



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.999 OF 2016**

**ABDALLA KUSIMBA MAKOKHA ..... CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

The claimant filed his Memorandum of Claim on 27<sup>th</sup> May, 2016, the respondent was served, an Affidavit of Service was filed and there was no appearance or a defence filed by the respondent. The court being satisfied that the respondent was aware of these proceedings and had failed to attend, heard the claimant on his evidence.

The claimant was employed by the respondent in April, 2012 as a Maintenance Helper. He started on casual terms and earning a daily wage of Kshs.395.00 which rose to Kshs.444.00.

The claimant worked diligently for 3 and a half years when his employment was terminated by the respondent. Despite working continuously and without break, the claimant was not issued with a written contract of employment and as required under section 37 of the Employment Act, 2007.

In June, 2015 the respondent unfairly terminated the claimant from his employment without notice, reason or a chance to hear his representations. This was contrary to the provisions of the Employment Act, 2007. The claim is for notice pay of Kshs.13, 320.00; unpaid overtime for a total of 6,552 hours all at Kshs.545, 454.00; leave pay and damages for unfair termination of employment.

The claimant also testified in support of his case that upon employment he worked from 7am to 7pm the whole week without a break and was not paid overtime hours worked. He did not take any annual leave as required under section 28 of the Employment Act, 2007 or paid in lieu thereof. The due wages were paid through the bank at Kshs.442.00 per day. The wages were paid once a week. His NSSF and NHIF were remitted to the requisite bodies.

The claimant also filed written submissions.

**Determination**

In the absence of any defence to challenge the claims made by the claimant, the court shall assess the claims made on their merits.

The claim is that the claimant worked for the respondent from April, 2012 to June, 2015 when he was dismissed from his employment. Such work was continuous and without a break. He was however never issued with a written contract of employment. Section 37 of the Employment Act, 2007 requires that

where an employee is engaged continuously and the nature of worked undertaken does not end and thus continuous in the same position over a month, such an employee becomes a full time employee and the benefits that go with such employment are protected in law. Such an employee can claim rights under the Employment Act, 2007. The claimant thus by operation of the law has his right in employment protected.

Termination of employment without notice, reason or a hearing is procedurally and substantively unfair. The claimant testified that he was not given reasons for his termination and there is no record as to the reasons leading to the same. Without any defence thus filed to controvert the claim, the evidence by the claimant is taken as true. The remedies sought for unfair termination of employment are due.

Notice pay is due in a case of unfair termination of employment and the claimant is hereby awarded Kshs.13,260.00 based on the evidence that the claimant earned a daily wage of Kshs.442.00 all being Kshs.13,260.00 per month.

The claim for overtime pay is based on the facts that the claimant was at work from 7am to 7pm for 7 days a week. Though no records have been filed by the respondent in this regard and no defence made to challenge these claims for overtime, I have made effort to rationalise the claim for overtime from April, 2012 to June, 2015 at 4 overtime hours per day for 7 days a week and for the 38 months the claimant was with the respondent according to his evidence and the computation of the same to 6,552 hours does not add up. Effort is made in the written submissions to rationalise the claim for overtime pay due and the same adds up to 5,040 hours. The rate of computation is used at kshs.444.00 pay per day but the claimant testified that he was earning Kshs.442.00 per day. In its totality I find the claim for overtime is not rational and whether the claimant in the Memorandum of Claim made an error in computation, his evidence and written submissions do not aid the case either. Such is declined.

Annual leave is a right due to every employee in accordance with section 28 of the Employment Act. Where the claimant worked for 3 years and did not take annual leave pay in lieu is due. The claimant is awarded leave pay at kshs.39, 780.00.

On the finding that the claimant was unfairly terminated from his employment with the respondent, compensation is hereby awarded at 12 months gross pay all being Kshs.159,120.00.

**Accordingly, judgement is hereby entered for the claimant against the respondent for an award of compensation at Kshs.159, 120.00; notice pay Kshs.13, 260.00; lave pay Kshs.39, 780.00 and costs of the suit.**

Delivered in open court at Nairobi this 28<sup>th</sup> day of September, 2017.

**M. MBARU JUDGE**

In the presence of:

David Muturi & Nancy Bor: Court Assistants

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