



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1318 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SIMEON MUTINDA.....CLAIMANT

-Versus-

PRIME STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

The claim herein has been instituted by the claimant who avers that he was unlawfully and unfairly dismissed by the respondent Prime Steel Mills Limited, his former employer. He further avers that the respondent failed to pay his terminal dues. He prays for the following remedies –

i... One month’s salary in lieu notice being

Kshs.457 x 30 daysKshs.13,710/=

ii.. Payment in lieu of untaken and unpaid leave

for the entire duration of service being

Kshs.13,710 x 5 years Kshs.68,550/=

iii. Service/Gratuity at the rate of 15 days’ salary

for every completed year of service

as NSSF was not remitted being

15/30 x Kshs.13,710 x 5 years Kshs.34,275/=

iv. 12 months gross salary being

Kshs.13,710 x 12 years Kshs.164,520/=

Total **Kshs.281,055/=**

The respondent did not file an appearance or defence although there is an affidavit filed on 8th December 2015 in which the process server depones that he served summons upon the respondent on 8th August 2014 upon Mr. Ongidi, the Human Resource Manager who accepted service but declined to sign his extra copy, which was returned to court.

The case was heard on 6th February 2018 in the absence of the respondent.

Claimant’s Case

It is the claimant's case that he was employed by the respondent in 2008 as a Tongsman but was not issued with a letter of appointment. His salary was Kshs.3,200 per week. He worked until 2014 when his employment was terminated. The reason for termination was that he had filed **MAVOKO CMCC NO. 1037 OF 2013** for compensation in respect of injury sustained in the course of employment on 2nd June 2011. That he had been treated at Kikuyu Eye Hospital for the injury to the left eye and had resumed work. He stated in his testimony that he was told by security guards at the gate that there was no work because he had filed suit against the company.

He states that he was not paid terminal dues or issued with a certificate of service even after his advocate sent a demand letter to the respondent. He testified that he was not given any notification of intention to terminate his employment, nor was he given a hearing. He further testified that he was not at fault, nor was he guilty of misconduct. He further testified that he did not take annual leave from 2008 to 2014 and was not paid in lieu of leave. He testified that the respondent did not pay NSSF and he was not paid service pay at the time of termination of service. He testified that the termination of his employment was unfair. He prayed for remedies as sought in his prayer in the claim.

Determination

I have considered the pleadings and the testimony of the claimant. I have further considered the submissions filed on behalf of the claimant.

In a case like the present one where there is no defence or admission of any averments in the claim, it is the duty of the claimant to establish that there was an employment relationship between him and the respondent. This he can do by producing some evidence that links him to the employer. The claimant testified that he was not issued with a letter of appointment. This does not absolve him from proving that there was indeed an employment relationship between him and the respondent. I note that the documents in the file other than the affidavit of service do not reflect the address of the respondent.

Before the court can consider the prayers of the claimant it must ascertain that indeed there was an employment relationship which was terminated as alleged by the claimant. No such relationship has been established.

It is trite law that he who avers must prove. Section 47(5) of the Employment Act provides that it is the burden of the employee to prove that there was an unfair termination or wrongful dismissal before the burden shifts to the employer to justify the grounds for termination. In this case, the claimant has failed to prove the existence of an employment relationship, which must first be established before the termination thereof can be considered.

This being the case, the claim must fail. I accordingly dismiss the claim on grounds that the claimant has not proved his case.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE