



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABO RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 622 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2020)

**BENSON WACHIRA MAINA.....CLAIMANT**

**VERSUS**

**PRIME STEEL MILLS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Benson Wachira filed this claim vide a Statement of Claim dated 12<sup>th</sup> April 2016 against the Respondent, Prime Steel Mills Limited for its failure to pay him compensation for injuries sustained in the course of employment with it.

2. He avers he was employed by the Respondent in 2010 as a Plate Mason and that he was paid Kshs. 470 per day. That it was a term of the contract of employment between him and the Respondent that the Respondent takes all the necessary precaution towards the safety of the Claimant while engaging in the foresaid employment and not to expose him to any risk of injury or damage which they know or ought to have known and to further provide a safe work place and an effective training and supervision of the work.

3. He avers that on the night of 18<sup>th</sup> May 2015, he was on night duty at the company premises at the pit side where he normally worked when one of the metals put in the furnace exploded. That he fell down as he tried to run away and the molten metal landed on his back, left hand, elbow and shoulder and burnt him extensively. That he sustained serious bodily injuries and was hospitalised for some time and that from the date of the accident, the Respondent failed to give him sick off but paid him half salary until the end of December 2015 when the Respondent unilaterally ordered him to resume work at the risk of dismissal. He however had not yet fully recovered and contends that he could not work considering the nature of his work and the nature of his injuries and that the Respondent did not give him an alternative place to work that would not endanger his life and health. The Claimant avers that the Respondent's conduct amounted to constructive termination of employment and that he seeks:-

**1. Compensation at Kshs. 170,640/= as general damages for unfair dismissal by the Respondent.**

**2. Payment in lieu of notice at Kshs. 9,954/=.**

**3. Leave pay at Kshs. 49,770/= for the 5 years he worked without any annual leave.**

**4. Housing allowance for 5 years in the sum of Kshs. 240,000/= as none was given.**

**5. Service pay for 5 years at Kshs 71,100/=.**

**6. Milk allowance in the sum of Kshs. 90,000/= for 5 years.**

**7. NSSF not remitted by the Respondent from 2010 to June 2014 in the sum of Ksh 82,570/=.**

**8. Overtime amounting to Kshs. 431,880/=.**

**9. He worked seven days a week and was not allowed a day off duty and was not compensated for the same and he claims the sum of Kshs 113,760/=.**

**10. Recommendation Letter.**

4. He annexes in his Claim copies of medical reports and medical discharge summary from Athi River medical services, a demand letter dated 20/01/2016 and a casual employee pay sheet for the period of 18/09/2014 to 24/09/2014. The Claimant prays that this Honourable Court awards him Kshs. 1,259,674/=; costs of this claim; interest on both from the date of filing the claim until payment in full; and any further award that the Court may deem fit to award.

5. In his Witness Statement, the Claimant states that his job included constructing the place where the hot metal is put but was never given a letter of employment/ pay slip and that they used to sign a payroll. He states that after the accident and admission at Athi River Medical Services, he was discharged on 03/06/2015 and went back to the said hospital on many occasions for dressing and treatment. That the Respondent told him to go back to work in January but refused to pay him any compensation and that the company filled LD 104 forms and told him to wait for payment from the insurance which never happened.

6. He further states that the only protective wear the Respondent gave is a helmet and ordinary overalls which cannot protect a person from the furnace in the work place and communicated to the Court that he had filed a separate claim for compensation for injuries sustained in the fire.

7. The matter proceeded undefended.

8. The Claimant stated in court that he wished to rely on his filed Witness Statement plus Statement of Claim as his case and evidence.

### **Claimant's Submissions**

9. The Claimant submits that the contract of employment he had with the Respondent was governed by the Employment Act and the Work Injury Benefits Act among other relevant provisions of the law. That the injuries he sustained were caused wholly by the Respondent's breach of statutory obligation, breach of employment terms and/or negligence on the part of the Respondent, its agents, employees and/or servants.

10. He also notifies the Court that the claim for compensation arising out of the said injuries was heard and determined by the *Magistrates Court at Kajiado CMCC No. 257 of 2016, Benson Wachira Maina -vs- Prime Steel Mills Limited* whose decree is attached to his submissions.

11. He submits that during his employment he worked without going for any annual leave contrary to **Section 28 of the Employment Act** and he cites the case of **Fancy Jeruto Cherop & Another v Hotel Cathay Limited [2018] eKLR** where the Court stated thus:-

**“The employer has the duty to ensure every employee has taken annual leave as and when due. The defence that the claimants failed to taken annual leave and thus forfeited the same is not a position supported in law as held in the case of Rajab Barasa & 4 Others versus Kenya Meat Commission [2016] e-KLR. The employer must ensure each employee has taken the annual leave when due or make payment in lieu thereof. Noting the various off days taken by the claimants in excess of the off days due, the respondent shall compute the leave days earned for the entire duration of employment and put the excess off days into account and pay for the annual leave.”**

12. That **Section 30 of the Employment Act** entitles an employee to sick leave with full pay for a period of not less than seven days and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner. That the Respondent however contravened this right as it failed to give him sick off and paid him half salary until end of December 2015.

13. The Claimant further contends that the Respondent also failed and/or refused to provide him with housing or pay him housing allowance during his employment period with it which is a statutory duty under **Section 31 of the Act**.

14. The Claimant submits that he worked overtime during the period of his employment whereas the Employment Act provides for a maximum of 8 hours of work per day with any work carried out beyond the said hours to be paid overtime. That he since he worked from 7 a.m. to 7 p.m. daily for seven days a week making a total of 12 hours for 5 years and that he therefore claims pay for the extra 4 hours he worked for 5 years at the Respondent's company. That contrary to **Section 27 of the Act**, he worked seven days a week and was not allowed a day off duty and neither was he compensated for the same.

15. He contends that he is claiming unremitted NSSF contributions by the Respondent as the same was never paid into the pension fund for the last 4 years as provided in the NSSF Act of 2013. Further, that the Respondent was under a duty as under **Section 49 of the Occupational Safety and Health Act** and other provisions of the law to provide a milk allowance due to the nature and the environment in which he worked to wit a hot (with molten iron) dusty place without proper air circulation. That he therefore seeks compensation for the said allowance for 5 years.

16. On the claim for compensation for constructive dismissal of employment, the Claimant relies on the case of **Nathan Ogada Atiagaga – v- David Engineering Limited - Cause No. 419 of 2014** where the Court defined constructive dismissal or discharge as follows:-

**"Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge."**

17. He also relies on the case of **Maria Kagai Ligaga v Coca Cola East and Central Africa Limited [unreported] - Cause No. 611 [N] of**

2009 where the Court further summed the basic ingredients in constructive dismissal as that:-

- a. **The employer must be in breach of the contract of employment;**
- b. **The breach must be fundamental as to be considered a repudiatory breach;**
- c. **The employee must resign in response to that breach; and**
- d. **The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.**

18. That in the case of Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR Rika J. observed that breach of the duty of trust and confidence is at the heart of constructive dismissal and that the employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence.

19. The Claimant submits that in the instant case, the Respondent's conduct amounted to constructive dismissal as he would only have resumed work at very great risk to his health and life with the Respondent not giving him an alternative place to work at the company.

20. He urges this Court to grant him compensation for the said termination together with payment in lieu of notice.

21. The Claimant cites the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd, Industrial Court Cause No. 66 of 2012 where the Court observed as follows:-

**“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.**

**Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.**

**Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”**

22. He submits that **Section 49(1) (c) of the Employment Act** entitles the Claimant to compensation for unfair dismissal if the Respondent fails to justify why he dismissed the Claimant and that he therefore claims general damages for the unfair dismissal by the Respondent. That he claims service pay under **Section 35(5) of the Employment Act** which provides that an employee whose contract of service has been terminated under **Section 35 (1) (c)** shall be entitled to service pay for every year worked. The Claimant urges this Honourable Court to find in his favour and to award compensation to the Claimant as well as costs and interests accrued.

23. I have considered the evidence and submissions of the Claimant herein. The issues for this Court's determination are as follows:-

- 1. Whether the Claimant was constructively terminated by the Respondent.**
- 2. Whether the Claimant is entitled to the remedies sought.**

#### **Constructive dismissal**

24. The Claimant contends that he was constructively dismissed because the Respondent expected him back to work when he was still unwell after the accident and also failed to pay him even when he was still unwell.

25. The Respondents did not give any evidence in this Court because they failed to enter appearance or file a defence and so this case proceeded exparte. The contention by the Claimant therefore remains uncontroverted.

26. It is evident from the evidence of the Claimant that he was injured while at work. He produced his medical documents to prove the injury.

27. It was therefore unfair and unjustified for the Respondent to expect him to continue working while he was still nursing injuries sustained. The failure by the Respondent to pay him his salary during the intervening period points to the fact that Respondent had already terminated him or intended to do so. In the circumstances, I find that the Claimant was indeed terminated by the Respondent constructively.

28. Having found as above, I also note that it is the duty of an employer to provide protective gear to an employee. The Claimant avers that he was injured as he was because he was not supplied with protective gear. There is no evidence to controvert this.

29. It is this Court's finding that the Respondent dismissed the Claimant from work and also failed to provide him a safe working environment which let him to being injured while at work.

30. In terms of remedies, I find for Claimant and I award him as follows:-

1. 1 month salary in lieu of notice= 9,954/=

2. Leave pay for year 2014/2015= 9,954/=

3. Service pay for 5 years served = 15 days salary for each year “A contract of ser1/2 x 9,954 x 5 = 24,885/=

4. 10 months’ salary for unfair termination = 10 x 9,954 = 99,540/=

**TOTAL = 144,333/=**

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 17<sup>th</sup> day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimani for Claimant – Present