



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER 1513 OF 2016

BETWEEN

BOAZ AKALICHE SHIKUKU..... CLAIMANT

VERSUS

PRIME STEEL MILLS LIMITED..... RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Kiruki & Kanyika Advocates for the Claimant

F.N. & Brian Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 2nd August 2016. He avers, he was employed by the Respondent in September 2009, as a Mould-Setter, earning a daily wage of Kshs. 690. He worked for 6 ½ years, he avers, which earned him conversion to regular employment under Section 37 of the Employment Act 2007.

2. He was arbitrarily dismissed in January 2016 by Respondent's Human Resource Officer. He was advised he would be recalled, but was not recalled. He considered his contract to have been unfairly terminated. He avers, he was laid off in violation of Sections 36, 40, 41, 44 and 45 of the Employment Act.

3. He prays for Judgment against the Respondent for: -

- a. Declaration that termination was unfair.
- b. Severance pay at Kshs. 62,100.
- c. Notice at Kshs. 20,700.
- d. Overtime of 6,840 hours at Kshs. 884,925.
- e. Leave pay at Kshs. 124,200.
- f. Damages for unfair dismissal, equivalent of 12 months' salary at Kshs. 248,400.

Total...Kshs. 1,340,325.

g. Certificate of Service to issue.

h. Costs.

i. Interest.

j. Any other suitable remedy.

4. The Respondent filed its Statement of Response on 5th February 2020. Its position is that the Claimant was employed in the month of June 2014 as a Casual Employee. He abandoned work on or about 24th December 2015 and did not return. The Respondent did not dismiss him; he deserted. He did not leave on redundancy to claim severance pay. He does not merit notice, having deserted. He does not merit compensation. He was paid for all hours worked. He is not owed overtime pay. He similarly does not merit leave pay. The Respondent asks the Court to dismiss the Claim with costs.

5. The Claimant gave evidence and rested his case on 14th January 2021. Respondent's Human Resource Manager Godfrey Oduor, gave evidence on 21st January 2021, bringing the curtain down on the hearing. The matter was last mentioned on 19th February 2021, when Parties confirmed filing of their Submissions.

6. The Claimant restated the contents of his Statements of Claim and Witness, in his oral evidence. He is presently a Construction Worker, resident of Kitengela, in Kajiado County. He was employed by the Respondent in 2009, and dismissed in 2016. He worked throughout, taking breaks only on Christmas day, and on 31st day of December. He never went on annual leave. He found a list of Employees, including himself pasted on the notice board, with the advice that the Employees should not report back to work.

7. Cross-examined, he stated that he did not have any document showing he was employed in 2009. N.S.S.F Statement shows he joined the Respondent in 2014. He did not have pay slip or salary voucher, indicating he worked for the Respondent from 2009. The clocking system exhibited by the Respondent shows that there were hours he did not work. He explained that he was always at work, but there were times there was no electric power or sufficient production material compelling him to do general work. He was not paid hourly. He was paid through his bank, DTB. He did not agree that he was in casual employment. He did not desert. Redirected, he stated that he was not called to any disciplinary forum.

8. Oduor adopted his Witness Statement and Documents filed on behalf of the Respondent, in his evidence. He confirmed that the Claimant was employed by the Respondent from 2014 to December 2015. The attendance register shows the days he worked. He did not return to work after December 2015. He was paid hourly as shown in the pay slip. His Claim is baseless.

9. Cross-examined, Oduor told the Court he was employed in 2009 as a Supervisor. He was the Human Resource Manager for the period the Claimant was in employment. He did not return in January 2016. The dates he was indicated to be absent, 24th December 2015 to 2nd January 2016, was a period when the Respondent had closed business. The Respondent called the Claimant in January 2016. He did not return. He was given a chance to explain. He did not report back. He was in casual employment and not entitled to annual leave. He was paid weekly. Pay slip indicates he was paid monthly. This was cumulative pay. Oduor explained on redirection that the Claimant worked for 3 months, and would take a break of 1 month, before resumption.

The Court Finds: -

10. The Claimant states he was employed by the Respondent in the year 2009. He has not given any document to support this, all called any other Witness, who could attest to 2009, as the year he was employed by the Respondent.

11. He exhibited a Statement of Account from the N.S.S.F. He is shown to have worked for Harvest Limited, Devki Steel Mills Limited, before joining Prime Steel Mills Limited, the Respondent herein, in 2014. The first contribution to N.S.S.F, in the name of the Respondent as his Employer, was on 30th April 2014.

12. He has not shown any relationship amongst the various entities shown to have employed him. He does not say that the Respondent was a successor Employer. He has failed to establish any employer-employee relationship between him and the Respondent, preceding 30th April 2014.

13. The Court adopts 30th April 2014, as the date the Claimant was employed by the Respondent, as a Mould Setter.

14. He left employment about 24th December 2015. The Respondent states that he deserted. It is pleaded that the Claimant was absent for 7 days which led the Respondent to conclude that he had deserted.

15. The Witness for the Respondent, Godfrey Oduor however, told the Court that the Respondent had closed, for the 7 days the Claimant was said to be a deserter falling between 24th December 2015 to 2nd January 2016.

16. It is not true that the Claimant was absent without leave or lawful cause, as the business he served, remained shut on the days he is said to have been absent.

17. The Respondent states that it called the Claimant back after 2nd January 2016, and that he failed to return. No evidence of such calls was availed to the Court. There was no letter written by the Respondent to the Claimant, asking about his whereabouts, and instructing him to resume duty, or inviting him to face disciplinary process for desertion.

18. The most believable version is that given by the Claimant. He found his name alongside those of other Employees, pasted on the notice board, with instructions that they should not resume duty.

19. It is the legal responsibility of an Employer under Section 43 and 45 of the Employment Act, to show valid reasons justifying termination. Section 47[5] places the burden of justifying termination on the Employer, while the Employee must show that unfair termination has taken place. The Respondent has not discharged its burden, while the Claimant has shown that termination was unfair.

20. He merits compensation and notice. His pay slip for December 2015, shows he was paid a gross salary of Kshs. 11,624. The Court does not have evidence of a daily rate of Kshs. 690. It does not have evidence of an hourly rate. The evidence that is available is on a monthly salary. The Claimant was not in casual employment or 3-month's renewable contracts, as argued variously by the Respondent.

21. He worked for about 20 months – April 2014 to December 2015. He is not shown to have had a poor performance or disciplinary record. He expected to go on working, but was discontinued in January 2015. He was not at fault. He was paid nothing on termination. He does not merit maximum compensation for unfair termination, having served for a period of 20 months. ***He is granted 2 months' salary in compensation for unfair termination at Kshs. 23,248.***

22. He is granted notice of 1 month at Kshs. 11,624.

23. There is no evidence to justify grant of overtime pay. The Claimant has not established when he did overtime work, and the nature of that work. He has not disclosed the formula he has adopted, to come up with a figure of Kshs. 884,925, a sum which forms the bulk of his Claim. The prayer is declined.

24. It is not suggested anywhere in the evidence, documents and pleadings of the Parties, that termination was on account of redundancy. The Claimant found his name on the notice board, with instructions that he does no resume duty. He was not told that his position had been declared redundant. There is no foundation to the prayer for severance pay under Section 40 of the Employment Act.

25. He completed 20 consecutive months in employment. He was entitled to annual leave, under Section 28 of the Employment Act, which the Court allows at the statutory minimum of 21 days per year. In the first 12 months he earned 21 days of annual leave at Kshs. 9,388, and for the remaining 8 months, 14 days of pro-rata leave, at Kshs. 6,259. ***Total annual leave pay is awarded at Kshs. 15,647.***

26. Certificate of Service shall be released to the Claimant under Section 51 of the Employment Act 2007.

27. Costs to the Claimant.

28. Interest allowed as prayed, but from the date of this Judgment.

IN SUM, IT IS ORDERED: --

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant: compensation at Kshs. 23,348; notice at Kshs. 11,624; and annual leave pay at Kshs. 15,647 – total Kshs. 50,619.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest allowed as prayed, but from the date of Judgment.

DATED, SIGNED AND RELEASED TO THE PARTIES, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT CHAKA, NYERI COUNTY, THIS 28TH DAY OF MAY 2021

JAMES RIKA

JUDGE