



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1517 OF 2016

SAMUEL MUIA MUTUKUCLAIMANT

-VERSUS-

PRIME STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

1. The claim before the court seeks for the following reliefs:

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

b. The Respondent be ordered to pay the Claimant the following;

i. Severance Pay.....Kshs. 49,770/-

ii. Payment in lieu of notice.....Kshs. 14,220/-

iii. Unpaid overtime for a total of 8,190 hours worked.....Kshs. 727,886/

iv. Payment in lieu of leave days not taken.....Kshs. 727,886/-

v. Damages for unfair dismissal, equivalent of twelve

(12) months gross salary.....Kshs. 170,640/-

Total.....Kshs. 1,062,056/-

(c) An order that the respondent issues the claimant with 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 Respondent denies liability and avers that she employed the claimant on casual basis between 29.9.2015 before he deserved work from 3.10.2015 never to report back again.

Claimants' case

3. The Claimant testified that he was employed by the respondent from March 2008 as a Barryman in the Furnace Department and worked continuously until 2.10.2015. He contended that his working hours were from 7 a.m. to 7 p.m. and that he used to sign Attendance Register which we kept by the Security Guard at the gate. He further contended that his daily wage was Kshs. 474 which was paid weekly in arrears. He also contended that he was working daily without any rest day or leave and he was never paid for the overtime worked.

4. He further testified that on 2.10.2015 he reported to work as usual but he was told that work had stopped. Upon demand for his terminal dues, he was told to come for the same the following day but when he returned, he found the place closed and under tight security by guards.

5. The claimant denied that he only worked for the respondent from 23.9.2015 to 29.9.2015 and from 30.9.2015 to 2.10.2015 and then deserted. He further denied that his supervisor called him and he declined to pick his calls. He maintained that he worked for the respondent from March 2008 until 2.10.2015 when his services were terminated alongside that of 30 other colleagues in the Furnace Section. He however admitted that he was paid his wages upto to 2.10.2015.

6. Upon cross-examination the claimant admitted that he joined the respondent in March, 2008 as a casual employee. He however contended that due to his prolonged services his employment converted to permanent employment which could not be terminated without notice. He admitted that he had no documentary evidence to prove that he joined in 2008 and worked up to 2.10.2015 and that he had no evidence to prove that 30 other employees were dismissed on 2.10.2015 but contended that they all filed suits after the termination. He also did not produce any bank statement to prove that he was paid wages continuously by the respondent from 2008 to 2.10.2015. He however admitted that his name was appearing as number 45 in the copy of the attendance book produced by the respondent. He further contended that the said copy resembled the attendance register he was signing when he was in employment.

Defence case

7. Mr. Godfrey Oduor, a supervisor at the respondent testified as Rw1. He testified that he joined the respondent in 2013. He further testified that he knew the claimant as a casual employee who worked for the respondent for about one week and then disappeared. He contended that the effort to reach the claimant by phone was in vain. He therefore prayed for the suit to be dismissed because the claimant is not entitled to the reliefs sought.

8. Upon cross examination, Rw1 contended that he is a General Supervisor in the company without any particular department. He further contended that the company has about 250 employees out of which only 120 are permanent employees. He admitted that there is an Attendance Register for employees to clock in and clock out. He further admitted that the employees work for 12 hours per day including the furnace department. He contended that a Barryman was supposed to be paid Kshs. 530 per day as at 2015.

9. He admitted that he had no evidence to prove that the claimant deserted work, but maintained that the claimant disappeared from work without reasons and he could not be traced through the phone number secured from his friend. He admitted that he is not the one who called the claimant but his friend who was asked to call him.

10. RW1 further contended that the wages paid to the claimant was inclusive of overtime pay. He contended that he was in the same department with the claimant and they used to sign a payroll but payment was channelled through the bank. However he did not produce the payroll as exhibit to prove that the claimant only worked for one week. As regards the claim for leave RW1, contended that only the permanent employees were given annual leave but stated that employees worked from Monday to Saturday and rested on Sundays.

Issues for determination

11. There is no dispute from the evidence and submission herein that the claimant was employed by the respondent as a casual employee. The issues for determination are:

- a. Whether or not the claimant worked as casual employee continuously from March 2008 to 2.10.2015.
- b. Whether or not the said casual employment converted to permanent employment.
- c. Whether or not the claimant deserted his employment or his services were unfairly terminated.
- d. Whether or not he is entitled to the reliefs sought in the suit.

a. Whether the claimant worked as a casual employee from March 2008 to 2.10.2015 continuously.

12. The burden of proving the alleged continuous employment from March 2008 to 2.10.2015 lies with the claimant and the standard of proof is balance of probability. He did not produce any documentary evidence or call any witness to corroborate his verbal allegations that he worked as a casual employee continuously from March 2008 to October 2015. Although it is agreed between the claimant and Rw1 that salaries were paid through the employee's bank account, the claimant did not produce any bank statement to prove that he, indeed worked for the respondent for all that period between March, 2008 and October 2010 as alleged.

13. In my view, nothing was difficult and it has not been shown that it was impossible for the claimant to secure a bank statement to prove the said prolonged employment relationship. The only reason one can imagine, for the failure to produce the bank statement is that, it would not support the claimant's allegation of continuous service. Without any documentary evidence and a witnesses to support the alleged continuous casual employment, I must return that the claimant worked for the respondent only between 23.9.2015 and 2.10.2015.

14. In view of foregoing finding, I see no need of considering the other issues framed herein above because it is obvious that his employment never converted to permanent and the issue of unfair termination did not arise. Consequently, the suit is dismissed with no order as to costs.

Dated, signed and delivered in open court at Nairobi this 14th day of February, 2020.

ONESMUS N. MAKAU

JUDGE