



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO. 435 OF 2018**

**CHIMERA CHIMOYO ALFAN.....CLAIMANT**

**VERSUS**

**STEEL MAKERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant's claim against the Respondent is by way of a Memorandum of Claim dated 21<sup>st</sup> June 2018 and filed in court on 22<sup>nd</sup> June 2018.

2. The Claimant testified before the Court on 29<sup>th</sup> January 2020. The Respondent chose not to call any witnesses.

3. The Claimant states that he was employed by the Respondent as a gas cutter, earning a monthly salary of Kshs.24,726 from March 2009 until 11<sup>th</sup> April 2017, when his employment was terminated.

4. Regarding the circumstances of the termination, the Claimant states that on 11<sup>th</sup> April 2017, he reported to work as usual but was told by his Head of Department, one Mr. Parsana to leave the premises and wait to be called back. The Claimant adds that he was not called back and did not receive any further communication from the Respondent.

5. The Claimant claims that he was not paid house allowance and was not allowed to go on leave.

6. The Claimant lays a claim of unlawful termination of employment and seeks the following from the Respondent:

- a) 1 month's salary in lieu of notice Kshs.24,726
- b) House Kshs.356,054
- c) Leave allowance for 8 years Kshs.197,808
- d) Severance pay for 8 years Kshs.114,120
- e) 12 months' salary in compensation Kshs.296,712
- f) Certificate of service
- g) Costs plus interest

7. Section 43(1) of the Employment Act provides as follows:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

8. The Respondent did not call any witnesses to debunk the Claimant's claim of unfair termination of employment. Instead, the Respondent sought to introduce contentious matters of fact in its final submissions filed in court on 21<sup>st</sup> May 2021. As it stands, the Claimant's claim of unfair termination was unchallenged and therefore succeeds.

9. Consequently, I award the Claimant eight (8) months' salary in compensation for unfair termination of employment. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in executing the termination.

10. I further award the Claimant one (1) month's salary in lieu of notice.

11. The Claimant also claims house allowance. He however told the Court that he was paid a daily wage, which would ordinarily be inclusive of house allowance. The claim for house allowance is therefore without basis and is disallowed.

12. The Respondent challenges the Claimant's claim for leave pay on the ground that it is statute barred by dint of Section 90 of the Employment Act, which provides that:

***90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.***

13. It seems to me that failure to grant annual leave would fall within the province of 'continuing injury or damage' and any claim thereon should have been brought within twelve months after cessation of the injury or damage.

14. It is now firmly settled that Section 90 of the Employment Act leaves no room for extension of time (see *Maria Machocho v Total Kenya Limited [2013] eKLR*).

15. Reckoning from the termination date of 11<sup>th</sup> April 2017, as pleaded by the Claimant himself, the claim for leave pay should have been brought by 10<sup>th</sup> April 2018. It follows that the Claimant's Memorandum of Claim, having been filed on 22<sup>nd</sup> June 2018, places the claim for leave pay within the jaws of limitation of time under Section 90 of the Employment Act. The only conclusion to make in this regard is that this particular claim, is time barred, is not properly before the Court.

16. No basis was laid for the claim for severance pay, available in cases of redundancy, which was not pleaded in this case.

17. In the end, I enter judgment in favour of the Claimant as follows:

a) 8 months' salary in compensation Kshs.197,808

b) 1 month's salary in lieu of notice 24,726

**Total Kshs.222,534**

18. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant is also entitled to a certificate of service plus the costs of the case.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY SEPTEMBER 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kyalo Matata for the Claimant

Mr. Kamoti Omollo for the Respondent