



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 69 OF 2017

[FORMERLY MOMBASA ELRC CAUSE NO 52 OF 2016]

DAVID MASHA MAITHA.....CLAIMANT

VS

ARM CEMENT(formerly known as

ATHI RIVER MINING LTD).....RESPONDENT

JUDGMENT

Introduction

1. By his claim brought by Memorandum of Claim dated 3rd February 2016 and filed in court on 4th February 2016, the Claimant seeks compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Reply on 7th December 2016.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Assistant, Nelly Nzingo Mulewa.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Welder on 16th September 2010. He earned a daily rate of Kshs. 550. He states that his employment was unlawfully and unfairly terminated on 19th June 2015.

He therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 14,300
- b) Unpaid leave for 4 years.....46,200
- c) Public holidays for 4 years.....44,000
- d) Unfair termination.....171,600
- e) Costs plus interest

The Respondent's Case

4. In its Memorandum of Reply dated 7th December 2016 and filed in court on even date, the Respondent admits that the Claimant was employed as Welder on 16th September 2010 under an oral agreement.

5. The Respondent denies the Claimant's claim for unlawful and unfair termination and states that the Claimant's employment was lawfully terminated on 19th June 2016, on account of poor performance. The Respondent adds that upon termination, the Claimant was paid his full terminal dues, including notice and leave pay.

Findings and Determination

6. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

7. In his testimony before the Court, the Claimant stated that his employment was terminated because he had inquired about working overtime without compensation. On its part, the Respondent maintains that the Claimant's termination was on account of poor performance.

8. While poor performance is a valid ground for termination of employment, it is always subject to the procedural fairness requirements set out under Section 41 of the Employment Act, 2007. The correct procedure of dealing with cases of poor performance was stated by **Rika J** in **Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures (Cause No 273 of 2010)** as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

9. In the case now before me, it is evident that the Claimant was not provided with any particulars of poor performance nor was he afforded any opportunity to improve. The result is that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

10. In light of the foregoing findings, I award the Claimant eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. The Claimant is also entitled to one (1) month's salary in lieu of notice.

11. In her witness statement dated 29th January 2018 and filed in court on 30th January 2018, the Respondent's witness, Nelly Nzingo Mulewa states that the Claimant was paid leave pay for 56 months. She was however unable to prove any payment to the Claimant, who himself denied receiving any money from the Respondent. Consequently, I award the Claimant leave pay for 56 months as admitted by the Respondent.

12. The claim for public holidays was not proved and is dismissed.

13. Cumulatively, I enter judgment in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 114,400
 - b) 1 month's salary in lieu of notice.....14,300
 - c) Leave pay for 56 months (550x56).....30,800
- Total.....159,500**

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

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

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF JUNE 2018

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JUDGE

Appearance:

Miss Marubu for the Claimant

