



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 779 OF 2016**

**HILLARY MTENGE KAMATA                      CLAIMANT**

**v**

**PRIME STEEL MILLS LTD                      RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 3 October 2019. Hillary Mtenge Kamata (Claimant) and Godfrey Oduor, a supervisor with Prime Steel Mills Ltd (Respondent) testified.
2. The Claimant filed his submissions on 17 October 2019 while the Respondent's submissions were not on file by this morning.
3. The parties had on 11 March 2019 filed some 8 *Agreed Issues* for trial.
4. The Court has considered the pleadings, evidence, and submissions on record and condensed the Issues as examined hereunder.

**Commencement/nature of the employment relationship**

5. The Claimant pleaded and stated that he was employed by the Respondent on 5 May 2010 as a Plate Mason on *casual terms* and that because he served for over 5 years, the contract converted into *term contract* by dint of section 37(1) of the Employment Act, 2007.
6. To demonstrate that there was a *term contract*, the Claimant produced copies of *National Social Security Fund* membership card issued on 24 May 2014 as well as a *Provisional Member Statement of Account* indicating the date of employment as 1 June 2014.
7. The Claimant also produced a copy of a labour register from the Respondent dated 16 March 2013 and a bank statement for 2015 showing salary transfers by the Respondent.
8. The Claimant further stated without the evidence being rebutted that the Respondent kept biometric attendance records.
9. The Respondent, however, asserted that the Claimant was intermittently employed on 16 March 2013; 14 May 2015 to 20 May 2015; 23 September 2015 to 26 September 2015 and from 28 September 2015 to 1 October 2015 (copies of muster roll were produced).
10. It is the responsibility of the employer to prepare a written contract in terms of section 9 of the Employment Act, 2007.
11. The Claimant's evidence was that he was not issued with a formal contract, and therefore he sought to rely on secondary evidence.
12. The Statement from the *National Social Security Fund* shows that the Respondent was paying standard contributions for the Claimant from 1 June 2014. *Casual employees* were not making standard contributions at the material time.
13. The Respondent did not deny keeping biometric attendance records. It is telling that the Respondent did not produce copies of the biometric attendance records to show that the Claimant worked intermittently as a casual.
14. The Court is satisfied on the basis of the secondary evidence that the Claimant served the Respondent on *term contract* from 1 June 2014 when the Respondent started deducting and remitting standard *National Social Security Fund* contributions on his behalf.

**Unfair termination**

15. The Claimant testified that on reporting to the Respondent's premises on 2 October 2015 he was informed that those whose names were

not on the notice board should not report to work.

16. He contended that because there was no prior notice or a hearing, the termination of employment was unfair.

17. The Respondent's witness appeared to corroborate the Claimant's testimony by stating that the Claimant's contract ended on 1 October 2015 with the payment of his wages for the day.

18. The Court has found that the Claimant was not on *casual employment* but was on *term contract* has no option but to find that the termination of the Claimant's employment without notice as contemplated by section 35(1) or a hearing as required by section 41 of the Employment Act, 2007 was unfair.

### **Compensation**

19. *Compensation* is discretionary and the factors the Court should consider in awarding it has been set out in section 49(4) of the Employment Act, 2007.

20. The Claimant served the Respondent for about 1 year during which tenure he was not issued with a written contract to know the terms and conditions of his engagement.

21. The Court is therefore of the view that the equivalent of 3 months' wages as compensation would be fair (the Court will adopt the amount of Kshs 14,220/- as pleaded by the Claimant as the same was not interrogated).

### **Pay in lieu of notice**

22. The Court having concluded that the Claimant was on *term contract* leads to the inference that he was entitled to notice as contemplated by section 35(1)(c) of the Employment Act, 2007.

23. Since the Respondent did not give the Claimant written notice, the Court would award the Claimant the equivalent of a 1-month salary, in lieu of notice.

### **Leave days**

24. The Claimant sought Kshs 71,100/- on account of leave.

25. Pursuant to the provisions of section 28 of the Employment Act, 2007, each employee is entitled to at least 21 days annual leave on full salary.

26. The Respondent did not produce leave records at least for the last year of service of the Claimant, and the Court will allow commuted leave, but only for the last year equivalent to 1 month salary.

### **Overtime**

27. The Respondent did not deny that it had biometric attendance records and before that, manual attendance records. The same was not produced.

28. The Claimant's testimony that he used to work from 7.00 am to 7.00 pm for 7 days in a week was not challenged.

29. The Claimant contended that he worked 10296 hours of overtime. This must have been based on the assumption that the employment relationship commenced in 2010.

30. The Court has concluded that based on the material on record, the relationship commenced in June 2014.

31. During cross-examination, the Claimant admitted that a copy of the records produced by the Respondent indicated that overtime work was paid for.

32. The Court is, therefore, unable to agree with the Claimant that overtime work was not compensated.

33. The head of the claim is declined.

### **Severance pay**

34. Severance pay is an entitlement in cases of redundancy.

35. The Claimant did not prove that this was a case of redundancy.

### **Conclusion and Orders**

36. The Court finds and holds that the Claimant was on *term contract* from 1 June 2014 and that the Respondent terminated his employment unfairly and awards him

(a) Compensation           Kshs 42,660/-

(b) Pay in lieu of notice   Kshs 14,220/-

(c) Leave                    Kshs 14,220/-

TOTAL                       **Kshs 71,100/-**

37. Respondent to issue a certificate of service within 21 days.

38. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of November 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Maloba instructed by Kiruki & Kayika Advocates

For Respondent Mr. Mutoro instructed by F.N. & Brian Advocates

Court Assistant   Lindsey