



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.777 OF 2016

JOASH OYARO MOSEGERE.....CLAIMANT

VERSUS

PRIME STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

1. By memorandum of claim dated 16th February 2016 the Claimant sought the following reliefs:-

a. A declaration that the Respondent's dismissal of the Claimant from his employment was unlawful unfair hence null and void.

b. The respondent be ordered to pay the Claimant the following: -

i. Payment in lieu of notice Kshs. 12,990/-

ii. Unpaid overtime for a total of 5,544 hours worked Kshs. 455,949/-

iii. Damages for unfair dismissal equivalent for twelve (12) months gross salaryKshs.155,880/-

Total.....Kshs.624,819/-

c. An order that the Respondent issues the Claimant with a certificate of service

d. Interest at court rates on (b) above from the date of filing the claim

e. Costs of this suit

f. Such other or further relief as this Honourable Court may deem just to grant.

2. The Claimant filed together with the statement of claim, a verifying affidavit dated 16th February 2015, and filed on the 6th may 2016, and attached NSSF print out, list of witnesses filed on 6th may 2016, witness statement dated 16th February 2016. A reply to the Response dated 14th August 2019.

3. The Respondent entered appearance and filed response dated 9th July 2019, list of documents dated 9th July 2019, and list of witnesses dated 9th July 2019. A witness statement of Harrizone Oruya dated 22nd July 2019.

4. The case was heard inter-partes on the 11th August 2021 with each party calling one witness.

5. The Claimant's written 20th September 2021. The Respondent did not file written submissions.

The Claimant's case

6. The Claimant Joash Oyaro Mosengere testified on his own behalf as Claimant's witness (CW). CW told the court that he stays in Kajiado

and the Respondent was his former employer where he worked for 3 years. CW adopted his statement dated 16th February 2016 as his evidence in examination in chief. CW produced his list of documents dated 16th February 2016 as his evidence in examination in chief.

7. During cross examination by counsel for the Respondent Mr. Mutoro, CW told the court that he had produced NSSF print out to show he was employed by the Respondent. CW told the court he had not filed document to show he was employed by the Respondent from 2012 to 2014. CW was referred by counsel for Respondent to paragraph 4 of his statement where he stated that he worked for 7 days from 7am to 7pm and was not paid overtime for the extra hours worked. CW was referred to the Respondent's bundle of documents filed on 10th July 2019 Doc. 2. The name of Claimant at No. 14 of the casual payment sheet. The document shows that he did not work on Sunday and Monday. OT1 and OT2 referring to overtime 1 and overtime 2. CW agreed he was paid overtime as per the document. CW stated that he was terminated on the 30th July 2015. CW was referred by Counsel for Respondent to his NSSF statement which indicated that in the month of July dues were remitted by Jokali Handling services. CW agreed that Jokali was engaged by his employer to pay workers. CW stated that it was not true he left on his own will to be employed by Jokali and that he realized his salary was being paid by Jokali and had no idea how it happened. CW told the court he was stopped by the management of the Respondent under Jokali.

8. During re-examination CW told the court that Jokali was like workers of the Respondent. CW told the court he did not know when overtime was paid and that he was not given any document. CW told the court that he was not following up on NSSF which started being paid in 2014. He said NSSF was not being paid when he started in October 2012.

The Respondent's case

9. The Respondent called Godfrey Odour (RW) as its witness. RW adopted the witness statement of Harrizone Oruya dated 22nd July 2019 as his evidence in examination in chief. RW told the court that he knew the Claimant as a casual worker. RW told the court that the Claimant started working from July 2014 to 2015. That the Claimant left work as he was put on contract. RW produced list of documents dated 9th July 2019 and filed on the 10th July 2019 as evidence for the Respondent in examination in chief.

10. RW on cross-examination by counsel for Claimant confirmed that the Claimant was an employee of the Respondent but they did not give him a letter of employment. RW was referred to the statement filed for Respondent. Paragraph 4 stated that the Respondent contracted Jokali for handling casual workers on its behalf. RW told the court that Jokali dealt with all employment issues like injuries and payment of employees. RW told the court that the Claimant was not terminated and they do not have document. RW stated that casual worker was paid Kshs. 450/- and that the Respondent paid overtime. RW told the court he did not have the file. RW told the court he is a supervisor. That the Respondent pays overtime but he did not know the time when payment is made.

11. On re- examination RW told the court that the Claimant was a casual worker under Jokali which picks them. That Jokali deals with injuries of their employees and payment. RW referred to the documents filed by the Respondent on the 10th July 2019 and told the court that the casual employment pay sheet filed therein was by Jokali and that the Respondent had a similar list for its employees.

Legal analysis and findings

12. The Claimant identified the following as issues for determination in the document dated 14th August 2019 as follows: -

- a. Whether the claimant was an employee of the Respondent.
- b. Whether the Respondent unlawfully and wrongly terminated the employment of the Claimant
- c. Whether the Claimant is entitled to the prayers sought in the statement of claim.

The Respondent did not file any issues in their response.

After carefully analyzing the Claimant's list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether the claimant was an employee of the Respondent?
- ii. Whether the Respondent unlawfully and wrongly terminated the employment of the Claimant?
- iii. Whether the procedure for termination of employment was fair and lawful?
- iv. Whether Claimant is entitled to reliefs sought?

13. The Court addressed the issues as follows: -

i. Whether the Claimant was an employee of the Respondent?

14. The Claimant told the court he was employed on the 17th October 2012 by the Respondent in its refractory section earning daily wage of kshs.333 which rose to kshs. 433 by the time he left the Respondent's employment. He told the court that on 30th July 2015 the Respondent terminated his employment without Notice. He told the court he was not given a letter of employment and worked 7 days a week without

overtime.

15. During cross examination CW told the court that he had produced NSSF print out to show he was employed by the Respondent. CW told the court he had not filed document to show he was employed by the Respondent from 2012 to 2014. CW stated that he was terminated on the 30th July 2015. CW was referred by Counsel for Respondent to his NSSF statement which indicated that in the month of July 2015 dues were remitted by Jokali Handling services. CW agreed that Jokali was engaged by his employer to pay workers. CW stated that it was not true he left on his own will to be employed by Jokali. He stated that he realized his salary was being paid by Jokali and had no idea how it happened. CW told the court he was stopped by the management of the Respondent under Jokali.

16. The issue is whether there is a contract of service or contracts sui generis where the Respondent had agreed with a third party that the Claimant offer services to it. The court is guided decision in **Wrigley Company EA Ltd v the Hon Attorney General and others** where a 3 Judge bench of the Employment and Labour Relations Court comprising of Justices Linnet Ndolo, Mathews Nderi Nduma and Nzioki wa Makau set out the parameters for consideration:-

a. Ordinarily employers are not expected to outsource their core functions;

b. An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;

c. An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases,

d. the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and

e. Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

In **Kenya Ferry Services Ltd versus Dock Workers Union Ltd 2015 eklr**, the Court held that outsourcing is a management prerogative and the Court cannot place a blanket ban the 'employer' to outsource.

In **Kenya Airways Ltd versus Aviation and Allied Workers Union and Others**, the Court of Appeal observed that outsourced service is one such widely accepted business concept which enables a company to focus on core business, reduce costs and efficiency savings and manage cyclical resource demands.

17. RW confirmed that the Respondent had similar list of casual employees as that used by the entity Jokali, meaning that it indeed had casual employees like the Claimant. The work performed by the Claimant therefore formed an integral part of its operations and there was therefore no basis whatsoever for the outsourcing. It is also noteworthy that the Claimant had in the evidence said that Jokali workers were like those of the Respondent. Jokali dealt with casual employees as per the statements of the witnesses. There was no evidence given in rebuttal to this statement. There is also no evidence that the Claimant had accepted the arrangement between the Respondent and the third party to affect his employment or that he decided to leave the Respondent Company. The Respondent's witness told the court that the Claimant was employed by Respondent through Jokali from 1st September 2014 to 30th march 2015 and the Claimant left work and was not terminated. The Respondent's witness told the court that the Claimant was not issued with letter of employment and no record was produced in court, that the Respondent had subcontracted a third party Jokali Handling Services for provision of payment services and dealing with injury claims. It is the finding of the court that the Claimant was an employee of the Respondent. He at least in the first instance was employed by the Respondent and worked for it till midstream in 2014 when he realized he was being paid salary by Jokali and had no idea how it happened. The Respondent had the obligation to produce record of employment and failed to do so. The court finds that the Claimant was for all purposes an employee of the Respondent.

ii. Whether the Respondent unlawfully and wrongly terminated the employment of the Claimant

18. The Claimant told the court he was stopped by the management of the Respondent under Jokali. That he was not given notice. The Claimant adopted his statement dated 16th February 2016 as his evidence in examination in chief. Paragraph 5 states, '*on or about 30th July 2015i was terminated from employment. This occurred after I returned to work after taking my sick child to hospital. This was unlawful and unfair since it was done without prior notice and no reason was given for the termination of the employment..*'

RW confirmed to the court that the Claimant was their employee and they did not give him a letter of employment. He told the court the claimant was not terminated. He told the court he does not have the record. In statement of Harrizone Oruya it is written that on 30th June 2015 the Claimant quit employment. This was the statement adopted by RW.

Since the employer did not file the employment record the court finds the evidence by the Claimant that he was terminated without a hearing was not rebutted. The termination was thus unlawful under section 41 of the employment act

The Employment Act section 41 provides the threshold of procedural fairness as follows:-

'(1) subject to section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language he understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Notwithstanding any other provision of this part, an employer shall before terminating the employment of employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation's 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'.

To buttress his claim the Claimant cites the decision of the Court of Appeal Justices P.N Waki, R.N Nambuye and P.O Kiage in **Five Forty Aviation Limited V Erwan Lanoë(2019)** eKLR quoted with approval the decision of **Janet Nyandiko v Kenya Commercial Bank Limited (2017)eKLR** where it held, *inter alia*,-

'...Section 41 of the Act enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also to ensure that the employee receives the said reasons in the presence of fellow employee or a shop floor union representative of own choice; and hear and consider any representations which the employee may advance in response to allegations against him by the employer.'

The court finds the defence that the Claimant quit employment is not supported by record. It was the duty of the employer under the law to produce the employment record of the Claimant. The Court believes the evidence of the Claimant that he was terminated from employment by the Respondent without notice. The procedure for termination of the Claimant's employment by the Respondent violated the mandatory terms under section 41 of the Employment Act and was thus unlawful and unfair.

iii. Is the claimant entitled to the reliefs sought?

19. The Claimant sought several reliefs under the statement of claim dated 16th February 2016 which the court proceeds to address as follows:-

a. A declaration is issued that the Respondent's dismissal of the Claimant from his employment was unlawful unfair hence null and void.

b. On the claim of Unpaid overtime for a total of 5,544 hours worked Kshs. 455,949/- The Claimant said he was not paid overtime. The Claimant to buttress this claim relies on **section 6(1) of the Regulation of Wages (General) Order 2007** which provides as follows:- *'overtime shall be payable at the following rates –(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate; and (b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.'* The Claimant further cites subsection 2 of that order.

During cross examination by Counsel for the Respondent the Claimant was referred to paragraph 4 of his statement where he stated that he worked for 7 days from 7am to 7pm and was not paid overtime. The Claimant was further referred to the Respondent's bundle of documents filed on 10th July 2019 Doc. 2. The name of the Claimant is at No. 14 of the casual payment sheet. The document shows that he did not work on Sunday and Monday. OT1 and OT2 referring to overtime 1 and overtime 2. The Claimant agreed he was paid overtime as per the document. The court, on a balance of probabilities, finds that the Claimant was paid overtime and hence this claim is disallowed.

c. The Claimant sought Damages for unfair dismissal equivalent for twelve (12) months gross salary Kshs.155,880/- The court has discretion on the compensation to award. The court found the termination was unfair. Under section 49 (1)(c) of the Employment Act the court may award the equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. Section 49(4) gives the terms under which the court shall exercise its discretion on the compensation. The court has considered the circumstances of the termination, fact that reinstatement is not an option available to the Claimant, the employees length of service of 3 years and the fact that there was no other compensation on termination in terms of gratuity or exgratia. The NSSF covered only 2014 and part of 2015. Taking into consideration all the above and all the provisions of that subsection the court opines that compensation equivalent of 9 months gross wages calculated at last monthly gross wage of Kshs.12,990/- is justified and adequate compensation.

d. Payment in lieu of notice - The Claimant having had his employment automatically converted to employer employee relationship following continuous service after 3 years was entitled to notice before termination. The court found no notice was issued. The notice pay of Kshs. 12,990/- is allowed.

e. An order that the Respondent issues the Claimant with a certificate of service is granted.

f. Interest at court rates on (b) above from the date of filing the claim is granted.

g. Costs of this suit to be borne by the Respondent.

h. In Submissions the Claimant introduced a claim for unpaid leave. This claim was not in the statement of claim and the submissions are disregarded on that claim.

CONCLUSION AND DISPOSITION

20. I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I further found that the Claimant is entitled to compensatory damages the equivalent of 9 months gross salary and notice pay for 1 month gross salary. I have dismissed the claim for overtime. Consequently I enter judgment for the Claimant against the Respondent in the following terms: -

a. Compensatory damages for 9 months (9 x Kshs.12,990 /-) total sum of Kshs. 116,910/-

b. Notice pay of Kshs. /- 12,990/-

The award in (a) and (b) above is subject to statutory deductions.

c. I also award the Claimant interest on the award sum (a and b above) at court rates from the date of the claim until payment in full.

d. Issuance of certificate of service under section 51 of the employment act.

e. Costs of this suit shall be borne by the Respondent

Written and Dated the 11th day of November 2021 at BUNGOMA

.....

J.W. KELI

JUDGE

Delivered and dated this 16th day of November 2021 at NAIROBI

.....

Judge

In the presence of

No appearance for parties.