



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1087 OF 2015

JOSEPHAT MUNENE MURANGU.....CLAIMANT

-VERSUS-

EMCO BILLETS & STEEL LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 24.06.2015 through Musili Mbiti & Associates Advocates. The claimant has pleaded that the respondent employed him in May 2010 as a manual labourer earning Kshs.12,150.00 per month. Further in September 2012 the respondent unlawfully terminated the claimant's contract of service because section 41 of the Employment Act, 2007 on notice and hearing was not complied with. The claimant prays for judgment against the respondent for:

- a. Payment of Kshs.486,001.00 comprising:
 - i. Salary in lieu of notice Kshs.12, 150.00.
 - ii. Overtime pay throughout service Kshs.236, 925.00.
 - iii. House allowance Kshs.54, 675.00.
 - iv. 21 Leave days for 2.5 years Kshs.15,263.00.
 - v. Service pay Kshs.15, 188.00.
 - vi. 12 months' salary Kshs.145, 800.00.
- b. Interest and costs incidental to the suit.
- c. Certificate of service.
- d. Any such other or further relief as the Honourable Court may deem fit and just to grant.

The respondent entered appearance on 21.10.2015 through Morara Apiemi & Nyangito Advocates and filed the response to the memorandum of response on 15.09.2015. The respondent admitted that it employed the claimant as a manual labourer at Kshs.12, 150.00 per month and effective May 2010. The respondent denied that it breached section 41 of the Act and stated that the claimant absconded from his duties without leave or lawful cause. The respondent further pleaded as follows:

- a. The claimant is not entitled to salary in lieu of notice since he abandoned his duties and his work place without notice.
- b. House allowance is not due because it was catered for in the pay.
- c. The leave days were paid out to him.

d. Service pay is not due because the claimant was a member of NSSF and the dues were remitted per law.

e. 12 months' compensation not due as the termination was not unlawful.

f. The respondent was ready to issue a certificate of service.

The respondent prayed that the claimant's suit be dismissed with costs.

The respondent changed its lawyers to Atieno Opiyo & Company Advocates. At the hearing the respondent's counsel informed the Court that the respondent was not co-operative and was absent at the hearing and no witness statement had been filed. The respondent's case was closed subject to the final submissions and which the respondent failed to file. The claimant testified to support his case.

The Court has considered the pleadings, the claimant's evidence, and the final submissions. The Court makes findings as follows.

First there is no dispute that the parties were in a contract of service as pleaded.

Second, the claimant testified that the respondent dismissed him on account of having sued the respondent about injuries the claimant sustained while on duty. The claimant did not recall the date of the termination. The Court finds that the reason for termination as per the claimant's evidence is inconsistent with the claimant's pleadings that section 41 of the Act on procedure for dismissal on account of misconduct, poor performance or ill health had been breached. In view of that inconsistency, the claimant's account of circumstances of the separation cannot be trusted. Thus the Court finds that the claimant has failed to establish that the termination was unfair or unlawful. The prayer for compensation will fail. Similarly the prayer for pay in lieu of one month notice will collapse.

Third, the claimant filed the suit on 24.06.2015 and the alleged dismissal was in September 2012. The Court returns that the claims for pay for annual leave, house allowance, and overtime were of a continuing injury. The time of limitation was 12 months from the date of cessation of the continuing injury. Thus the Court finds that the claims were time barred. In any event the claimant testified that he was paid for all the days he worked and overtime was therefore, by implication, not due.

Fourth, the service pay is not due under section 35 of the Act because the claimant was a member of NSSF and he has exhibited the NSSF statement confirming that the respondent remitted the dues.

The certificate of service will issue as conceded by the respondent.

The Court has considered the respondent's failure to comply with the rules and directions of the Court and each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020**.

BYRAM ONGAYA

JUDGE