



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.859 OF 2016**

**RICHARD MOCHACHE OBWOGE.....CLAIMANT**

**VERSUS**

**PRIME STEEL MILLS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claim herein is undefended after the respondent was issued with summons but failed to file any appearance or defence. The claimant was heard on his evidence in support of his claim.

2. The claimant was in September, 2011 employed by the respondent as a Box Charger and later as Burryman. He started at a daily wage of Kshs.334.00 which graduated to Kshs.510.00. for four (4) years the claimant served diligently until 2<sup>nd</sup> October, 2015 when the respondent without any justifiable cause, notice or hearing terminated the claimant from his employment. The claimant dutifully reported to work but was told that the persons listed and posted on the notice board should not report back to work. Such effectively terminated the claimant from his employment as he was not allowed back to his workplace. Despite working overtime the claimant was not paid his dues upon termination.

3. The claimant is seeking;

*a) notice pay;*

*b) Severance pay;*

*c) Unpaid overtime*

*d) Payment in lieu of leave;*

*e) Compensation; certificate of service; and*

*f) Costs.*

4. The claimant testified in support of his claim. That upon employment he was made to work for 7 days a week, from 7am to 7pm and would not leave work until all allocated work was complete. That no overtime was paid. He never went on annual leave or paid for the same.

5. The claimant also filed written submissions.

## **Determination**

6. It is always a big mistake and an affront on justice when a respondent, served with court summons fails to attend to tell his side of the story. The court is left without any option but to hear the party present in court and take it that the respondent, having been served but opts to be absent to defend the suit is not interested in the proceedings but will be ready to abide the outcome.

7. The failure to attend and or file defence deny the court material evidence particularly the work record required under section 10(6) and (7) of the Employment Act. Such records are crucial for the effective determination of disputes before this court. Without the defence and work records, the employee case must be believed as it is not challenged in any material way.

8. Where an employee is employed continuously to do a job that is not likely to end within a day or within the month, such employment converts tot full time despite their being not written contract. Such an employee cannot be termed as a casual employee who can be dismissed at close of the day. The claimant worked for 4 years for the respondent, was not issued with a written contract and as such, by application of section 37 of the Employment Act he became full time employee.

9. Termination of employment for a full time employee must be with notice, such notice must give a valid and genuine reason for the termination and more fundamentally, the employee must be given a hearing in terms of section 35, 43 and 41 of the Employment Act respectively. In this case, where the claimant reported to work and was turned away simply because his name was not poste don the notice board, whatever the reasons for such notice, the mandatory provisions of the law were not adhered to. Such I find to be unlawful and unfair in terms of section 45 of the Employment Act.

## **Remedies**

10. Notice pay is due in a case of unfair termination where there is no notice, reason or hearing. The claimant daily wage being Kshs.510.00 notice for one month amounts to Kshs.15, 300.00.

11. Compensation is due to unfair termination of employment. Without any notice, hearing or reasons being given by the respondent, compensation is due. 6 months' pay is found reasonable and appropriate compensation. The claimant is awarded kshs.91, 800.00.

12. On the claim for overtime, the evidence was that the claimant worked for 7 days per week and from 7am to 7pm. This evidence is not challenged. The claimant is awarded kshs.556, 560.00.

3. On the claim for severance pay, the evidence being that the claimant was termination for the reason that there was no work. However the claimant testified that there was a list posted on the notice board and his name was not listed therein and hence was not allowed at the workplace. Compensation has been awarded for unfair termination. Such addresses the unfair circumstances of the termination.

4. Where there is no record of the claimant taking leave or payment in lieu thereof, the payment is due all at kshs.61, 200.00.

**Judgement is hereby entered for the claimant for compensation at Kshs.91, 800; notice pay Kshs.15, 300.00; overtime pay at kshs.556, 560.00; leave pay at Kshs.61, 200.00; a certificate of service; and costs of the suit.**

Dated and delivered in open court at Nairobi this 6<sup>th</sup> day of April, 2017

**M. MBARU**

**JUDGE**

In the presence of:

