



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2119 OF 2015

CEDRIC LUMIDI.....CLAIMANT

v

PRIME STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

1. This Cause was heard on 16 April 2018 when Cedric Lumidi (Claimant) and the Group Human Resources Manager of Prime Steel Mills Ltd (Respondent) both testified.
2. The Claimant filed written submissions on 11 May 2018 (should have been filed by 27 April 2018) while the Respondent filed its submissions on 16 May 2018.
3. The Court has considered the pleadings, evidence and submissions and identified the Issues for Determination as, *what was the nature of the contract between the parties, whether the termination of the Claimant's employment was unfair, whether the Claimant was underpaid, whether the Claimant worked overtime without pay and appropriate remedies/orders.*

Nature of contract

4. The Claimant was engaged by the Respondent around 6 June 2014 as a Plant Human Resources Officer.
5. The engagement was preceded by verbal discussions, in which, according to the Claimant, remuneration was agreed as Kshs 55,000/- per month.
6. However, according to the Claimant, the written contract which he was given to sign indicated that the salary was Kshs 48,000/- per month, and therefore he declined to sign it.
7. On the part of the Respondent, its witness stated that because the Claimant declined to sign the contract he was issued with, the contract was oral, and was for 1 year.
8. Both parties therefore broadly agree that the contract was oral but there is a question as to its duration.
9. Assuming that the agreement was for 1 year contract, the Respondent was under a statutory obligation to reduce in into writing in accordance with the requirements of section 9(1) & (2) of the Employment Act, 2007.
10. The Respondent drew a written contract but the Claimant declined to sign it on the ground that it did not reflect the verbal discussions made prior to its drawing.
11. And because the Claimant did not sign the contract but assumed the position he was offered on a monthly salary of Kshs 48,000/-, the Court can conclude that the contract was of an indefinite duration, but subject to the provisions of part VI of the Employment Act, 2007.

Unfair termination of employment

Procedural fairness

12. In terms of section 35(1)(c) of the Employment Act, 2007, an employee paid by the month ought to be given a written notice of

termination of employment at least 28 days in advance.

13. Further, and by dint of section 41 of the Act, the employee should be informed of the reasons for the contemplated termination of employment and be afforded an opportunity to make representations in the company of a colleague, if the termination is on account of *misconduct, poor performance or physical incapacity*.

14. The requirements of section 35 and 41 of the Employment Act, 2007 assure an employee of *procedural fairness* and the process under section 41 of the Act is mandatory.

15. On the circumstances surrounding the separation, the Claimant stated that after 1 year of service, he proceeded on leave and when he resumed he was called to a meeting and informed that his employment had been terminated due to *performance*.

16. He stated that the termination of contract was not preceded with a *show cause notice*, and that though he was shown and signed a copy of the letter of termination, he was not given a copy.

17. The Respondent's witness' testimony on the reason for the separation was that the Claimant was *underperforming* (failing to give reports on time leading to loss of production).

18. According to the witness, because the contract between the parties was oral and was for 1 year, and because of the *performance* concerns, when it came up for renewal after 1 year, the Claimant was informed that it would not be renewed.

19. Because the Court has already concluded that the contract was of an *indefinite* duration, then in terms of sections 35(1) and 41 of the Employment Act, 2007, written advance notice or *show cause* and a hearing were imperative.

20. The Respondent did not demonstrate that it gave the written notice as envisaged under section 35(1)(c) of the Employment Act, 2007 or conduct a hearing as contemplated by section 41 of the Act.

21. The Court finds that the termination of the Claimant's employment was *procedurally unfair*.

Substantive fairness

22. With that finding on *procedural fairness*, it is not necessary for the Court to inquire into whether the Respondent has proved reasons for its action, or that the reasons for such decision were valid and fair in terms of sections 43 and 45 of the Employment Act, 2007.

Underpayments

23. The Claimant's testimony was that there was a verbal agreement on a monthly salary of Kshs 55,000/- but that he was being paid Kshs 48,000/- per month.

24. The Respondent's witness denied that there was a verbal agreement to pay the Claimant Kshs 55,000/-.

25. It appears that if there was an agreement of minds on the remuneration, the same was not reduced into writing.

26. It is noteworthy that the Claimant, a *human resource practitioner* did not put into writing any disagreements on the remuneration despite serving for a whole year.

27. Considering that the Claimant nevertheless agreed to assume the position and received the salary of Kshs 48,000/-, the Court is unable to agree with the Claimant that he was underpaid. He acquiesced to the remuneration.

28. This head of claim was not proved.

Overtime

29. The Claimant did not disclose during testimony the prescribed minimum working hours within the sector the Respondent was operating in beyond which overtime would become payable.

30. There was also no evidence as to the nature of the business the Respondent was involved in to enable the Court determine whether any of the *Regulation of Wages Orders* applied.

31. On contractual agreement as to the working hours, the Claimant's testimony was vague and general. There was no evidence as to how the pleaded 260 hours of overtime was accumulated, and the formula used to arrive at the sum of Kshs 89,375/-.

32. This head of claim was not proved.

Appropriate remedies

Pay in lieu of notice

33. The Court finds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice.

Compensation

34. The Claimant served the Respondent for 1 year, and in consideration of the length of service, the Court is of the view that the equivalent of 2 months' salary as compensation would be appropriate.

Lost income for balance of contract

35. The Court having reached a conclusion that the contract was of an indefinite duration, the question of lost income for unserved term of contract becomes moot.

Certificate of Service

36. A certificate of service is a statutory right and the Respondent should issue one to the Claimant forthwith.

Conclusion and Orders

37. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(a) Pay in lieu of notice	Kshs 48,000/-
(b) Compensation	Kshs 96,000/-
TOTAL	Kshs 148,000/-

38. Respondent to issue certificate of service forthwith.

39. Claimant is denied costs for late filing of submissions with no explanation tendered.

Delivered, dated and signed in open Court in Nairobi on this 18th day of May 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maina instructed by Kiruki & Kayika Advocates

For Respondent Mr. Kigata instructed by Wamae & Allen Advocates

Court Assistant Lindsey