



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1599 OF 2012

JAMES MACHARIA TUAMU CLAIMANT

VERSUS

NAILS & STEEL PRODUCTS LTDRESPONDENT

M/s Mwangi for Claimant

Mr. Masinde for Respondent

JUDGMENT

1. The Claimant was employed on 16th July, 2007 by the Respondent as a machine operator on an oral contact of employment. He worked continuously until the 14th June, 2012 when his employment was terminated by a letter produced by the Claimant as Exhibit 1.

2. The Memorandum of Claim dated 7th September, 2012, was filed by the Claimant seeking compensation for wrongful termination and payment of terminal benefits to wit;

- | | | |
|-----|---|-------------------------|
| (a) | Overtime for 5 years in the sum of Ksh.587,736.00 | |
| (b) | Service for 5 years | - Ksh.48,792.00 |
| (c) | Holidays for 5 years | - Ksh.13,060.00 |
| (d) | Gratuity for 5 years | - Ksh.48,630.00 |
| (e) | Annual leave for 5 years | - Ksh.81,630.00 |
| (f) | 3 month's notice | - <u>Kshs.48,630.00</u> |

Total Claim - **Ksh.829,360.00**

3. The Claimant testified in support of his claim and told the court that he served the Respondent with loyalty and diligence but was unlawfully terminated from duty after serving for 5 years.

4. That during his service he was not given weekly rest days, holiday - offs nor was he paid for overtime worked as stipulated in the Regulation of Wages (Machine Operators) Order under Cap. 22 of

the Laws of Kenya.

5. That he was not given any warning letter nor subjected to any disciplinary hearing by the Respondent prior to the termination.

6. The Claimant prays that the court upholds the suit and award the Claimant accordingly with costs and interest.

7. **Response**

The Respondent filed a Memorandum of Reply dated 15th October, 2012 in which it;

(a) Admits that the Claimant was its employee between the period 16th July, 2007 to 14th June, 2012.

(b) That at the time of termination, the Claimant earned a gross salary of Ksh.23,993.00 per month

(c) That the Claimant was a unionisable employee and there existed a Memorandum of Agreement between the union and the Respondent. A Collective Bargaining Agreement was produced by the Respondent.

8. The Respondent however denies;

(i) That the Claimant worked diligently and instead states that the Claimant failed to exercise due care and attention as expected of him thereby exposing himself to unnecessary risk which he knew or ought to have known existed. These details are in the letter of termination.

(ii) That the Claimant was given several oral warnings but did not reform.

(iii) That the Claimant's services were procedurally and lawfully terminated on 10th June, 2012.

(iv) That the Respondent owes the Claimant Ksh.18,469.83 terminal benefits, payable only upon clearance by the Claimant, which he has failed to do.

9. **Testimony**

The Claimant gave oral testimony in support of his claim in which he told the court that on 14th June, 2012, while operating a machine at the workplace, he was told that he was not operating the machine properly and was issued with a letter of termination on the spot and told to go home. He was asked to collect his terminal dues on 19th June, 2012. He reported the matter to the union and did not go back on 19th June, 2012. He produced his payslip to show his earnings.

10. The Claimant testified that he was not given any notice prior to the termination.

11. That he never went on leave for five years but was paid in lieu of leave for the years 2010 and 2011. He claims leave pay for the other three years.

12. He further testified that he reported to work at 8.00 a.m. and worked upto 4.30 p.m. He however left work late many times as he operated a loading crane. He was not paid overtime at all though he left work between 6.00 to 7.00 p.m. many times. That he demanded payment of overtime many times in vain.

13. The Claimant also said that he worked during public holidays but was not paid overtime.
14. The working week was from Monday to Saturday. That Saturday was a half day. He worked 45 hours a week. That he wrote a demand letter before his employment was terminated but there was no response.
15. The Claimant added that he was registered with NSSF and NHIF and the employer duly contributed to the Funds.
16. According to the Collective Bargaining Agreement, he was entitled to 16 days service pay for every year worked. This amount was admitted by the Respondent.
17. The Claimant stated that he was head-operator and worked with the machine well. That he could not be taught how to use the machine by his supervisor because he was the expert. That it was normal to step on the machine to retrieve iron sheets. That he was wrongfully terminated when he sustained injury from the sheering machine which rolls the iron sheets.
18. That he stepped up to redirect the sheets and was summarily dismissed for that reason.
19. RW1 was Josphine Irungu, the Human Resource Officer of the Respondent. She told the court that the Claimant left the employment of the Respondent before she joined the Respondent company. She was unable to tell the court the reason for the termination of the Claimant's employment.

From the record, she told the court as follows;

Overtime

The Claimant was paid overtime every month for 5 years. She produced payslips found on page 41 to indicate the payment.

Service Pay

RW1 told the court that since the Claimant was registered with NSSF he was not entitled payment of service pay.

Gratuity

RW1 confirmed that the Claimant was unionisable and was entitled to severance gratuity provided in the Collective Bargaining Agreement calculated at 15 days salary in each completed year of service.

RW1 admitted that the Respondent owed the Claimant Ksh.33,127.05 in this respect.

Annual Leave for 5 Years

RW1 explained that the Claimant was paid for all outstanding leave days. The last payment in lieu of leave was Ksh.8,392.00 in June, 2012. This was for the year 2011 – 2012.

According to the records, only 4 leave days are outstanding.

Notice Pay

According to Clause 18 of the Collective Bargaining Agreement, the Claimant is entitled to payment of one month salary in lieu of notice in the sum of Ksh.23,993.00.

Compensation

RW1 told the court that she did not know the reason for the termination of the employment of the Claimant and therefore could not testify on this aspect of the case. This left the Claimant's version uncontroverted.

20. Issues for determination

- (1) Is the Claimant owed terminal benefits set out in the Memorandum of Claim?
- (2) Is the Claimant entitled to compensation for the alleged wrongful and unlawful termination of employment?

21. Determination

Overtime

From the documentary evidence presented in court, and in particular the payslips for the Claimant, it is apparent that the Claimant was paid overtime for hours worked over and above the 45 normal hours per week he served. The Claimant has also failed to show that he was not paid for public holidays worked.

The claims for overtime are accordingly dismissed.

Service Gratuity

It is common cause that the Claimant is owed 15 days salary for each completed year of service for 5 years contrary to the evidence of RW1. This amount totals Ksh.59,982.50 and not Ksh.33,127.05.

The court awards Ksh.59,982.50 as service gratuity to the Claimant.

22. Notice Pay

It is also not in dispute that the Claimant was not given notice upon termination nor was he paid in lieu thereof. The claimant is therefore owed Ksh.23,993.00 being one month's salary in lieu of notice and the court awards him accordingly.

23. Leave Pay

The court finds that the Claimant is only owed 4 days salary in lieu of leave days not taken in the sum of Ksh.3,199.00 and awards him accordingly.

24. Compensation

The evidence by the Claimant that he was terminated without notice, without a show cause letter and without an opportunity to explain to the employer why his employment ought not to be terminated remains uncontroverted by the Respondent. RW1 told the court that she was not in a position to inform the court the circumstances under which the employment of the Claimant came to an end other than what she read from the file records.

25. The Claimant has established on a balance of probability that the termination of his employment was not for a valid reason and the termination itself was not done in terms of a fair procedure.

26. This was in contravention of Section 43(1) as read with Sections 45(1) and 45(2) (a) and (c) of the Employment Act.

Therefore the Claimant is entitled to compensation in terms of Section 49(1)(c) of the said Act. The award to be granted is guided by the provisions of Section 49(4) as read with Section 50 thereof. In making the award the court observes that the Claimant had served the Respondent for a period of 5 years.

27. The Claimant did not have any adverse written records concerning Conduct of work. He had injured himself in the course of operating the machine at the workplace. He was not paid terminal benefits upon termination and was not given a certificate of service upon termination. This has aggravated the suffering by the Claimant.

28. Accordingly, the court awards the Claimant eight(8) months salary as compensation for the unlawful and unfair termination in the sum of Ksh.191,944.

Total award to the Claimant is therefore as follows;

(i) Kshs.59,982.50 being Service Gratuity

(ii) Ksh.23,993.00 being Notice Pay

(iii) Ksh.3,199.00 being Leave pay and

(iv) Ksh.191,944.00 being Compensation

Total – Ksh.279,118.00

(v) The award is payable with interest at court rates from the date of judgment to payment in full

(vi) The Respondent is to pay the costs of the suit

(vii) The Respondent is to provide a Certificate of Service to the Claimant within 30 days from the date of the judgment.

Dated and Delivered at Nairobi this 29th day of January, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE