



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1820 OF 2013

JAMES OCHOLA OCHOLA.....CLAIMANT

VERSUS

APEX STEEL LIMITED.....RESPONDENT

JUDGMENT

1. James Ochola Ochoa (Claimant) acting in person instituted legal proceedings against Apex Steel Ltd on 13 November 2013 alleging breach of contract (failure to pay salary in lieu of notice, accrued leave for 5 years, underpayments, house allowance and severance pay).
2. On 21 March 2014 an *Amended Memorandum of Claim* was filed on behalf of the Claimant by Owang & Associates Advocates and on 23 November 2015, the firm of Okemwa & Co. Advocates came on record.
3. On 20 June 2015, the Respondent filed a *Statement of Response* to the *Amended Memorandum of Claim* contending that the Claimant was a casual employee paid based on volume of work and was later assigned duties as general labourer before resigning.
4. The Cause was heard on 19 April 2018 and on 11 July 2018. The Claimant and the Respondent's Human Resources Manager and Supervisor testified.
5. The parties did not file submissions within the agreed timelines.
6. The Court has considered the pleadings and evidence and identified the Issues for determination as, *whether Claimant had accrued leave by time of separation, whether Claimant was underpaid, whether Claimant's wage included house allowance, whether Claimant was entitled to severance pay and appropriate remedies/orders.*
7. Just for record purposes the Court notes that this was not a case of unfair termination of employment as the Claimant voluntarily resigned from employment through a letter dated 27 September 2012.

Accrued leave

8. The Claimant testified that he was a Machine Operator up to February 2010 when he was assigned duties of a turn boy, duties he carried until he became a general labourer in 2012 and that he was seeking accrued leave.
9. The Respondent maintained that the Claimant was a casual employee from 2007 to 7 May 2011 and was thus not entitled to any leave, and that from 2011 to separation, the Claimant was on contract.
10. Despite the contention, the Respondent filed leave records which show that *casual workers* leave days were commuted. The Claimant is listed in the breakdown for 2011.
11. Considering that other *casual workers* leave days were commuted, the Court finds that it is unfair and discriminative not to pay the Claimant *commuted leave* for 2007, 2008, 2009 and 2012.
12. However, because of section 28(4) of the Employment Act, 2007, the Court declines to grant a relief under this head.

Underpayments

13. The Claimant anchored his claim for underpayments on various *Regulation of Wages Orders* prescribing minimum wages during the employment.
14. The Respondent on the other hand advanced the position that the Claimant was on *piece rate* and was therefore not underpaid.
15. In the view of the Court, the position presented by the Respondent could not have been true for the *Casual Workers Daily Wage Sheets* for 2007 indicate that all the *casual workers* were on a daily rate of Kshs 230/- and also worked overtime.
16. Piece work by its very nature would be incongruent with a uniform daily wage.
17. In 2006, the prescribed minimum wage for a machine attendant was Kshs 265/- (see LN No. 38 of 2006), 2009 the prescribed daily wage for machine attendants was Kshs 312/70 (see L.N. No. 70 of 2009) and in 2011, the prescribed minimum daily wage was Kshs 386/- (see L.N. No. 38 of 2011).
18. The Court finds that the Claimant was underpaid as particularised in the witness statement which was adopted as part of the evidence.

House allowance

19. The schedule to the various *Regulation of Wages Orders* relied on by the Claimant are clear that daily and hour rates of pay are inclusive of house allowance.

Severance pay

20. The Claimant did not lay any contractual or evidential basis for payment of *severance pay*, and if he meant the *severance pay* provided for in section 40 of the Employment Act, 2007, he would not be entitled to the same as his case was not one of redundancy.

Conclusion and Orders

21. The Court finds and holds that the Claimant has made out a case for an award of and is awarded

(a) Underpayments Kshs 21,408/-

22. The other heads of reliefs are dismissed.
23. Claimant is denied costs for failing to file/serve submissions.

Delivered, dated and signed in Nairobi on this 2nd day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Okemwa instructed by Okemwa & Co. Advocates
For Respondent Ms. Mumbi instructed by LJA & Associates Advocates
Court Assistant Lindsey