



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 257 OF 2015

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 13TH FEBRUARY, 2019)

SAMUEL MUTUKU MUTUNGA.....CLAIMANT

VERSUS

STEEL M AKERS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 26th February, 2015, through the firm of Njogu & Associates seeking damages for unfair termination of his employment and refusal to pay terminal dues and other monies owed to him.
2. The Claimant states that he was employed by the Respondent Company from the year 2004 to the year 2013 earning Kshs. 735/= per day translating to Kshs. 22,050/= per month.
3. The Claimant avers that his services were terminated on or about the year 2013 without prior notice and his terminal dues were not paid to him.
4. The Claimant further avers that at all times during the subsistence of his employment contract, he discharged his duties effectively, diligently and to the Respondent's satisfaction.
5. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

a) Unfair termination Kshs. 264,600.00

b) Notice Kshs. 22,050.00

c) Service pay Kshs. 99,225.00

d) Leave Pay Kshs. 198,450.00

e) Overtime Kshs. 178,848.00

f) House Allowance Kshs. 357,210.00

g) Night Allowance Kshs. 1989,710.00

TOTAL Kshs. 1,319,103.00

h) Costs of this Suit together with interest thereon for such period as this Honourable Court may deem fit to Order.

i) Any Order just and equitable relief as this Honourable Court may deem fit and appropriate.

6. The Respondent in its Memorandum of Defence dated and filed on 17th September, 2015, admits having engaged the Claimant. However,

the Respondent contends that his engagement was not continuous and was on casual basis and on daily wages.

7. The Respondent avers that the Claimant's services were not terminated without notice and states that it had stopped production, which necessitated cessation of admitting casual employees, the Claimant included.

8. The Respondent further avers that owing to the nature of his engagement, the Claimant is not entitled to the reliefs sought in his Memorandum of Claim.

9. The Respondent further prays that the claim herein be dismissed with costs.

Evidence

10. On 8th October 2018, the claimant (CW1) made his testimony and stated that he was earning 735/= at the time of termination and that the payments were made on Saturdays.

11. The Claimant averred that he worked overtime with no pay and that he was not a member of NSSF. However, he admitted having been a member of NHIF. It was his further testimony that he also worked night shift with no pay and is now seeking payment of overtime including night shift allowance.

12. The Claimant testified that he was dismissed when the Respondent told him that the raw materials were depleted and that they were further informed that they had to wait until further notice. He further testified that he was neither issued with any notice prior to his termination nor were his terminal dues paid.

13. On cross-examination, the Claimant confirmed that he was a casual employee however, his wages were not paid on a daily basis and to confirm payment they signed wage sheets.

14. On further cross-examination, he further stated that he was employed by the Respondent Company from the year 2004 to the year 2013 when his services were terminated.

15. The Respondent put up one witness one **Biliah Kemunto** (RW1), an Assistant Human Resource Officer of the Respondent Company.

16. RW1 testified that the Claimant's services were no longer necessary to the Respondent Company as production was being stopped and that based on the nature of his engagement the Respondent Company was not bound to issue any notice to the Claimant prior to this.

17. On Cross-examination, RW1 stated that the Claimant was not given any written notice stopping production.

18. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

19. The Claimant submitted that his termination was unfair, as Section 45 of the Employment Act was not complied with at the time of termination. He further submitted that the reason adduced by the Respondent for his termination was that there was no more work to be undertaken by him at the Company. For emphasis, the Claimant relied on the case of **Mombasa ELRC 107 of 2013 George Onyango Akuti Versus G4S Security Services Kenya Limited (2013) eKLR.**

20. The Claimant further submitted that his termination was unfair as no notice was issued prior to his termination contrary to the provision of Section 35(1) of the Employment Act. Further, that the Claimant was not accorded any hearing as provided under Section 41 of the Employment Act, 2007.

21. The Claimant urged the Court to allow his Memorandum of Claim as drawn.

Respondent's submissions

22. It is submitted by the Respondent that the Claimant was engaged by the Respondent as a casual labourer and engaged on and off basis and was paid on a daily basis. Further that when the Respondent Company stopped production the Claimant and others were informed accordingly.

23. The Respondent relied on the provisions of Section 35 (1) of the Employment Act that provides:-

“Where the contract of service is to pay wages daily, it shall be deemed to be a contract terminable by either party at the close of any day without notice.”

24. The Respondent further submits that the Claimant's employment is subject to Section 35 (1) (a) and therefore the entire claim must fail.

25. In conclusion, the Respondent submits that the Claimant has failed the test of standard of proof and the evidence tendered in support of the Claim, if any, is insufficient to satisfactorily prove the Claim. It is further submitted that the Claim be dismissed with costs to the

Respondent.

26. I have examined all the evidence and submissions of both parties. From the evidence of the Claimant, his wages were calculated on a daily basis but paid weekly. He also testified that there was a payment sheet that he used to sign wherever his wages were paid.

27. The Respondent insisted that they paid the Claimant on a daily basis but they never produced the payment sheets to show how they made the payments.

28. An employer is obliged by law to keep employment records including wages payment records. Had these been produced by the Respondents, they would have proved their assertion. Failure to produce such records would lead to an assumption that these records had they been produced would have been prejudicial to their case.

29. The Respondent also averred that the Claimant worked only when work was available. They also failed to produce their muster roll to prove this position as such it can be assumed that the position stated by the claimant that he worked continuously from 2004 to 2013 is the correct position.

30. From this evidence therefore, it is my finding that the claim by the Respondent that the Claimant was a casual labourer is not true. Section 37 of Employment Act states as follows:-

1) "Notwithstanding any provisions of this Act, where a casual employee:-

a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

31. The Claimant having worked for the Respondent for close to 9 years therefore satisfies to be a permanent employee and therefore provision of Section 41 of Employment Act apply to him before termination. There is no indication that he was given any notice before the termination or was he given any hearing before the said termination.

32. It is my finding therefore that the termination of the Claimant was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

33. In terms of remedies, I find for the claimant and award him as follows:-

1. 1 months salary in lieu of notice = 22,050/=

2. 9 months salary as compensation for unfair termination – 22,050 x 9 = 198,450/=

3. Service pay for 9 years = $\frac{1}{2} \times 22,050 \times 9 = 99,225/=$

TOTAL = 339,570/=

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

Dated and delivered in open Court this 13th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Guserwa holding brief Njogu for Claimant – Present

Respondents – Absent