitled to the reliefs sought such as housing allowance, NSSF dues, milk allowance, pay in lieu of notice, compensation and certificate of service.
41. The Court of Appeal decision in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR is relied upon to urge that the respondent did not discharge its burden of proof under the provisions of section 43(1), 45(2) and 47(5) of the *Employment Act*.
42. Finally, the claimant prays for costs plus interest.

Respondent's Submissions

43. The respondent identifies four issues for determination namely; when the claimant was employed by the respondent, whether the claimant absconded duty, entitlement to reliefs and costs of the suit.
44. As regards employment, the respondent submits that the totality of the evidence on record is that the claimant was an employee of the respondent from June 1, 2014 to May 6, 2014 as evidenced by the casual attendance lists and NSSF statements on record.
45. That the claimant led no evidence to demonstrate that he was engaged in 2010 and left in May, 2014.
46. As to whether the claimant deserted duty, the respondent submits that after refusing to work as the plate mason on May 5, 2015, the claimant voluntarily left work and never came back and his absence rendered the conduct of disciplinary proceedings ineffectual.
47. The decision in *Ezra Nyamweya Motari v Kanini Haraka Enterprises Ltd* (2016) eKLR is relied upon to urge that the claimant absconded duty and section 44(4) (c) of the *Employment Act* was applicable.
48. Reliance is also made on the provisions of section 45(2) and 47 (5) of the *Employment Act* to urge that the claimant left employment on his own accord.
49. On the reliefs sought, it is urged that the claimant is not entitled to housing allowance as the standard daily rate of a casual employee of Kshs 454 was only for one (1) year and was not entitled to off-days and overtime was paid according to the casual pay sheets on record.
50. It is submitted that the respondent remitted NSSF dues from June, 2014 to May, 2015.
51. That all employees working at the furnace were given milk though it was not a contractual obligation.
52. The respondent further submits that the claimant is not entitled to one month's pay as he absconded duty and was a member of the NSSF and thus not entitled to service pay or damages as his employment was not terminated by the respondent.



Determination

53. The issues for determination are;
- i. When the claimant was employed by the respondent and the duration served.
 - ii. Whether the claimant's employment was terminated or he absconded duty.
 - iii. Whether the claimant is entitled to the reliefs sought.
54. As regards the date of employment and duration, the parties have different assertions. While the claimant alleges that he was employed on February 5, 2010, the respondent asserts that it engaged the claimant as a casual in September 2014.
55. Intriguingly, two documents produced by the respondent, signed by one Mr Cedric Lumidi indicate that the claimant joined the respondent in 2010. Both documents are undated. The first document "to whom it may concern," is more or less a reference letter and is emphatic that the claimant joined on February 5, 2010 and left on May 6, 2015 having risen from the cutting section to an assistant to the Plate Mason.
- The second document is a letter addressed to the branch manager of the NSSF Kitengela confirming that the claimant had been an employee of the respondent since 2010.
56. RWI confirmed that Mr Cedric Lumidi, the human resource manager was a former employee of the respondent.
57. To urge its case, the respondent has produced casual employee pay sheets for 2014 and 2015.
58. It is unclear to the court why the human resource department of an organization could confirm that a person was in its employment and the same organization later relies on other documents to disprove the earlier confirmation.
59. The documents on record show that the claimant joined the respondent's employment in 2010, the nature of employment notwithstanding.
60. A closely related issue is whether the claimant was employed as a casual or on permanent terms. Neither the claimant nor the respondent submitted on this issue and no document on record is explicit on it.
61. Although the documents filed by the respondent confirm that the claimant joined the respondent sometime in 2010, neither the nature of employment nor the salary or other terms are set out.
62. Intriguingly, although the respondent denies the contents of paragraph 4 on the date of employment and salary, and alleges that he was a casual employee, it is reticent on the salary it was paying him and documents provided are of no assistance in this regard.
63. Section 10(7) of the *Employment Act* provides;
- If in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
64. Other than the casual employees' pay sheets for September 18, 2014 to September 24, 2014 and those of April 30, 2015 to May 16, 2015 which show that the claimant was being paid hourly, it has adduced no other evidence on the terms of employment, but admitted that the claimant was on permanent terms for about 1 year.



65. On his part, the claimant has not provided any evidence of on when he was employed and how much he was earning from 2010, not even bank statements from which the court could have discerned his monthly pay.
66. It is unclear how the amount Kshs 13,600/= cited as monthly salary was arrived at.
67. In the absence of the accurate figures from the respondent as required by law, the court will take the sum of Kshs 13,600/= as the monthly pay of the claimant.
68. For the foregoing reasons, it is the finding of the court that the respondent has on a balance of probability failed to demonstrate that the claimant was employed in 2014 or a casual employee.
69. As to whether the claimant's employment was terminated by the respondent or he absconded duty, parties have adopted contrasting positions. While the claimant asserts that his employment was terminated, the respondent's case is that he left employment voluntarily on October 5, 2015 and never came back. That he deserted the workplace. Strangely, whereas the claimant alleges that his employment was terminated on May 5, 2015, the respondent's case is that the claimant deserted employment on October 5, 2015.
70. The casual employees pay sheet on record reveal that the claimant was in employment in September, 2014. Records for 2015 are illegible and the claimant's name is undiscernible.
71. To his credit, the claimant explains the circumstances in which his employment was terminated and the respondent's undated letter on record confirms that he left employment on May 6, 2015.
72. In support of its averment that the claimant absconded duty, the respondent's witness stated that Mr Kelvin Omondi was to follow up to ascertain the whereabouts of the claimant. It is unclear whether he did so and what transpired. The witness was unaware of the telephone number of the claimant or whether Mr Kelvin Omondi actually called the claimant.
73. Even assuming that Mr Kelvin Omondi called the claimant, and there was no response, the respondent was still bound to issue a notice to show cause to the claimant and inform him that termination of employment was being considered on the ground of absconding duty.
74. The court is guided by the sentiments of Onyango J in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR, the court held

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, is expected to issue a notice to the deserting employee that termination of employment on the grounds of desertion is being considered.”
75. Similar sentiments were expressed in *Boniface Mwangi v B.O.M Iyego Secondary School* (2019) eKLR, *Simon Mbithi Mbane v Inter Security Services Ltd* (2018) eKLR as well as *Nzioka v Smart Coatings Ltd* (2017) eKLR.
76. Similarly, in *Judith Otieno Owuor v Sameer Agriculture and Livestock Ltd* (2020) eKLR as follows;

“Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there have been a disciplinary process or notice issued prior to the termination. It is



the duty of the respondent to show this court it did accord the claimant a fair hearing prior to termination.”

77. The court is guided by these sentiments.
78. For the foregoing reasons, the court is satisfied that the respondent has on a balance of probability failed to demonstrate that it took reasonable steps to ascertain the whereabouts of the claimant to resume duty or issue the necessary notices to commence the disciplinary process.
79. In the instant case, the claimant’s testimony that his employment was terminated on the ground that he refused to work as a plate mason on the night of May 5, 2015 was uncontroverted.
80. The claimant testified on cross-examination that he had not been trained as a plate mason and was only a helper. It was his testimony that he had been injured before and feared doing something he had not been trained to do.
81. RWI confirmed that the worked required training but led no evidence that the claimant had been trained.
82. Finally, the respondent led no evidence to show that termination of the claimant’s employment was conducted in accordance with the provisions of the *Employment Act* as regards notice, reason(s) for termination, notice to show cause and hearing and dismissal or termination.
83. For the above stated reasons, it is the finding of the court that the respondent has on a balance of probability failed to establish that termination of the claimant’s employment on May 5, 2015 was fair.
84. Having found that termination of the claimant’s employment was unfair, I will now proceed to assess the reliefs available to the claimant.

(i) Housing Allowance Kshs 217,000/=

85. Although the respondent avered that it was paying the claimant Kshs 454/= per day. It led no documentary evidence of the payment. However, the claimant did not contest the figure and relies on it in his computations. The claimant also confirmed that he was paid on a weekly basis.
86. The sum of Kshs 454/= payable to the claimant as daily wage was higher than the prescribed daily wage in 2012 and 2013 which was Kshs 379.30 and 432.40 respectively which was inclusive of house allowance.
87. However effective May, 1st 2015, the daily wage rose to 484.30. Granted that the claimant’s daily wage from 2010 to 2015 was inclusive of housing allowance, no allowance is due to the claimant and none is awarded.

(ii) Hours worked on days of rest Kshs 109,868/=

88. The claimant furnished no particulars for this claim. The rest days are neither particularized nor identified.

The claim is unproven and is declined.

(iii) Public holidays Kshs 15,890/=

89. The claimant led no evidence in support of this claim. Although the statement of claim avers 7 holidays per year, they are neither identified nor explained. The claimant led no evidence that the respondent’s premises was open during public holidays.



The prayer is declined.

(iv) Overtime

90. The relevant particulars of this prayer were neither pleaded nor proved.

It is declined.

(v) NSSF dues Kshs 10,100.00

91. The NSSF statement on record dated April 4, 2015 show that the claimant was a member of the National Social Security Fund and contributions had been made from September, 2014 to February, 2015. The claimant is claiming unremitted NSSF dues deducted by the respondent.

92. It is common knowledge that NSSF dues are payable to the NSSF whose board of directors is empowered to enforce compliance with the provisions of the *National Social Security Fund Act*.

The prayer is declined.

(vi) Daily milk Kshs 93,000/=

93. The claimant testified that employees working at the furnace or boiler were given milk and RWI confirmed as much. The claimant claims that while other employees were given milk, he was not.

94. It is unclear for how long the respondent had been giving milk to staff who worked at the furnace and for how long the claimant had been denied the milk. The claimant led no evidence of how much milk was being given, when, including why he was left out and why he did not raise the issue with the supervisor, if he did the response he received.

95. The court is not persuaded that all his colleagues were given milk and he was left out.

The prayer is declined.

(vii) One month salary in lieu of notice Kshs 13,600/=

96. The respondent terminated the claimant's employment without according him the requisite notice as mandated by section 35 of the *Employment Act*, 2007.

The prayer is awarded.

(viii) Service for the years worked Kshs 47,595.00

97. Evidence on record show that the claimant was a member of the NSSF, the intermittent contributions notwithstanding.

98. Section 35(6)(d) of the employment excludes members of the NSSF from service pay.

The claim is declined.

(ix) Damages Kshs 163,000/=

99. Having found that termination of the claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, the claimant is entitled to the relief provided under section 49(1) (c) of the *Employment Act*.



100. The court has taken into consideration the following;
- i. The claimant was an employee of the respondent for about 5 years and 3 months and had no record of misconduct or warning.
 - ii. The claimant did not appeal the decision communicated to him by the human resource manager.
 - iii. The claimant did not contribute to the termination of employment.
101. In the circumstances, the court is satisfied that the equivalent of four (4) months salary is fair Kshs 54,400/=

(x) Detailed Certificate of service

102. The claimant is entitled to a certificate of service by dint of section 51 of the Employment Act, 2007.

(xi) Costs of the suit

103. Section 12(4) of the Employment and Labour Relations Court Act, 2011 and regulation 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 donate to the court discretion to award costs.
104. Having found that termination of the claimant's employment was unfair, it is only fair that the discretion be exercised in favour of the claimant.
105. In conclusion, judgement is entered for the claimant against the respondent in the following terms;
- (a) One month's salary *in lieu* of notice Kshs 13,600/=
 - (b) Equivalent of 4 months gross salary Kshs 54,400/=
 - (c) Costs of this suit.
 - (d) Interest at court rates from the date of judgement till payment in full.
 - (e) Certificate of service.
 - (f) All other prayers are dismissed.
106. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 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

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