



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT**

**AT NAIROBI**

**CAUSE NO. 1344 OF 2014**

***(Before D. K. N. Marete)***

**CHRISPINE ONGUSO OKINYI.....CLAIMANT**

**VERSUS**

**DEVKI STEEL MILLS LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by a Memorandum of Claim dated 11th August, 2014. It does not disclose any issue in dispute on its face.

The respondent in a Statement of Defence dated 10th December, 2014 denies the claim and prays that this be dismissed with costs.

The claimant in a Reply to Defence dated 15th October, 2014 prays that the statement of defence be struck out with costs and judgement entered in his favour as prayed.

The respondent in a Reply to the Memorandum of Claim dated 1st October, 2018 reiterates his defence and further prays that the claim be dismissed with costs to the respondent.

The claimant's case is that on or about 1st September, 2008 he was employed by the respondent as a machine helper at a salary of Kshs.15,000.00.

The claimant's further case is that on or about 14th September, 2012, he was operating a straightening machine within the respondent's premises when the machine crushed, fractured and badly mutilated his fingers. He further avers that this was occasioned by reason of negligence of the respondent as follows;

- i. Failing to take any adequate precautions for the safety of the Claimant while he was engaged in his work.*
- ii. Exposing the Claimant to a risk of damage or injury which they knew or ought to have known.*
- iii. Failing to take any adequate measure to ensure that the place where the Claimant carried out his work was safe.*
- iv. Failing to provide suitable or sufficient protection while the Claimant was engaged in his work.*
- v. Failing to provide and maintain a safe and proper system of work or to instruct their workmen including the Claimant to follow that system.*

The claimants' other case is that as a result of the negligence of the respondent above cited, he was severely injured and has suffered loss and damage as follows;

**PARTICULARS OF INJURIES**

- i. Fractured and crushed on the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> fingers*
- ii. Amputation of the index, middle and ring finger on his right hand*

*iii. Permanent disablement*

Again, his ring finger had been earlier amputated on account of working under these conditions.

The claimant's further case is that sometimes in October, 2012, the respondent unfairly and unlawfully terminated his services without payment of any dues and blocked his access to the work premises. Then, he had had a four year and seven months stint of diligent service. This termination was in total disregard of the law and particularly the Employment Act, 2007. This is as follows;

**PARTICULARS OF UNFAIR TERMINATION & DISMISSAL**

- i) Failure to pay the Claimant his dues in lieu of notice.*
- ii) Disregard of due process of notification and hearing under Section 41 of the Act and issue a notice, in a language that the Claimant understands, that it is intended to terminate the Claimant' contract of employment on account of "ill-health"*
- iii) Failure for the Respondent to require the Claimant present himself or herself before a medical professional or board to facilitate a medical certificate of fitness or unfitness*
- iv) Failure for the Respondent to hear the Claimant's representations in view of the medical certificate of fitness or unfitness*
- v) Termination of the services of the claimant without being given the right to be heard.*
- vi) Termination of the services of the Claimant without paying him full dues as required by law.*

He claims as follows;

- i. One year compensation for loss of employment*  
*(Kshs.15,000.00\*12 months) Kshs.180,000.00*
- ii. Salary for October 2012 Kshs. 15,000.00*
- iii. Three months payment in lieu of notice*  
*(15,000\*3 months) Kshs.45,000.00*
- iv. Leave days earned but not taken (84 days) Kshs.98,000.00*
- TOTAL Kshs.98,000.00***

He claims for compensation for permanent disablement at Kshs.1,440,000.00 per section 30 of the WIBA, 2007.

The claimant in the penultimate submits on the following averment;

*15. Pursuant to the period of services of the Claimant and in line with the provisions of Section 5(3a), 41, 44, 45, 47(3), 49 and 50 of the Employment Act 2007, sections 5, 10, 30 and 37 of the Work Injury Benefits Act (2007) and Sections 12 (1) of the Industrial Court Act, No. 20 of 2011 and any other written law the Claimant submits as follows;*

*16. That he was lawfully and rightfully employed by the Respondent, whilst in the said employment he was never in breach of any terms of employment.*

*17. That the Respondent illegally and without any colour of right discriminated the Claimant on account of disability.*

This has necessitated this suit.

He prays as follows;

- i) A declaration that the Claimants termination of services was unfair, unlawful and illegal.*
- ii) Compensation for permanent disablement for Kshs.1,440,000.00 under the Work Injury Benefits Acts, 2007.*
- iii) Claimant to be paid terminal benefits as set out under paragraph 13 of this Claim.*
- iv) Costs of the suit*

The respondent's case is a denial of the claim.

She further denies the claim as follows;

- That the claimant was her employee as alleged in paragraph 3 of the plaint.
- That an accident occurred at her premises on 14th September, 2012 as alleged or at all.
- That the accident was occasioned by reason of his negligence or breach of statutory duty or contract.
- Denies *in toto* all allegations of negligence as set out and pleaded by the claimant.

It is her case and position that the accident, if at all, was entirely caused by and or substantially contributed by the plaintiff's negligence in carrying out his work. This is as follows;

**PARTICULARS OF NEGLIGENCE ON THE PART OF THE PLAINTIFF**

- a) *Failing to keep any or any proper lookout.*
- b) *Failing to take any measures that would be expected of him to avoid being injured.*
- c) *Failing to observed the laid down procedure in carrying out his duties.*
- d) *Exposing himself to the risk of damage or injury which he knew or ought to have known.*
- e) *Failing to use the protective clothing provided by the Defendant.*
- f) *Willfully inflicting the injuries on himself.*
- g) *Failing to exercise due care and diligence when carrying out duties assigned to him.*

The defendant avers that she had taken all these necessary measures to provide a safe and healthy working place and therefore the absence of breaches of any statutory obligations as alleged in the claim. She also denies dismissal or termination of the services of the claimant and asserts that he left employment on his own volition.

With leave of court made on 29th September, 2018, the respondent on 3rd October, 2018 filed a further reply to the Memorandum of Claim. Like in the earlier one, her case is almost similar to the earlier one and comes out as follows;

- That the injury was as a result of the negligence on the part of the claimant as the respondent had always provided a safe working environment as well as the necessary safety gears. The claimant had the necessary training and experience to perform his work.
- The claimant proceeded on sick off due to the injuries but never resumed work. He absconded duty with no communication and a case of termination does not arise.
- He was not a diligent worker. This is demonstrated by his abscondment of duty.
- He earned a basic salary of Ksh.s7,715.00 and a house allowance of Kshs.2,000.00
- There was no termination, the particulars thereof become inapplicable.
- The claim for permanent disability is the subject matter for another forum not this court.

The claimant's case in response to the defence dated 15th October, 2015 is a reiteration of his original case. He avers that he was not served with any notice (of termination?) as contemplated in the Employment Act, 2007. This therefore necessitated his claim of unfair termination bereft of procedural aspects and reason (s) for termination.

This matter came to variously until the 17th October, 2015 when the court directed a disposal by way of written submissions. This was agreed on by the parties.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent?
2. Whether the termination, if at all, was wrongful, unfair and unlawful.

3. Is the claimant entitled to the relief sought?

4. Whether the claimant is entitled to compensation for permanent disability under the Work Injury Benefits Act, 2007?

5. Who bears the costs of the claim?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. The claimant in his written submissions dated 25th October, 2018 cites three uncontested issues as follows;

- That the claimant was employed by the respondent as a machine helper from 1st September, 2008 at a salary of Kshs.15,000.00(?)
- That the claimant is no longer the employ of the respondent
- That the claimant was injured while under the respondents employment

I do not agree. These issues are somewhat contested.

The claimant does not *in toto* address or submit to the issue as to whether he was or was not terminated from employment by the respondent. This is despite the respondent's plea and submission to this extent.

The respondent not only pleads to this fact and issue but also submits on the same. This is as follows;

*It is the Respondent's position that the Claimant deserted his duties and never reported back to his duties. Section 30 of the Employment Act 2007 outlines the process to be followed when an employee proceeds to sick leave. It requires an employee to produce a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid Centre. None has been availed before the court.*

*On the other hand, the Claimant has alleged that his services were terminated by the Respondent in October 2012. The Claimant has not availed before the court any supporting documents to evidence his allegations of the termination of his services by the Respondent. These are mere connotations that have not been substantiated.*

*The Claimant failed to resume his duties and the Respondent states that the Claimant did not communicate to the Respondent at all and further efforts made by the Respondent to trace the Claimant were futile. The only communication that was received from the Claimant was the pleadings in the present case.*

The golden rule here is that he who alleges must prove. In a scenario where the respondent seeks to rely on a defence of absconding duty, she should ably demonstrate this in evidence to a balance of probability. This is not done.

The respondent should have gone out to demonstrate what steps she took in the event of the claimant's desertion of duty. Evidence of desertion and disciplinary action taken in view of such desertion should have been fronted by the respondent in evidence. Moreover, the law at section 9, 10 and 74 of the Employment Act, 2007 mandates an employer to keep and maintain records of employment contracts and allied details. If this was the case, it would be easy to decipher the direction to take in this case. The absence of records and therefore evidence puts us in a dilemma of determination of the state of affairs preceding this cause.

Issues of desertion of duty as a defence to cases of unlawful termination of employment have been rampant. They have become the corner stone of denial of workers rights in the event of termination of employment. I opine that a new approach to the determination of such defence should be had. This is because of the mischief behind the scenes. A behind where no court shall ever reach. In this case, the onus lies on the employer respondent to outrightly demonstrate a case of absconding duty.

The claimant is not to blame for breach of the law. He is likewise not to blame for lack of proof of the defence of desertion and abscondment from duty. I therefore find in his favour. A termination of the employment of the claimant by the respondent ensued in the circumstances. I hold as much.

The 2nd issue for determination is whether the termination, if at all, was wrongful, unfair and unlawful. On a finding of termination of the employment, and in the absence of a defence of unlawful termination of employment, I find for the claimant. His termination from employment by the respondent was unlawful.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on an issue of termination and unlawful termination of employment, he becomes entitled to the relief sought.

The 4th issue for determination is whether the claimant is entitled to

compensation for permanent disability under the Work Injury Benefits Act, 2007. A determination of this issue is succinct: This court lacks jurisdiction on such subject matter and determination. I leave it open.

I am therefore inclined allow the claim and order relief as follows;

i. A declaration be and is hereby issued that the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful.

ii. One (1) months's salary in lieu of notice.....Kshs.15,000.00

iii. Salary for October, 2012.....Kshs.15,000.00

iv. Twelve (12) months compensation for unlawful termination

of employment Kshs.15,000.00 x 12=.....Kshs.180,000.00

**Total Claim.....Kshs.210,000.00**

v. The cost of the claim shall be borne by the respondent.

Dated and signed this                      day of                      2018.

**D.K. Njagi Marete**

**JUDGE**

Delivered and signed this 20th day of December, 2018.

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Onyonyi holding brief for Omari instructed by Howard and Nic Advocates for the claimant.
2. Mr. Nyanchiro holding brief for Miss Kisaka Instructed by K. Mberia & Company Advocates for the respondent.