



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 478 OF 2014

BETWEEN

BERNARD MWANGEKA MBUGHY.....CLAIMANT

VERSUS

STEEL ENGINEERING SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe:

IRB Mbuya & Company Advocates for the Claimant

E.W. Munyari & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 8th October 2014. He states he was initially employed by the Respondent as a Casual Labourer in the production department from early April 2008. He worked continuously and in aggregate for 4 years, 10 months, leaving on 6th January 2014. He was paid Kshs. 550 daily as of the date of termination. He was only registered to the National Social Security Fund on 1st February 2012. He was injured at work on 29th November 2013. He was asked by the Respondent to go home, and return when healed. He went back on 6th January 2014, having healed in part. He asked the Business Owner Parma, to allocate to him lighter duties. Parma offered to continue employing the Claimant, but on a lowered daily rate of Kshs. 225 per day. The Claimant was then bundled out of the workplace by Parma, and advised never to return. He considers his contract was unfairly and unlawfully terminated and seeks Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 15,180.
- b) House allowance for the period worked at Kshs. 134,640.
- c) Annual leave for 5 years and 8 months at Kshs. 86,070.
- d) Service pay at Kshs. 36,782.
- e) Maximum compensation for unlawful termination.

f) Any other suitable relief.

2. The Respondent filed its Statement of Response on 13th November 2014. Its position is that the Claim is statute- barred under Section 90 of the Employment Act 2007. It is pleaded the Claimant was a Casual Labourer and did not work in continuity. He deserted employment and is not entitled to terminal benefits. He was injured at work as stated. He sued the Respondent for work injury compensation and was by consent of the Parties, paid Kshs. 160,000 together with costs, in settlement, payable on before 7th December 2014. He was to return to work in January 2014 after injury. He did not. The Respondent prays for dismissal of the Claim with costs to the Respondent.

3. The Claimant gave evidence, and closed his case, on 11th October 2016. Administrative Manager Dominic Mailu Fulanda testified on 13th February 2017 for the Respondent, when hearing closed. The matter was last mentioned on 14th March 2017 when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

4. Mbughy told the Court he is a Pastor. He worked with the Respondent in the capacity, period and rate of pay stated in the Claim. He was injured while lifting weights which was supposed to be a role carried out by use of a forklift. He was advised by Parma to go home and return when mended. When he returned, Parma told him he would be assigned casual tasks at half the rate he earned before the injury. The Claimant insisted he wanted to continue as a Welder, on a daily rate of Kshs. 550. Parma terminated Claimant's contract.

5. On cross-examination the Claimant testified it was not true, that he worked intermittently. In his Witness Statement, the Claimant stated he worked from the year 2012. He did not work at the workshop exclusively. Respondent N.S.S.F contributions were paid from 2012. He was compensated for work injury. He was given sick leave by the Respondent by word of mouth. It is not true that the Claimant deserted. On redirection the Claimant clarified that his Witness Statement indicates he was employed in 2008, and registered under the N.S.S.F, in 2012. Respondent's Witness Statement confirms the Claimant was told to stay out.

6. Fulanda testified the Claimant was a Helper, not a Welder. He assisted Welders and Fitters. He did not come to work continuously. Payment vouchers show he was paid different rates, and worked intermittently. He was injured at work and compensated. He was advised by the Respondent to go back when he got well, to perform light duties. He did not return. He was not bundled out by the Respondent as alleged. The Respondent used to pay special contribution at 5% of total wages, for Casual Employees on the advice of the N.S.S.F. From 2012, it was advised to, and paid, contributions for individual Employees. Respondent was receipted by N.S.S.F on remitting special contributions [R. exhibit 3]. Compensation is not merited as the Respondent did no terminate.

7. On cross-examination, Fulanda told the Court he did not have any documents showing the Claimant was a Helper rather than a Welder. He did not see the Claimant at the workplace on 6th January 2014. The Claimant was employed in 2009. Fulanda did not withhold some of the Payment Vouchers from the Court. He was not aware that the Claimant was a Welder Grade 3. The Respondent made attempts to reach the Claimant after he deserted to no avail

The Court Finds:-

8. The Claimant states he was employed as a General Labourer in Respondent's Production Department, in early 2008. He worked up to January 2014. He was earning a daily rate of Kshs. 550 as of the date of exit.

9. Misunderstanding between the Parties arose after the Claimant suffered an accident in the course of work, on 29th November 2013. The Claimant sued the Respondent for work injury compensation. The matter was settled with the Claimant paid Kshs. 215,580 in compensation and costs.

10. He went to the workplace on 6th January 2014. He was offered light general duties at half the rate he was used to. He insisted on working as a Welder, on his normal daily rate of Kshs. 550. Parties disagreed, and either the Claimant walked away, or was told to stay way. The Court was not persuaded by either Party, on who instigated termination. It is safe to conclude Parties disagreed on the terms of engagement in light of the Claimant's injury and reduced capacity.

11. Having not fully healed, the Claimant would not have been able to discharge his role as a Welder fully. He complained in the course of his evidence that lifting of heavy objects led to the injury. How would he continue welding and lifting heavy objects with his unhealed injury? Why did he not consider the light general duties offered, and the reduced rate of pay, as a temporary arrangement meant to allow him time to be fully rehabilitated? If his capacity was reduced, it would be reduced production for the Respondent, and compensating the Claimant for his labour at full rate, would thin Respondent's overall profit margins. He was not reasonable in demanding to continue working as a Welder while still injured, and in rejecting the partial work offered to him in the interim.

12. The Respondent on its part ought to have called for medical assessment before assigning the Claimant new duties. There was no firm medical evidence to guide the Respondent, in dealing with the Claimant after the injury.

13. Encountered with a situation where both Parties were at fault in ending the employment relationship, the Court is unable to say termination was unfair. The Parties disagreed on the terms of continued engagement. In the end there was a stalemate, which none of the Parties should draw benefit from. The prayers for notice pay and compensation for unfair termination are rejected.

14. The Claimant was paid a daily rate of Kshs. 550. He does not complain that he was underpaid. The daily rate included housing element. He was paid the correct daily rate for his grade, which included the housing element. His prayer for house allowance is rejected.

15. The Respondent was able to show it was paying a special rate of 5% of total wages for Casual Workers, for the period the Claimant states his N.S.S.F contributions were not remitted. His prayer for service pay is baseless.

16. At paragraph 5 [b] of his Statement of Claim, he states he worked continuously for 4 years and 10 months. He did not explain why his prayer for annual leave, is based on 5 years 8 months. ***He is allowed annual leave pay of 21 days per year, amounting to 94 days of annual leave x 550 = Kshs. 51,700.***

17. Certificate of Service to issue.

18. No order on the costs.

19. Interest granted at 14% per annum from the date of Judgment till payment in full.

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant Kshs. 51,700 in annual leave pay.

b) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

c) Certificate of Service to issue.

d) No order on the costs.

Dated and delivered at Mombasa this 20th day of June 2017

James Rika

Judge