



**REPUBLIC OF KENYA**

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

**CAUSE NO.2336 OF 2012**

**DOMINIC WAMBUA ..... CLAIMANT**

**VERSUS**

**TONONOKA ROLLING MILLS ..... RESPONDENT**

**JUDGEMENT**

1. The claim is that in March 2005 the Claimant was employed by the Respondent as a casual labourer at a monthly salary of Kshs.10, 500.00. On or about 6<sup>th</sup> June 2012 the Claimant was terminated from his employment without notice or being given any reasons. That there was no explanation or hearing before the termination or being given time to defend himself over any allegation. The Respondent also refused to pay the terminal dues and the Claimant is seeking notice pay; unpaid leave; service pay for 7 years and compensation.

2. The Claimant also testified that he was employed in the Cutting Section at the Respondent and was paid a daily wage of Kshs.350.00 per day. The supervisor told him that work had gone down and was stopped. The supervisor Samuel, called him alone and told not to report to work. Other colleagues only realised that the Claimant had been terminated when he failed to turn up at work. There was no notice before the termination or pay for days worked and leave earned. The Claimant went to the labour officer but the case was not resolved.

3. In cross-examination, the Claimant testified that he was employed by the Respondent in 2004 and not 2005, there had been a change of ownership but he did not know how as he remained on the same job all his time. He worked until September 2011. In each month he took 2 days of leave but was not paid. No pay slip was issued or a contract with the terms of work. Before he was terminated he got his terminal dues on 2<sup>nd</sup> February 2012 and he signed the last voucher. He was told that there was no work. When such situations occurred, the Respondent would stop employees by due process but in this case he was the only one stopped. He did not abscond though he got sick and was able to resume duty in 2011. He was later paid Kshs.1, 916.00 which cannot be the final dues owing.

**Defence**

4. In defence, the Respondent stated that they had employed the Claimant as a casual labourer depending on availability of work on diverse dates from 2005 to 2011. The Respondent did not terminate the claimant, he left voluntarily due to ill health. There is nothing owing and the Claimant was a voluntary member of NSSF and thus no service pay is due.

5. In evidence, the Respondent called Veronica Mueni Nzioki, the Labour Clerk who kept workers records and noted attendance. She worked with the Claimant as a Machine cutting who was at

Respondent since 2006 as a casual on daily wage for 8 hours and any overtime was paid separately. In 2011 the Claimant left work due to health problems and was not issued with a termination letter. The Claimant was allowed to come back on condition he had a medical report and when there was work. He never came back. In 2012 the Claimant came to demand for his leave dues which was paid but refused to sign. He had been at work until 30<sup>th</sup> June 2011. He was a member of NSSF and all dues were remitted. Notice was not necessary as the Claimant was the one to give notice.

### **Submissions**

6. In submissions, the Claimant has relied on the provisions of section 37 of the Employment Act. That though he was employed as a casual, he continued to work with the Respondent from 2006 to 2012 and thus his became a full time position. He was never issued with an employment contract indicating his terms of service contrary to section 10 of the Act. There is no record of the process terminating the Claimant and the final dues offered are not accurate. This was unfair termination.

7. The Respondent submitted that the Claimant left employment voluntarily and no notice pay is due. He left due to ill health and there is no record of his resumption of duty in 2012. The Claimant admitted he was a member of the NSSF, all leave was paid and having left work due to ill health, no dues are owing.

### **Determination**

8. The Claimant admit that in 2011 he was unwell and was given time off. He was a member of the NSSF which was the duty of the Respondent as the employer to remit the dues. From the attached record of NSSF returns/records, the last such remittance was in May 2011. This supports the evidence that the Claimant that he left work due to ill health in 2011 which evidence is in tandem with what the Respondent asserted that the Claimant left work in 2011 and did not report back as he was supposed to bring back with him a medical report.

9. The NSSF records indicate emittances commended in 2000, remittances were erratic, this stopped in 2001 and only resumed in 2007 for 3 months. The Claimant did not explain this disparity. This was challenged by the Respondent on the basis that the Claimant was a casual employee taken when work was available. However in 2010, the Claimant NSSF dues were remitted for April and June, then July to October a period of 4 months. The next remittance was in May 2011.

10. The Claimant did not give emphasis as to the various lapses in his record. He simply stated that the Respondent failed to remit his NSSF dues, he was not issued with an employment contract. The record of attendance submitted by the Respondent was contested by the Claimant as not being authentic. That is does not have a letter head of the Respondent and is not signed. Indeed such record is bare. But the Respondent witness Veronica Mueni Nzioka testified that the Claimant was at work in 2011 until 30<sup>th</sup> June. Indeed, even where the Court were to rely on the Respondent list, it notes that in 2011, the Claimant was engaged at the Respondent for the 6 months. Thus by application of section 37 of the Employment Act and based on the Respondent evidence, the Claimant remained in the employment of the Respondent for a period of more than 60, 120, 180 days thus by application of the law, he enjoyed protection as under full employment. Where the Claimant became ill/unwell or sick, the duty was vested upon the Respondent to ensure that he got time to attend. To be simply let go due to ill health and do nothing about it is an unfair labour practice.

### **Remedies**

11. Fair labour practice entails that there should be notice before termination. Where the employee absconds duty and the employer opts to seat back and watch and do nothing, make effort to recall the employee or issue notice of termination, such unfair practice entitles the Claimant notice pay. However the Claimant does not aid his case as he also fails to submit any records of Medical Certificate as required of him under section 30 of the Employment Act to justify his absence. This will however be put into account with regard to the finding of unfair labour practice. The Court awards kshs.10, 500.00.

12. From the record and evidence of the Claimant he stated that each month he got 2 leave days. To claim leave as due for 7 years does not arise. This is declined.

13. The Claimant admitted he was a member of the NSSF. Service pay is not due under the provisions of section 35 (5) and (6) read together.

**Judgement is hereby entered for the Claimant for kshs.10, 500.00 and a Certificate of Service should be issued in 7 days. Each party shall bear their own costs.**

Orders accordingly.

Delivered in open court at Nairobi this 25<sup>th</sup> day of November 2015.

**M. MBARU**

**JUDGE**

In the presence of:

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