



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 41 OF 2017

(Formerly Nakuru Cause No 243 of 2016)

MARTIN RATEMO NIXON CLAIMANT

VERSUS

JUMBO NORTH EAST AFRICA MILLS LIMITED.... RESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed by the respondent as a Tongs Machine Operator on September, 2009 he later became a supervisor. He stated that he used to earn Kshs. 400 for twelve hours each day which worked out to Kshs. 12,000/= per month. The mode of payment was by cash and later on through I & M Bank Limited.
2. According to the Claimant he served respondent with dedication and commitment until around 31st March, 2015, when the respondent summarily dismissed him from employment. The Claimant alleged that prior to dismissal he had earlier been involved in an industrial accident and got injured while on duty on 9th March, 2014.
3. During the period he worked the respondent never paid him house allowance and never allowed him rest days. The respondent further failed or refused to pay the Claimant his terminal benefits upon termination and also failed or refused to issue the Claimant with a certificate of service.
4. The respondent on the other hand pleaded that when the claimant joined its employment in 2012 he was engaged as a casual labourer at the rate of Kshs. 350/= per day and payments were made weekly and the total depended on members of days an employed would have worked. This would include overtime dues.
5. The respondent denied that the Claimant was summarily dismissed from employment unfairly. Accordingly to the respondent the Claimant and one Mr. Erick Ochenga were involved in theft of respondents metal which was done by through overloading the lorry which was to be dispatched from the respondents factory and when they were stopped at the respondent's weight bridge by the respondent's security guards they vanished leaving behind the lorry and the metals. A report was made at Kapsoya Police Post on 26th March, 2015 vide OB 24/26/03/2015. And have absconded duties since then.
6. The respondent denied withholding the Claimant's terminal benefits and further contended that the Claimant is not entitled to any damages given the manner in which he left employment without notifying the respondent.
7. At the hearing the Claimant adopted his recorded statement as evidence in Chief and further stated that he got injured at work and when he issued a demand letter for compensation he was terminated and told work had reduced. He denied leading extra steel and that he absconded duty. It was his evidence that Zachary Tarakwa was his supervisor and Lawrence Omas was the supervisor for lorries. He stated that he has never been arrested for any offence nor summoned for any disciplinary hearing.
8. According to him, his salary was kshs. 12,000/= per month at the time he was terminated. Further he alleged that he never went on leave during the period he worked and that the respondent deducted but never remitted his NSSF dues.
9. In cross-examination he stated that he was employed in 2009 and was paid Kshs. 200 per day. This was remitted weekly and included overtime for the week. He stated he knew Erick Ochenga, that they used to work together and they were not terminated the same day he denied running away from work. He further denied being found with extra steel loaded on the lorry. The Claimant further stated that he signed a voucher on 16th December, 2013 and also declaration of settlement on the same date. He signed another on 20th December, 2014. He further stated the respondent used to remit NSSF dues.

10. The Respondent's witness Mr. Zakaria Ngaira informed the Court that he worked for the respondent as Human Resource supervisor. He adopted his statement as evidence in Chief. According to him, the Claimant was employed at the end of 2011. His pay was Kshs. 350 per day paid weekly. The amount paid weekly included overtime and that leave was paid every year.

11. It was his evidence that the Claimant signed every year that dues had been paid. According to him, there was no termination, the Claimant left work on his own on 24th April, 2015 and that the incident was reported at Kapsoya Police station.

12. In cross-examination he stated that no show cause letter was issued because the Claimant deserted. The respondent's witness Mr. Lawrence Omas stated that he worked for the respondent as a supervisor and that the Claimant bonded excess pieces of steel on the lorry and they were called to the weighbridge the Claimant had disappeared.

13. A termination of employment on account of desertion in order to be justifiable must be supported by evidence of attempts contact the employee to show cause why the employment should not be terminated for unauthorized absence from work.

14. In this particular case, it may well be true that the Claimant attempted to smuggle extra steel from the respondent premise, it may also be true that on being found he ran away and has never come back. However to justify the termination, the employer must show attempts were made to contact the employee to show cause why his services should not be terminated on account of desertion. This has not been demonstrated by the respondent.

15. To that extent the Court finds and holds that the termination of the Claimant's service was unfair in terms of procedure.

16. The Court therefore awards him as follows.

	Kshs.
(a) One month's salary in lieu of notice	12,000
(b) Six months' salary as compensation for unfair termination	<u>72,000</u>
	<u>84,000</u>

(c) Costs of the suit.

17. The claims for overtime and annual dues have been successfully rebutted by the respondent. Further the Claimant admitted that he signed for his annual dues every year which included all his allowances including overtime.

18. The award shall attract interest at Court rates but shall where applicable be subject to taxes.

19. It is so ordered.

Dated at Nairobi this 14th day of November 2019

Abuodha Jorum Nelson

Judge

Delivered this 14th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge