



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT NAIROBI**

**CAUSE NO. 621 OF 2016**

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

**JOHN MWANGI WANGUI.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

1. The Claimant filed a Statement of Claim on 15/4/2016 alleging that the Respondent constructively dismissed him by ordering him to resume work yet he had not fully recovered from injuries sustained while he was on night duty.

2. The Claimant seeks the following reliefs:-

**a. Kshs. 1,259,674/-**

**b. Costs of this claim.**

**c. Interest on a, b and c from the date of filing this claim until payment in full.**

**d. Any further award that the Court may deem fit to award.**

3. The Respondent neither entered appearance nor filed a defence thus the matter proceeded as an undefended cause.

**Claimant's case**

4. The Claimant relied on his Witness Statement dated 16/2/2016 as his evidence-in-chief. He stated that he was employed by the Respondent in May 2010 in the scrap metal section and later as a Plate Mason.

5. He stated that on 18/5/2015, he was on night duty when a fire erupted from the furnace. He averred that he was injured on the face and hands and as a result he was admitted in hospital from 19/5/2015 to 1/6/2015. He stated that he never went back to work as he was on sick off. He testified that his salary was Kshs. 474 per day and upon being admitted, he was paid half salary until December 2015.

6. He averred that he went back to work in January 2016 when the Respondent informed him to resume work as his sick off had lapsed. He however averred that it was not possible for him to get back to work because he had not healed and his wounds were swelling when exposed to the sun or a hot environment. He avers that the Respondent did not give him an opportunity to work in a different environment.

7. He stated that the Respondent did not pay him any compensation despite the fact that he had filled the requisite forms.

**Claimant's submissions**

8. The Claimant submitted that the claim for compensation arising out of the injuries was determined in **Kajiado CMCC 257 of 2016 Benson Wachira Maina v Prime Steel Mills Limited.**

9. He submitted that during his employment, he worked without any leave contrary to section 28 of the Employment Act. He relied on the

case of **Fancy Jeruto Cherop & another v Hotel Cathay Limited [2018] eKLR** where the Court held that the employer has a duty to ensure that every employee has taken annual leave when it's due or make payment in lieu thereof. He therefore urged the Court to find that he is entitled to Kshs. 49,770 as annual leave.

10. He submitted that the Respondent failed to pay him full pay while on sick leave as provided under section 30 of the Employment Act. He further avers that the Respondent failed to pay him house allowance as provided under section 31 of the Employment Act.

11. He argued that he worked daily from 7 am to 7 pm, which is a total of 12 hours per day for the 5 years worked. It was therefore his submission that he is entitled to an extra 4 hours pay amounting to Kshs. 431,880/-.

12. He also submitted that he worked 7 days a week and was not allowed a day off therefore he is entitled to Kshs. 113,760/-. He submitted that the Respondent did not remit his NSSF contributions for 4 years. He further submitted that he is entitled to Kshs. 90,000 as compensation under the Occupational Safety and Health Act.

13. He relied on the cases of **Nathan Ogada Atiagaga v David Engineering Limited [2015] eKLR** and **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** on constructive dismissal. He further relied on the case of **Catherine Kinyany v Mcl Saatchi & Saatchi [2013] eKLR** where the Court held that for a claim for constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it extremely hard for the Claimant to continue working.

14. He argued that the Respondent's conduct amounted to constructive termination of employment for reason that the Claimant would only have resumed work at a very great risk to health and life. He submitted that the Respondent's conduct amounts to unfair dismissal and relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR**. He relied on Section 35 (5) of the Employment Act and submitted that he is entitled to service pay for each year worked.

15. He urged the Court to find in his favour and award compensation, costs and interests.

16. I have examined evidence of the Claimant herein this matter heaving proceeded exparte due to the failure of the Respondent to enter appearance/file defence within the requisite period.

17. The evidence of the Claimant remains uncontroverted. The Claimant has established that he was unwell having sustained injuries while on duty. He also established that the Respondents stopped paying his salary while he was still on sick off insisting that he resumes duty.

18. This in my view was an act of constructive dismissal. I therefore find that the Claimant has established that he was unfairly dismissed. 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