



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.784 OF 2016

ESTONE HAMISI DUME.....CLAIMANT

VERSUS

PRIME STEEL MILLERS.....RESPONDENT

JUDGEMENT

The Claimant filed the Memorandum of Claim on 6th May, 2016 and served the Respondent with summonses and hearing notices and filed Affidavit of Services to confirm the same but the Respondent has failed to enter appearance, file defence or attend at the hearing. On the evidence of service upon the respondent, the court proceeded to give hearing directions and take the claimant's evidence.

Claim

The Claimant was employed by the Respondent on 12th June, 2012 by contract of employment as a Box Charger and later became the Mould Setter Helper. The Claimant was initially earning Kshs.433.00 daily which rose to Kshs.459.00 at the time of termination.

The Claimant worked continuously and diligently for the Respondent for 3 years and a half. By virtue of section 37 of the Employment Act, the claimant's casual employment converted to full time employment as he remained in continuous employment. While in employment, the Claimant was never issued with disciplinary rules or a contract of employment.

On 19th May, 2015 while the Claimant was at work he got injured. On 3rd August, 2015 the Claimant issued the Respondent with a letter demanding for compensation and the Respondent dismissed him from employment immediately. There was no notice, hearing or reasons given for the termination. The same was unfair as the law was not followed. The Respondent did not pay terminal dues or issue a certificate of service.

a) The Claimant is seeking;

b) *Service pay*

c) *Notice pay*

d) *Unpaid overtime*

e) *Payment in lieu of leave*

f) Damages for unfair termination

g) Costs.

The Claimant also testified in support of his case that upon his employment he would report to work at 7am to 7pm every day of the week. He was not paid for the overtime hours worked. He got injured while at work, he filed a claim for compensation and when he reported back to work he was terminated on 3rd August, 2015.

While the Claimant was in employment of the respondent, they paid the NSSf dues. Despite termination of employment, the Respondent went on paying until January, 2016 when the payment to NSSF stopped.

Determination

On the claimant's evidence and without any defence by the claimant, the same shall be assessed on its merits.

Section 8, 9, 10 and 37 of the Employment Act requires that all employers who employ any employee on an oral contract to reduce the same into writing within two months of such employment and issue a written contract spelling out the terms and conditions of such employment to the employee. Such is to ensure that when there is a dispute, the employer is able to produce that contract and records of employment to the court for arbitration of the dispute. Where the employer fails to issue a written contract, the consequence is to believe the testimony of the Claimant in the absence of any other evidence to controvert the same.

Where an employee remains in the continuous employment of an employer for a period exceeding one (1) month, and such work period is for a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or the employee performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, then by virtue of the application of section 37 of the Employment Act, the contract of service of the casual employee is to be deemed to be one where wages are paid monthly. The law thus converts such employment into full time employment and can only be terminated through notice. The rights under the law become applicable to such an employee.

On the evidence of the Claimant that he commenced employment with the Respondent from 2012 to August, 2015, he remained in continuous employment that did not end within 3 months, he became protected in law. His termination from employment fell under the protections and rights under section 35, 41 and 43 of the Employment Act. The Claimant was entitled to notice, hearing and being given valid reasons for the termination.

The evidence is that the Claimant reported to work and due to the injury he had suffered while in employment; the claim he had for compensation, the Respondent terminated his employment with immediate effect. Such was unfair and without justification in terms of section 45 of the Employment Act.

Remedies

Notice pay is due in a case of termination without notice or payment in lieu thereof. The Claimant is awarded one (1) month pay at Kshs.13, 770.00.

On the evidence that the Claimant reported to work from 7am to 7pm, he worked overtime and without evidence of overtime pay, the overtime hours pay is due. The Claimant testified that on 19th May, 2015 he got injured while at work. He instructed his advocates to issue demand on the Respondent over the same but when the Respondent was served, he was terminated. I take it the Claimant was not at work on 12 hours for 7 days for him to logically be able to attend to his injuries, attend at his advocates to file the work injury claim and then serve the Respondent seeking compensation. The averments that the Claimant

remained at work for 12 days for 7 days from the date of employment to the date of employment is not humanly possible in the scenario set out in his sworn testimony. However in the absence of any defence, I will apply a reasonable work overtime claim at 2 hours instead of the total 4 hours claimed in application of a fair and reasonable assessment putting all factors into account. The Claimant was earning a monthly wage of Kshs.13, 770.00 per months and to have him work overtime for 2 hours per day for the period at work all dues amounts to Kshs.241, 663.50.

On due leave days, where the Claimant worked from June, 2012 to August, 2015 without taking leave he was entitle to leave pay for 21 days for each year all being 63 days computed to kshs.28,917.00.

On the claim for service pay, the Claimant testified that the Respondent paid for his NSSF dues and continued to pay the same even after termination to January, 2016. Service pay is not due. The Claimant is declined.

On the finding that the termination was unfair, compensation is due. An award of 6 months gross wage is appropriate compensation. The Claimant is awarded Kshs.82, 682.00.

Accordingly, judgement is entered for the Claimant against the Respondent for notice pay at Kshs.13,770; unpaid overtime Kshs.241,663.00; leave pay Kshs.28,917.00; compensation of Kshs.82,682.00; and costs.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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