



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2287 OF 2014

GEORGE OGOLLA ONDORO

CLAIMANT

v

NEW WORLD STAINLESS STEEL LTD RESPONDENT

JUDGMENT

1. George Ogolla Ondoro (Claimant) sued New World Stainless Ltd (Respondent) alleging unfair termination of employment and failure to pay terminal dues. The Claimant sought a total of Kshs 946,366/-.
2. In a *Reply to Statement of Claim and Counterclaim* filed on 12 March 2015, the Respondent denied the averments by the Claimant and alleged breach of contract by the Claimant.
3. The Claimant filed a *Reply to the Defence and Counterclaim* which prompted the Respondent to file a *Further Reply Statement* on 5 June 2015.
4. The Cause was heard on 12 March 2019 when the Claimant and Respondent's Executive Director testified. The parties also adopted their written witness statements.
5. The Claimant filed his submissions on 25 April 2019 (should have been filed/served before 11 April 2019) while the Respondent filed its submissions on 6 May 2019.
6. The Court has considered the pleadings, evidence and the submissions.

Commencement of employment relationship

7. The Claimant contended that he was employed by the Respondent in October 1996 as a Machine Technician.
8. To demonstrate the employment relationship, the Claimant produced several pay slips running from January 2000 to June 2014. Some of the pay slips indicate a different entity as the employer (New World Industries Ltd).
9. The Respondent however denied that it had employed the Claimant from October 1996. Copies of Agreement(s) of Service starting from 9 July 2007 were produced.
10. The Claimant acknowledged having signed the contracts.
11. The Respondent also produced a copy of a certificate of incorporation dated 2 July 2007.
12. Considering the *juristic* nature of the Respondent, technically it could not have employed the Claimant before its incorporation.
13. The Court therefore finds that the employment relationship commenced on 9 July 2007.

Desertion or dismissal?

14. The Claimant, a Machine Technician, testified that on 7 September 2014, a Mr. Satyin Bhalla ordered him to leave the factory. He asserted that this amounted to the termination of employment and was unfair because notice of 3 months was not given.
15. The Respondent's Director denied that Satyin Bhalla (his son) orally terminated the Claimant's contract. He contended that the Claimant

deserted work 8 October 2014 and produced copy of muster roll for October 2014 to show that the Claimant was marked as present up to 7 October 2014.

16. The witness also produced a copy of letter written to the District Labour Officer on 16 October 2014 informing the office of the Claimant's *desertion* of duty. The letter has the stamp of the District Labour Office acknowledging receipt.

17. The letter to the District Labour Office was written before these legal proceedings were instituted. It is not clear whether the demand letter had been delivered by that date.

18. In the view of the Court, the date of the letter to the District Labour Officer would be consistent with the narration by the Respondent's Director that the Claimant did not report to work after 7 September 2014 and that this was a case of *desertion*.

Unfair termination of employment

Procedural fairness

19. *Desertion* of duty, a more serious misconduct is in the same genre as absence from work without permission or lawful cause, and would attract summary dismissal in terms of section 44(4) of the Employment Act, 2007.

20. *Summary dismissal*, however is circumscribed by the requirements of section 41(2) of the Act.

21. The Respondent's witness stated that no attempt was made to reach the Claimant to explain his whereabouts (show cause) or allow him an opportunity to be heard.

22. Technically, the Court finds that the Respondent did not comply with the requirements of section 41(1) and (2) of the Act, and therefore there was procedural impropriety. The Respondent should have notified the Claimant that it considered the contract as at an end.

Compensation and pay in lieu of notice

23. Compensation is a discretionary remedy.

24. In the view of the Court, this is not a suitable case to award compensation.

25. Pay in lieu of notice would also be declined.

Leave

26. Every employee is entitled to at least 21 days annual leave. The Claimant alleged he had not gone on leave for 2 years for which he sought Kshs 40,600/-.

27. The Respondent produced a copy of an application for leave by the Claimant dated 21 December 2013. The records show that the Claimant commuted the leave days (Kshs 19,645/-) which was paid through cheque.

28. The application form does not indicate that the Claimant had any leave balance carried forward, and therefore the only legitimate claim for leave the Claimant would have is up to October 2014 when the separation occurred.

Salary for September 2014

29. The Claimant pleaded for Kshs 6,766/- said to be wages for 7 days worked in September 2014.

30. The Respondent did not produce any form of pay records to disprove the head of claim, and the Court will allow it.

Service pay

31. The Claimant was contributing towards National Social Security Fund and pursuant to section 35(5) & (6) of the Employment Act, 2007 would not be eligible for service pay.

Counterclaim

Pay in lieu of notice

32. The Claimant would be liable to the Respondent for breach of contract. The contract provided for 1- month notice or pay in lieu of notice but because the Respondent did not notify the Claimant that it considered the contract at an end, the Court will decline the relief.

Loan

33. The Respondent contended that it granted the Claimant a loan of Kshs 50,000/- and that by the time of separation there was a balance of Kshs 28,000/-.

34. The Claimant on his part acknowledged applying for a loan of Kshs 50,000/- but insisted that he only received Kshs 25,000/-.He asserted the balance was Kshs 7,000/-.

35. A copy of the loan agreement produced in Court indicated a loan amount of Kshs 50,000/- to be repaid over 6 months. The agreement was witnessed.

36. Although the witness was not called to testify, the Court is of the view that it is more probable that the Claimant received the Kshs 50,000/- loan and that by time of separation, deductions of Kshs 21,000/- had been made leaving a balance of Kshs 29,000/-.

37. Since the pleaded loan balance was Kshs 28,000/-, that is the sum that the Court will allow.

Conclusion and Orders

38. The Court finds and awards the Claimant

(a) Prorated leave for 2014

(b) 7 days wage for September 2014 Kshs 6,766/-

39. The Court also finds in favour of the Respondent for the counterclaim of Kshs 28,000/-.

40. The Respondent to reconcile the awards and pay any balances to the Claimant.

41. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

42. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 14th day of June 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muhia instructed by S.M. Muhia & Co. Advocates

For Respondent Ms. Muyai instructed by Mugambi Mungania & Co. Advocates

Court Assistant Lindsey