



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

AT NAIROBI

CAUSE NO. 1066 OF 2013

CHARLES KIOKO MATUVA.....CLAIMANT

VERSUS

STEEL STRUCTURES LTD.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 15th July, 2013 the claimant averred that he was employed from 1st March, 2008 by the respondent as a general labourer on daily wage of Kshs 580 payable after every two weeks.
2. During the Easter holidays he travelled to his rural home and was supposed to resume duties on 2nd April, 2013 but was unable to due to transport hitches.
3. According to the claimant, he informed his colleague one Festus Mwanzia to inform the production manager of his predicament but when he resumed duties on 3rd April, 2013 the production manager informed him that no such report had been received. The manager consequently asked him to stay away for two weeks after which he would be recalled. After the said two weeks, on 22nd April, 2013 he returned to the respondent's premises and was once against told to wait indefinitely.
4. The claimant was never called, so he assumed his services had been terminated. The claimant therefore averred that in terminating his services the respondent never afforded him an opportunity to be heard as required by law and rules of natural justice. The respondent further failed to pay him his terminal dues.
5. The respondent denied the claimant's claims and averred that he was a casual employee on an "on and off" basis. The respondent further averred that the claimant was lawfully dismissed after being absent from work without leave or lawful excuse. According to the respondent the claimant's services were fairly terminated and in accordance with the provisions of the law.
6. In his oral evidence in court, the claimant testified that he worked for the respondent as a welder for five years. According to him he travelled to his rural home over Easter 2013 and it rained heavily so the roads became impassable. He called his colleague Festus to report the problem and request for leave.
7. Prior to his dismissal he was not issued with any warning letter and no disciplinary hearing took place before his dismissal. He further stated that during his employment he never went on leave. In cross-examination he stated he had gone for Easter holidays many times and whenever he was unable to make it

to work he would call his boss. He further stated that Festus was his colleague and that he followed the issue of reporting his absence and Festus confirmed he had reported.

8. The respondent's witness Mr Michael Olunga informed the court that he joined the respondent in 2009, January. He stated that he knew the claimant and that he found him already working for the respondent. According to him the claimant was a seasonal worker but in April 2010 he became a regular worker performing general duties.

9. He further stated that he was the one in charge of the claimant and that the claimant never returned to work after Easter. According to him he tried to trace the claimant without success as the claimant's phone was off. Mr Olunga further told the court that the claimant had a habit of disappearing from work without permission. In cross-examination he stated that the respondent had the claimant's personal details however no show cause letter was written to the claimant and that the claimant was never called for a disciplinary hearing prior to the termination of his services.

10. It is not in dispute that the claimant was a general worker and that he had regularly worked for the respondent from 2008 until 2013 when he claimed his services were terminated by the respondent, however the respondent on its part maintained it was the claimant who absconded duties. Section 37 of the Employment Act deems as a regular employee and casual worker who has worked for an aggregate period exceeding one month. Such an employee is entitled to full rights as if he was a regular worker.

11. The respondent claimed the claimant absconded duties but failed to prove that any effort to notify the claimant to resume work at the pain of being dismissed in default was ever made. The respondent's witness Mr Olunga admitted that despite the fact that the respondent had claimant's records, no show cause letter was issued to him when it was found out that he was absent from duty without permission. The respondent's witness further admitted that the claimant was not subjected to any disciplinary hearing prior to dismissal.

12. The burden of proof for reason(s) for dismissal or termination of employment rests with the employer. Further, the respondent must prove that the process of the dismissal or termination was carried out using a fair procedure. The foregoing from the observations made earlier in this judgement appear not to have taken place.

13. The court therefore reaches the conclusion that the termination of the claimant's services was done for invalid or non justifiable reasons and that the process of termination was not done in accordance with fair procedure.

14. On the issue of leave the onus of keeping employee records is on the employer. The respondent never produced any records to show the claimant took leave for the period he worked.

15. The court therefore awards the claimant as follows:

a. One month's salary in lieu of notice	17,400
b. Leave for the five years worked for the respondent	87,000
c. Six months salary for unfair termination of service	<u>104,400</u>
	<u>208,800</u>
d. Costs of the suit	

16. It is so ordered.

Dated at Nairobi this 29th day of September, 2017

Abuodha J. N.

Judge

Delivered this 29th day of September, 2017

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge