



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 248 OF 2017

(Before Hon. Justice Mathews N. Nduma)

MWANGANGI MBUMBU.....CLAIMANT

VERSUS

PRIME STEEL MILLS LIMITED..... RESPONDENT

JUDGMENT

1. By a statement of Claim dated 27th January, 2017 and filed on 9th February, 2017 the Claimant seeks damages for unfair dismissal and payment of terminal benefits including –

- | | |
|--------------------------------|----------------|
| (i) Severance Pay | Kshs. 46,260/- |
| (ii) Notice Pay | Kshs. 15,420/- |
| (iii) Overtime for 8,760 hours | Kshs.844,245/- |
| (iv) Leave pay | Kshs. 92,520 |
| (v) Certificate of Service. | |
| (vi) Interest and Costs. | |

2. The memorandum of Claim and Notice of Summons were served on the Assistant Human Resource Manager of the Respondent Mr. Stanley Okoth, in his office at Kitengela on 16th February, 2017.

3. The Respondent did not enter appearance nor file memorandum of defence.

4. The claim is therefore undefended and proceeded to formal proof on 21st September, 2017.

5. The Claimant testified under oath in support of the Claim. He adopted a witness statement dated 27th January, 2017 as his evidence in chief.

6. The Claimant further relies on the list of documents attached to the statement of claim including NSSF statement of account, claimant's casual labour card, employee pay sheet and claimant's bank statement.

Facts of the Case

7. The Claimant was employed by the Respondent in 2010 as a laboratory technician earning Kshs.514 daily wage.

8. The Claimant worked continuously until 29th August 2016, when the Respondent terminated the employment of the Claimant on the basis that there were no more work for the Claimant and several of his colleagues. The termination was without notice. The Claimant worked from 7am to 7pm daily for 7 days a week inclusive of public holidays. The Claimant was never paid overtime for the extra hours worked. The Claimant states that the termination was unlawful and unfair and violated sections 36, 40, 41, 44, 45 and 46 of the Employment Act,

2007.

9. The Claimant was not issued with a certificate of service upon termination. The Claimant prays that the suit be allowed with costs.

Determination

10. The issues for determination in this matter are –

- (a) Whether the Claimant who was admittedly employed as a casual had converted to a permanent employee and therefore entitled to the benefits claimed.
- (b) Whether the Claimant has proved that he is entitled to the terminal benefits sought.
- (c) If the Claimant had converted to a permanent employee, whether the termination was lawful and fair.

Determination

Issue (i)

11. The Claimant was employed as a daily paid casual in the year 2010. From his sworn testimony and documentary evidence produced especially, the Claimant's bank statement, it is clear that the Claimant worked continuously and salary was remitted to his bank account by the Respondent on a weekly basis until the employment was terminated on 29th August, 2016. At the time of termination, the Claimant earned a daily wage of Kshs.514, paid weekly.

12. In terms of section 37 of the Employment Act, 2007 a casual employee converts into permanent, protected status when –

- (a) He/She works for a period or a number of **continuous working days** which amounts to one month or more.
- (b) Performs work which cannot reasonably be expected to be completed within a period equivalent to three months or more.

13. When the above happens the contract of the employee is deemed to be one where wages are paid monthly, regardless of the mode of payment made by the employer and the contract may only be terminated upon giving at least 28 days notice in terms of section 35(1)(c) of the Act.

14. From the uncontroverted evidence by the Claimant, the contract of service of the Claimant had converted from a casual employee to a protected employee in terms of section 35 and 37 of the Act and the court finds so.

Issue (ii)

15. Having found that the Claimant had converted from a casual to an employee protected by the provisions of the Employment Act, 2007, the Claimant upon proof on a balance of probability is entitled to –

- (i) Payment in lieu of notice in terms of section 36, 37 and 38 of the Act.
- (ii) At least 21 days leave or payment in lieu of leave not taken in terms of section 28 of the Act.
- (iii) All the redundancy terms and benefits set out under section 40 of the Act.
- (iv) Overtime in respect of hours worked in excess of 8 hours worked daily and hours worked during public holidays upon proof of such work.

16. Accordingly, the court is satisfied that the Claimant has proved on a balance of probabilities that he is entitled and is awarded –

- (a) Kshs.15,420 in lieu of termination notice.
- (b) Kshs.92,520 in lieu of leave days evidently not granted on the mistaken belief that the Claimant was still a casual.
- (c) Payment of a total of Kshs.8,760 hours worked in excess of the 8 hours working day, and not paid on the mistaken belief that the Claimant was a casual in the sum of Kshs.844,245.
- (d) Severance pay calculated at 15 days salary for the six(6) years served in terms of section 40(1)(g) of the Act.

Issue (iii)

17. No evidence has been adduced to show that the Respondent was not entitled to declare the Claimant and others redundant on account that

there was no more work to be done by the employees. Accordingly the Claim for grant of damages for unlawful declaration of redundancy has no merit and is dismissed.

18. In final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

- (a) Kshs.15,420 in lieu of notice.
- (b) Kshs.46,260 severance pay.
- (c) Kshs.844,245, overtime done and not paid for.
- (d) Kshs.92,520 in lieu of leave days not granted.

Total award Kshs.998,445.

- (e) The award is payable with interest at court rates from date of filing suit till payment in full.
- (f) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 5th day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 16th day of February, 2018

Maureen Onyango

Judge

Appearances

Mr. Maina for Claimant

Anne Njung'e – Court Clerk