



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

AT NYERI

CAUSE NO. 54 OF 2017

JAMES KAMOTHO KIMANI.....CLAIMANT

VERSUS

DEVKI STEEL MILLS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 15th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 24.02.2017 through Mwaura Kamau & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from his employment was wrong, unfair and unlawful.
- b) A declaration that the claimant is entitled to payment of his terminal dues in the sum of Kshs.211,984.02 being Kshs.12,183 pay in lieu of notice, Kshs.8,528.01 pay in lieu of leave for 3 years of service, pay for work on off days Kshs.38,985.06, service gratuity at Kshs.6,091.06, and 12 months' salaries for compensation for unfair termination Kshs.146,196.00.
- c) Interest and costs of the suit.

The claimant's case is that he was employed by the respondent from 2014 to 30.07.2015 as a machine operator. He worked 7 days per week without rest. NSSF was deducted but not remitted. The claimant's further case was that on 30.06.2015 the respondent's manager by an internal memo terminated the claimant's employment on the ground of non-performance. At that time the claimant had served for one year with a clean record.

The response was filed on 05.05.2017 through K. Mberia & Partners. It was prayed that the claimant's suit be dismissed with costs.

The respondent admitted that it employed the claimant on 13.02.2014 as a twisting machine operator. The respondent denied that it terminated the claimant's employment on 30.06.2015 and that the claimant worked 7 days per week without rest. The claimant stated that NHIF and NSSF were deducted and remitted. The respondent pleaded that the claimant absconded duty effective 17.06.2015 to 11.07.2015 and thus his employment was terminated. Terminal dues of Kshs. 17, 540.00 (net) was paid including 13 leave days Kshs. 7, 309.00, one month pay in lieu of notice Kshs. 8, 771.00, and service pay of Kshs.11,245.00.

The court has considered the evidence on record together with the pleadings and submissions and makes findings as follows:

a) The claimant testified that he worked 6 or 7 days per week which contradicted his case that he worked 7 days per week without off or rest day. The court has considered the respondent's evidence that work on Sunday was paid as overtime per filed pay slips. Thus the court returns that the claim for pay on off days will fail.

b) The claimant testified that on 30.07.2015 the manager known as Musyoka summoned him and told him that his services were no longer needed in view of the previous injuries the claimant had sustained. He testified that the termination was verbal and without a warning letter. In cross examination he testified that he was injured in April 2014. The respondent's evidence was that the claimant stopped reporting on duty on 17.06.2015 up to termination on 13.07.2015. The claimant's employment was therefore terminated. The court has considered the contradictory evidence by the claimant that he was terminated verbally whereas in the statement of claim is pleaded that there had been a memo. In the witness statement he stated that the termination was by memo. Thus, the court returns that the account by the claimant cannot be trusted and is not acceptable. The court returns that the account by the respondent that the claimant absconded duty was credible. Even if the respondent failed to accord the claimant a notice and a hearing as per section 41 of the Employment Act, 2007, the court has considered the misleading account, the established claimant's absence from duty and the short service of slightly over one year. The court returns that in the circumstances the claimant would not be entitled to any compensation under section 49 (1) (c) of the Act.

c) The respondent testified and confirmed that it had paid the claimant 13 outstanding leave days.

d) The claimant confirmed that NSSF and NHIF had been deducted and remitted, once again, contradicting his pleading that the same had been deducted but not remitted.

In conclusion the court returns that the claimant's suit is liable to dismissal with costs. A decree will issue accordingly.

Signed, dated and delivered in court at Nyeri this **Friday, 15th December, 2017.**

BYRAM ONGAYA

JUDGE