



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 894 OF 2014

ELIJAH MARUBE OKETCH.....CLAIMANT

VS

ENDMOR STEEL MILLERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This matter has traveled a long litigation journey. It first came before me on 7th December 2015 when I took the Claimant’s evidence in chief, after which I gave 21st January 2016 for further hearing.
2. For some reason, the matter did not proceed on 21st January 2016. On 12th October 2016, the Claimant was given the date of 21st March 2017 at the Registry. On this date, there was no appearance for the Respondent and I therefore closed both the Claimant’s and Respondent’s cases and directed the parties to file final submissions.
3. The Respondent subsequently moved the Court by way of Notice of Motion under certificate of urgency seeking orders to reopen the case. On 31st May 2017, the parties agreed that the Claimant be recalled for cross examination and that the Respondent’s witness be allowed an opportunity to testify. This happened on 16th November 2017 and thereafter, parties filed their submissions.

The Claimant’s Case

4. The Claimant’s case is documented by a Memorandum of Claim dated 28th May 2014 and filed in court on even date. He states that he was employed by the Respondent as a general worker from September 2012. As at the time of leaving employment on 20th January 2014, the Claimant earned a daily rate of Kshs. 800. He avers that on this date, he was asked by his supervisor, Philip Soita to leave work and report back on 21st January 2014 but when he reported, he found that his position had been taken over by a new employee. Upon inquiry, the supervisor directed the Claimant to the Production Manager, Mr. Singh who told him to go home as his services had been terminated.
5. The Claimant claims that the termination of his employment was unlawful and unfair as he was not given any reason for the termination nor was he given an opportunity to be heard. He claims the following:

a) One month’s salary in lieu of notice.....Kshs. 24,000

- b) Unpaid salary for 18th and 20th January 2014.....1,600
- c) Pay in lieu of untaken leave for 1 year & 5 months.....34,000
- d) Service pay @ 15 days per year.....12,000
- e) 12 months' salary as damages for unfair termination.....288,000
- f) Costs plus interest

The Respondent's Case

6. In its Memorandum of Response dated 22nd August 2014 and filed in court on even date, the Respondent states that the Claimant was a casual worker contracted from time to time on need basis. He was paid Kshs. 471 for each duration of eight (8) hours worked.

7. The Respondent further states that the Claimant suddenly and without explanation deserted duty on 20th January 2014 and never reported back. The Respondent denies terminating the Claimant's employment or withholding his terminal benefits.

Findings and Determination

8. From the pleadings filed by the parties and the evidence adduced before the Court, the following three (3) issues emerge for determination:

- a) The status of the Claimant's employment;
- b) Whether the Claimant deserted duty or was unlawfully terminated;
- c) Whether the Claimant is entitled to the remedies sought.

The Claimant's Employment Status

9. In its Memorandum of Response, the Respondent avers that the Claimant was a casual worker contracted from time to time on need basis. On his part, the Claimant states that he worked throughout from September 2012 until 20th January 2014.

10. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person whose terms of engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”

11. The Respondent's Human Resource Officer, Sharon Muli testified that the Claimant worked six (6) days a week. Further, none of the employment records produced by the Respondent were consistent with casual employment. The averment that the Claimant was a casual employee was therefore not supported by any evidence and is rejected, with the conclusion that the Claimant was a regular employee of the Respondent.

Desertion of Duty or Unlawful Termination?

12. In its Memorandum of Response, the Respondent states that the Claimant deserted duty on 20th January 2014, never to return. Desertion of duty is a legitimate ground for termination of employment. Nevertheless, like all other grounds, it must be proved.

13. It is now well settled that an employer who seeks to rely on this ground must demonstrate the efforts

made to get in touch with the deserting employee. In *Evans Ochieng v Njimia Pharmaceuticals [2016] eKLR* this Court reiterated that such an employer is expected to notify the employee that termination on account of desertion is being considered.

14. In the instant case, there was no effort made to contact the Claimant, much less notifying him that his termination was in the offing. What is more, the Respondent's witness told the Court that the Claimant had in fact been suspended for two (2) weeks. Neither the witness nor the Court could tell the circumstances and terms of the alleged suspension. There are far too many gaps in the Respondent's account of what led to the Claimant's separation from its employment leading to only one conclusion; that the Claimant's employment was unlawfully terminated.

Remedies

15. In light of this, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I also award the Claimant one (1) month's salary in lieu of notice.

16. In the absence of any documentary evidence to counter the claims for leave pay and salary for two (2) days in January 2014, these claims succeed and are allowed.

17. The Claimant also claims service pay. His claim under this head is based on the averment that the Respondent did not remit all his National Social Security Fund (NSSF) dues. The Claimant produced a provisional statement issued by NSSF in support of this claim. This statement however, only shows records up to December 2012. Without the subsequent records, the Court was unable to determine the veracity of the Claimant's claim that the Respondent had not remitted all his NSSF dues. Consequently, the claim for service pay fails and is dismissed.

18. Before making the final award in this matter, I need to determine the Claimant's monthly salary on which the parties differed. While the Claimant gave Kshs. 800 as his daily rate, the Respondent gave the figure of Kshs. 471. Under the Employment Act, the employer is obligated to keep employee records. The daily rate of Kshs. 471 was not backed by any such record and the Court therefore invokes Section 10 (7) of the Act and adopts the rate of Kshs. 800 pleaded by the Claimant, making his monthly salary Kshs. 24,000.

19. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs.144,000
b) 1 month's salary in lieu of notice.....	24,000
c) Salary for 2 days in January 2014.....	1,600
d) Leave pay for 1 year & 4 months (800x21+800x1.75x4).....	<u>22,400</u>
Total.....	192,000

20. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

21. The Claimant will have the costs of the case.

22. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF APRIL 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NATIROBI THIS 13TH DAY OF APRIL, 2018

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JUDGE

Appearance:

Mr. Wathome for the Claimant

Miss Oswera for the Respondent