



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 786 OF 2016

SYLVESTER OUMA ONDUU.....CLAIMANT

VERSUS

PRIME STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

1. Sylvester Ouma Onduu instituted the suit vide a Statement of Claim dated 16th February 2016 against Prime Steel Mills Limited for unfairly dismissing him from employment. He avers that he was employed by the Respondent on or about March 2012 as a Basket Charger and rose to the position of Plate Mason helper and that he was engaged as a casual labourer earning a daily wage of Kshs. 473/- by the time he left the Respondent's employment. The Claimant avers that he worked continuously and diligently for the Respondent for a period of about three and a half years before his employment was terminated on or about 2nd October 2015. The Claimant avers that his employment had therefore converted to a term contract by operation of law even though the Respondent never issued him with an employment contract. He further avers that the Respondent unlawfully and unfairly terminated his services without giving him any reason and notice and only being informed upon his reporting to work that day that those whose names were not on the notice board were not to report for work again. Further, he was not subjected to any disciplinary hearing before his termination. The Claimant averred that he used to work from 7am to 7pm for seven days a week inclusive of public holidays but was never paid for the overtime and that he was also never given a rest day. He prays the Court makes a declaration that his dismissal from employment by the Respondent was unlawful, unfair and hence null and void. He seeks that the Respondent be ordered to pay him severance pay, notice pay, unpaid overtime, leave days not taken, damages for unfair dismissal at 12 months' gross salary, interest at court rates on the aforementioned payments from the date of filing the claim and costs of the suit. He also seeks for a certificate of service.

2. In response, the Respondent filed a Response dated 25th October 2018 admitting to have employed the Claimant and further averring that the Claimant wilfully absconded duty indefinitely only to file the claim herein on false and malicious allegations. The Respondent thus avers it claims from the Claimant notice pay since he ended the employment contract abruptly thus justifying his summary dismissal and that the Claimant is not entitled to any notice in view of the foregoing. Further, it does not owe him anything as all his benefits were fully tabulated and paid to him and there were no overtime and public holidays worked. The Respondent prays the claim herein be dismissed with costs. The Respondent also filed a witness statement authored by a Supervisor of the Respondent, Mr. Godfrey Oduor on 2nd July 2021. He states that the Claimant herein was engaged by the Respondent as a casual employee sometime in the month of April 2014 and that he was paid for all hours worked, including overtime. He stated that on or about 30th June 2015, the Claimant voluntarily left employment with the Respondent and the Respondent was aware that the Claimant thereafter took up employment with Jokali Handling Services, a third party company sub-contracted by the Respondent to offer labour services. He states that the Respondent accordingly paid the Claimant his dues until his last day of employment and is thus not entitled to the claims of notice pay and overtime. For the claim of severance pay, he states that the Claimant is not entitled to the same was not declared redundant and that the Respondent also deducted and remitted NSSF on behalf of the Claimant and that for the claim for payment of untaken leave, the Respondent pleads that the Claimant exhausted all his off days and that in any event, the Claimant did not complete any full year in service.

3. The Claimant filed a Reply to the Response dated 1st April 2019 denying that he was paid terminal benefits and averring that the Respondent's Response is evasive and does not raise any triable issue. He further prays that the said Response is struck off with costs and judgment be entered in the Claimant's favour as prayed for in the Statement of Claim.

4. Claimant's Submissions

The Claimant submits that the Respondent contravened Section 41 of the Employment Act, 2007 since he was neither told the reason for the termination or given an opportunity to respond to the allegations leading to his termination before a disciplinary committee. He relies on the case of **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR** cited with approval in **Narry Philemons Onaya-Odeck v Technical University of Kenya (Formerly, the Kenya Polytechnic University College) [2017] eKLR**. He submits that since the Respondent has failed to prove to this Court the reason for terminating the Claimant's contract, the termination was unfair as under Sections 43 and 45 of the Employment Act. To this end he relies on the decision in **Janet Nyandiko v Kenya Commercial Bank Limited [2017]**

eKLR cited with approval in the Court of Appeal case of **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR**. It is the Claimant's submission that as he has demonstrated unlawful and unfair termination of his employment, he should be paid damages equivalent to 12 months' gross salary. The Claimant submits that he is also entitled to notice pay as under Section 35(1)(c) of the Employment Act since he was never issued with any notice or paid in lieu of notice and entitled to leave as under Section 28(1)(b) of the Employment Act. For the claim of over time he relies on Section 6(1) and (2) of the Regulation of Wages (General) Order, 2007.

5. Respondent's Submissions

The Respondent submits that whereas the Claimant stated in his pleadings that he was employed sometimes in March 2012, it is informing that no document in the form of an employment contract or payslip or NSSF form or work attendance sheet was adduced to prove he worked for the Respondent between the years 2012 to 2014. The Respondent submitted that the Claimant only presented NSSF Statements for the period between 1st January 2015 to 30th June 2015 and no other witness was presented in court to corroborate the assertion that the Claimant worked for the Respondent between 2012 and 2014. The Respondent submitted that therefore from the said evidence, it can only be concluded that the Claimant worked for the Respondent between the period 1st January 2015 to 30th June 2015. It submitted that the NSSF Statements filed in Court by the Claimant show he was in employment with a different entity named Jokali Handling Services between August and October 2015. It submits that the Claimant voluntarily left employment on 30th June 2015 and that establishing the intention not to return to work will depend on the facts as presented in evidence. The Respondent relies in the case of **Ezra Nyamweya Motari v Kanini Haraka Enterprises Ltd [2016] eKLR** where the Court stated that:

“[8] Desertion is not the same as being absent from the place appointed from work without permission or lawful cause as envisaged under section 44(4)(a) of the Employment Act, 2007.

[9] It needs no debating that absence without permission or lawful cause attracts summary dismissal. But the employee who is absent has no intention of not resuming work.

[10] Desertion, on the other hand in employment law is a repudiation of the contract of employment. The employee who deserts is in breach of contract and an employer is entitled to dismiss him on the ground of repudiation of contract. This is because he has no intention of turning up for work.

.....

[15] Where an employer alleges desertion, it must prove the ingredients of desertion.

[16] A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).”

It also relies on Section 47(5) of the Employment Act which burdens the employee to prove a case of unlawful termination with an obligation on the employer to rebut the same.

6. Determination

The Claimant was employed by the Respondent no doubt. He asserts that he worked for the Respondent from 2012 till 2015 but provided evidence of NSSF deductions only for January to June 2016. The same statements show he was working for another enterprise in August 2015. In the case of **Ezra Nyamweya Motari v Kanini Haraka Enterprises Ltd (supra)** the Court stated:-

Desertion, on the other hand in employment law is a repudiation of the contract of employment. The employee who deserts is in breach of contract and an employer is entitled to dismiss him on the ground of repudiation of contract. This is because he has no intention of turning up for work. (Emphasis supplied)

It would seem that the Claimant by declining to show up for work deserted his employment and by so doing repudiated the contract of employment. As such, the Respondent's assertion that the Claimant absconded duty carries more weight. From the testimony adduced and the pleadings filed, it is evident that the Claimant earned daily wages and in the absence of any proof that he was terminated, he would not be entitled to recover compensation or even notice pay. The Claimant terminated the contract on his own volition as the evidence adduced by the Respondent shows. Granted that the Claimant's claim was devoid of merit and ought not have been filled it shall be dismissed but the Court will direct that each party bears its own costs for the proceedings.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November 2021

Nzioki wa Makau

JUDGE