



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 262 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 13th December, 2018)

AGGREY ONYANGO OBER.....CLAIMANT

VERSUS

STEELMAKERS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 26th February, 2015, through the firm of Njogu & Associates Advocates seeking damages for unlawful termination in the alternative wrongful dismissal and non-payment of his terminal benefits.
2. He states that he was employed by the Respondent from the year 1996 to the year 2007 earning Kshs. 611 per day translating to Kshs. 18,330 per month as a casual employee. The Claimant further states that he was confirmed as a permanent employee vide an appointment letter dated 1st August, 2007 as a workshop turner in the rolling mill department.
3. The Claimant avers that at all times during his employment at the Respondent Company he did perform his duties effectively, diligently and satisfactorily until his termination on or about January, 2013 on the grounds that there was no more work for him to undertake at the Respondent Company.
4. The Claimant further avers that his termination was unfair and that the Respondent did not follow the laid down procedure.
5. The Claimant demands for damages as a result of unfair termination equal to 12 months as set out in the Employment Act, service pay, Salary in lieu of notice and a certificate of service.
6. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

<i>a) Unfair Termination</i>	<i>Kshs. 219,960.00</i>
<i>b) Notice</i>	<i>Kshs. 13,330.00</i>
<i>c) Service Pay</i>	<i>Kshs. 155,805.00</i>
<i>d) Leave Pay</i>	<i>Kshs. 311,610.00</i>

e) Overtime

Kshs. 62,220.00

f) House Allowance

Kshs. 469,200.00

TOTAL

Kshs. 1,237,125.00

7. He also claims costs of the suit as well as interest thereon at such rate and for such period as the Court may deem fit.

8. The Respondent in its Memorandum of Defence dated and filed in Court on 17th September, 2015 admits that the Claimant was indeed employed as a Workshop Turner-Rolling Mill from August 2007 to June 2013.

9. The Respondent avers that the Claimant's monthly salary at the time of separation was in fact Kshs. 14,375 with leave allowance of Kshs. 2,300.

10. The Respondent further avers that the Claimant left employment at the Company without notice after securing a job with Morris & Company and in fact he owes the Respondent Company 1 month's salary in lieu of notice as stipulated in his appointment letter.

11. The Respondent avers that the Claimant had been paid all his dues at the time he left the Respondent's employment. The Respondent further states that the Claimant's actions amounted to gross misconduct as envisaged by Section 44 of the Employment Act. The Respondent further prays that the claim herein be dismissed with costs.

Evidence

12. On 1st October, 2018, the Claimant (CW1) in his testimony stated that he was employed by the Respondent from the year 1996 to 2007 as a casual employee. He was later confirmed on a permanent basis in 2007. It was his evidence that he worked from Monday to Saturday and at times on Sundays. He further avers that the Respondent did not pay for overtime from 1996 to 2007 or leave allowance.

13. It was his evidence that his services were terminated in January 2013 when he demanded for a better pay. He stated that he was locked out of the Respondent's Company gate was not allowed into the Company. He further stated that he was not issued with any notice before termination.

14. It was the Claimant's further evidence that he has never worked for Morris & Company and that his claim for service pay is before 2007.

15. On cross-examination CW1 stated that currently he pays his own NSSF. He further stated that he was called by one Patel of the Respondent Company and informed that his services were no longer required.

16. On further cross-examination, the Claimant stated that he was being paid house allowance from 2007 to the time of dismissal. Similarly, leave was available from 2007 onwards but from 1996 to 2007, they did not go on leave and no leave allowance paid in lieu.

17. The Respondent put up one witness one Ms. Biliah Kemunto, an Assistant Human Resources Officer at the Respondent Company. RW1 stated that the Claimant was employed by the Respondent as a permanent employee from 1st August 2007 to June 2013 as a Workshop Turner- Rolling Mill.

18. RW1 further stated that the Claimant was summarily dismissed by the Respondent Company after he absconded duties and that at the time the Claimant left duty, he was paid all his dues.

19. On Cross-examination RW1 stated that the Claimant was never denied access into the Respondent Company and that he absconded duties and was dismissed 1 ½ months after he absconded duties.

20. On further cross-examination RW1 stated that the Respondent Company did not issue the Claimant with a dismissal letter after termination.

21. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

22. The Claimant submitted that the reasons relied on by the Respondent were unsubstantiated, unfair and maliciously orchestrated to ensure the Claimant's employment was terminated at any cost and that this was an example of unfair labour practice.

23. The Claimant further submitted that the dismissal was unlawful and relied on **Mombasa ELRC 107 of 2013 George Onyango Akuti vs G4S Security Services Kenya Ltd (2013) eKLR.**

24. The Claimant further submits that the statutory burden upon a person complaining unfair termination of employment or wrongful dismissal is found in Section 47 (5) of the Employment Act. The Section provides that, for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

25. The Claimant further submits that the termination was unfair as no notice was issued as required by Section 35 (1); no reasons were given and he was not afforded a hearing as required by Section 41 of the Employment Act.

26. The Claimant submits that in the case of summary dismissal for fundamental breach of contractual obligations or gross misconduct, Section 41 (2) of the Employment Act obliges the employer to hear and consider any representations which the employee may wish to make, which was not done.

27. The Claimant further submitted that the claim be allowed as drawn.

Respondent's submissions

28. It is submitted by the Respondent that it is not true that the Claimant's services were terminated on account of no work but the Claimant absconded duties forcing the Respondent to terminate the Claimant's employment on account of gross misconduct. A master roll was produced in evidence to that effect.

29. The Respondent further stated that given that the Claimant absconded duty no notice was to be issued to an employee who has absconded and the Claim for unfair termination and/or wrongful termination and notice in lieu must fail.

30. On the issue of terminal dues including service pay, leave pay, overtime allowance for the period ranging 1996 to 2007, the Respondent submits that the injury or damage must be continuous and the proceedings must be brought within 12 months after cessation of the said injury. They cite the case of **Kesi Mohamed Salim vs Kwale International Sugar Co Ltd (2017) eKLR** where the Court stated:-

"... I however dismiss that objection because the denial of leave was a continuous breach and the Claim having been brought within 12 months after cessation of the breach the same is not time barred."

31. The same Court further quoted the **Court of Appeal in C.A No 39 of 2006 Rift Valley Railways (Kenya) Ltd vs Hawkins Wagunza Muronsye and Another (2016) eKLR** where the Court stated:-

"... for it is clear from our reading of Section 90 aforesaid that there are no exceptions to the three years limitation period save for cases of continuing injury or damage where action or proceedings must be brought within 12 months after cessation thereof."

32. The Respondent therefore submits that the Claim for service pay, leave pay, overtime allowance are time barred as the Claim was filed in 2015. They urge the Court to dismiss the same.

33. The Respondent further submit that at the time, the alleged breach was committed the prevailing laws were different from those currently in place and therefore casual labourers were not entitled to the same privileges as their permanent colleagues. The Respondent relied on the case of **Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited (2015)eKLR** where the Court stated:-

“...Having found that the appellants were casual workers within the prevailing laws, the conduct of the Respondent towards the appellants has not been found to be beyond the statutes governing employment relationship...”

34. The Respondent prays that the Claim be dismissed with costs.

35. I have examined all the evidence and submissions of the Parties. The issues for determination are as follows:-

1. Whether the Claimant was dismissed or he absconded duty.

2. If dismissed, if the dismissal was fair and justified.

3. If the remedies sought can be granted

36. On the first issue, the Claimant contends that he was called by one Patel of the Respondent and advised that his services were no longer required. This, the Claimant avers occurred in January 2013 after he complained of being underpaid.

37. In his paragraph 4 of the claim, the Claimant avers that he was terminated on allegation that there was no work and the guard denied him entry into the premises.

38. The Respondent denied this contention and aver that the Claimant infact absconded duty and was thereafter dismissed. There is no letter of dismissal served upon the Claimant for absconding though they produced some muster rolls documents which they say indicate the abscondment. This in my view does not point to absconding as the muster rolls do not bear any signature of the Claimant. No payment sheets with Claimant's signature were produced to indicate the period prior and after the said abscondment.

39. In the absence of any termination or dismissal letter due to abscondment, it is my finding that the Claimant was dismissed and never absconded. There is no indication that the Claimant was accorded any hearing before the dismissal.

40. Section 41 of Employment Act was not adhered to. It is my finding that the dismissal of the Claimant was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..”.

41. In terms of remedies, the remedies sought for service pay prior to 2007 was not tenable. This is

because such a claim should have been brought within 6 years from the time the cause of action occurred.

42. The claim was over 6 years from 2007 as per the repealed Employment Act Cap 226 Laws of Kenya. This also applies to leave pay which I find to be time barred. The remedy of overtime pay is also not proved.

43. The only remedies I award the Claimant are:-

1. 1 months salary in lieu of notice = 18,330/=.

2. 6 months' salary as compensation for unlawful termination = 6 x 18,330 = 109,980/=.

Total = 128,310/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 13th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngunyu holding brief for Njogu for Claimant- Present

Ongicho holding brief Miss Omondi for Respondent – Present