



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 527 OF 2012

KIMONGOYO MUIA.....CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....RESPONDENT

JUDGMENT

This case was filed by the Claimant KIMONGOYO MUIA who by Memorandum of claim dated 29th March 2012 and filed in court on the same day, alleges that he was employed by the Respondent Steel Structures Ltd on 1st October 2009 as a hand help in creation of steel works at a monthly salary of Kshs 8,500/-.

That on 6th January 2011 he was unlawfully terminated and the Respondent has refused to pay him terminal benefits which he tabulated as follows:-

- | | |
|--|------------------------|
| i. Salary in lieu of notice | Kshs. 8,500.00 |
| ii. Leave (8500/30 x 21 x 15 months) | Kshs. 7,437.50 |
| iii. NSSF contributions deducted and not Remitted | |
| 2008 - Feb to Dec (11 x 400) | Kshs. 4,400.00 |
| 2009 -Jan - Sept & Dec(10 x 400) | Kshs. 4,000.00 |
| 2010 – Jan, Feb, August & Dec(200/-) | |
| (3 x 400) + 200/+ = | Kshs. 1,400.00 |
| 2011 - Jan | 400.00 |
| iv. House allowance for 3 years at 15% of basic Salary | |
| (8500 x 15% x 15 months) | <u>Kshs. 19,125.00</u> |

Total

Kshs. 45,262.50

He prays for the following orders:-

- i. The sum of Kshs. 45,262.50 as particularized in paragraph 5 of the claim.
- ii. Compensation for wrongful dismissal to a maximum of 12 month's wages amounting to Kshs. 102,000/-.
- iii. Cost of this suit.
- iv. Interest in (i) and (ii) above.
- v. Any other relief as the Court may deem just.

The Respondent filed a memorandum in Reply to the claim on 31st May 2012 and a supplementary memorandum in Reply on 6th December 2012. In their replies the Respondent avers that the Claimant was employed as a casual and worked on and off depending on availability of work. The Claimant was paid a daily wage of Shs. 424. On 4th July 2010 the Claimant was injured while at work and after treatment was placed on light duty for 6 months. Upon expiry of the 6 months the Respondent sent the Claimant for medical assessment on 14th December 2010 and was assessed on 16th December 2010. That the Claimant thereafter did not report to work until 5th January 2011 when he presented an extension of light duty for a further 4 months. The Respondents memorandum in Reply states the Claimant failed to report back to work on 15th December 2010. The Respondent therefore presumed that the Claimant had absconded duty. The supplementary memorandum in Reply however states he reported back on 5th January 2011. That the Respondent later received a demand letter from the labour Officer for Claimants terminal benefits. Another demand letter was received in October 2011 from Kituo Cha Sheria.

The case was first mentioned on 31st ay 2012 when the Claimant was present in person while Mr. Kibanya held brief for Otieno for the Respondent. The case was fixed for hearing by consent on 22nd November 2011. The parties appeared before me on 22nd November 2012 when the Claimant was in person while Mr. Kandie appeared for the Respondent.

Mr. Kandie informed the court that he was not ready to proceed as he wished to file a supplementary memorandum of Reply. The case was adjourned and the Respondent granted leave to file the supplementary memorandum of Reply on or before 6th December 2012. I then fixed the case for hearing by consent on 1st February 2013 at 9.00 am.

On 1st February 2013 when the case came up for hearing the Claimant was present in person but the Respondent was absent. After ascertaining that the case was fixed for hearing by consent in court I permitted the Claimant to proceed with his case exparte.

During the hearing it transpired that Claimant was never compensated for the injury he sustained while in employment which is referred to in both the Respondents memorandum and the supplementary memorandum of Reply. The injury was never reported as provided by the Work Injury Benefits Act and the Occupational Safety and Health Act.

After hearing the case I sent the Claimant to report the injury and get assessment of compensation from the Directorate of Occupational Safety and Health.

When the matter came up for mention on 18th March 2013 the Claimant reported that the Directorate of Occupational Safety and Health referred him to a doctor who asked for fees of Shs. 10,000, which he did not have and therefore no assessment was done. I then made an order instructing the Director of Occupation Safety and Health Services to prepare a medical report for the Claimant free of charge using a

Government doctor to enable me include the assessed damages in my judgment.

On 4th April 2013 the Director of Occupational Safety and Health Services wrote to the court to advise that the Claimant had been examined by doctors at the Work Injury Benefits Clinic and advised to go for further tests which could not be done at their clinic. That these tests were necessary to enable the doctors link his injury and the current complaints. He advised that the tests could be carried out at Kenyatta National Hospital at a fee, but the fee could be waived if there was an order from the court to that effect.

Upon receipt of the letter the Registrar caused the file to be placed before me on 27th May 2013 when I made the necessary orders to Kenyatta National Hospital. The Claimant was eventually assessed at Kenyatta National Hospital and a medical report filed in court on 2nd July 2013 prepared by Dr. G.O. Afulo, a hand /Orthopedic Surgeon at Kenyatta National Hospital.

The parties were thereafter notified of the date of judgment which was to be delivered on 1st October 2013.

On that date the Claimant attended court and the Respondent was represented by Ms. Kagia holding brief for Mr. Mogeni. The judgment was however not ready because there was no copy of the Respondent's memorandum of Reply in the court file prompting the court to obtain a copy from the Respondent.

Upon learning that judgment had not been read the Respondent filed an application seeking stay of proceedings and judgment, the re-opening of the case, and recalling of the Claimant to be cross-examined.

The application was allowed in my ruling delivered on 5th March 2014 in the presence of the Claimant and in the absence of the Respondent. The Case was then fixed for hearing on 6th May 2014 and the Claimant directed to serve hearing notice upon the Respondent.

On 6th May 2014, the Claimant was present in court but the Respondent was absent. After confirming from the Claimant that he personally delivered both the Ruling and the hearing notice to the Respondents advocates, that copies of both the hearing notice and the Ruling duly stamped as received by Kelvin Mogeni Advocates on 7th March 2014, were in the court file and that the Claimant had been paid the thrown away costs by the Respondent as directed in the Ruling, after also noting that the hearing date was stated in the ruling, I decided to close the Respondents case and proceed to prepare judgment.

There is no dispute that the Claimant was employed by the Respondent as this is confirmed in the memorandum in reply as well as in the supplementary memorandum of Reply.

The Claimant testified that he was employed by the Respondent on 1st October 2007 as a helper at a salary of Shs. 424/- per day. On 28th November 2009 he was sent by the company to work at Wadia Construction. He was injured the same day at about 3.30 pm. He was taken to Kenyatta National Hospital for treatment and thereafter attended the company's Clinic. Whenever the company's Clinic was not open he was treated at Emmau Nursing Home. His situation did not improve and he was referred to Kenyatta National.

The Hospital recommended light duty for 6 months. On 5th January 2011 Kenyatta National Hospital recommended a further 4 months light duty.

On 6th January 2011 when he reported for work he was told to stay at the gate. He asked for the letter to go back to Kenyatta National Hospital but was not given. He reported for work for the next two weeks but was not allowed into the work place. After the two weeks he was told not go back to the work place. He reported the matter to the labour officer but did not get any assistance as the Respondent did not attend meetings called by the Labour Officer. He then went to Kituo Cha Sheria who arranged a meeting with the Respondent to resolve the matter but the Respondent failed to attend.

The Claimant told the court that his hand is still not functioning. I observed the Claimant's hand and noted that it is partially deformed.

I have considered the pleadings by the parties and the documents filed in court which are basically treatment records for the Claimant at Kenyatta National Hospital. These are attached to both the claim and the supplementary memorandum of Reply.

The issues for determination are whether the Claimant was employed as a casual as alleged by the Respondent, whether he was wrongfully and unfairly terminated and whether he is entitled to the prayers sought.

1. Was the Claimant a casual employee?

The Claimant testified that he was employed by the Respondent on 1st October 2007 and was terminated after the hospital extended his light duty by 4 months when the initial 6 months had expired. The Respondent pleaded the Claimant was a casual and worked on and off. No dates were specified by the Respondent and no employment records were produced. The Claimant's evidence therefore remains uncontroverted.

The Employment Act defines a casual employee as one who works for a period not longer than 24 hours. Section 37 of the Act provides for conversion of a casual employee who works continuously for one month to a monthly contract of employment.

Having worked for more than one month the Claimant was not a casual employee. His terms of employment were automatically converted to monthly contracts by operation of law.

2. Was the Claimant unfairly terminated?

The Claimant testified that on 5th January 2011 he was given a letter extending his light duty by 4 months. When he went back and presented the letter to the company he was not allowed to get into the compound. He was kept at the gate for 2 weeks after which he was told that he should never be seen there again.

The Respondent in the memorandum of Reply and the Supplementary Memorandum of Reply did not give a consistent position. The memorandum of reply states that the Claimant failed to report back to work after being sent for medical assessment on 14th December 2010. The Supplementary Reply on the other hand avers that the Claimant did not report back to work after going for medical assessment form on 16th Decembr 2010 but reported back to work on 5th January 2011 with an extension of his light duty for a further 4 months. It does not state what happened to the Claimant after he reported back to work on 5th January 2011 with the extension of his light duty.

This leaves the testimony of the Claimant uncontroverted.

I therefore find that the Claimant was terminated due to the extension of his light duty by 4 months.

Section 45 of the Employment Act provides that termination of employment of an employee is unfair where the employer fails to prove that the reason for termination is valid or that the termination was not in accordance with fair procedure. In this case the employer has failed to prove both validity or reason or fair procedure.

The termination of the Claimants employment was therefore wrongful and unfair.

3. Remedies

The Claimant seeks the following remedies:-

i. Pay in lieu of notice.

Having been terminated without notice, the Claimant is entitled to pay in lieu of notice of 28 days salary as provided in Section 35 (1) (c) 37 (1) and 49 (1) (a) of the Employment Act.

I therefore award the Claimant (424×28) Kshs. 11,872/- being 28 days salary in lieu of notice.

ii. Leave

The Respondent did not deny the claim for leave. Having been in employment from 1st October 2007 to 5th January 2011, the Claimant worked for a total of 39 months. At the rate of 17.5 days leave per month he is entitled to $(1.75 \times 39 \times 424)$ Kshs. 28,938 in lieu of annual leave not taken.

iii. NSSF

The Respondent did not deny failure to remit NSSF contribution claimed by the Claimant. The Respondent is directed to remit all the unremitted NSSF contributions from October 2007 to December 2010 and to submit proof of compliance by way of a statement from NSSF within 30 days from the date of judgment.

iv. House Allowance

The Claimant is not entitled to house allowance as he was paid at a daily rate of pay which according to the Regulation of Wages General Order, is inclusive of house allowance.

The claim for house allowance is dismissed.

v. Compensation for unfair termination

Having unfairly terminated and there being no specific denial of the prayer by the Respondent, taking into account the Claimant's length of service, the manner in which he was terminated and the fact that he was kept as a casual for the entire period of service of more than 39 months it is my opinion that maximum compensation is reasonable in the circumstances.

I therefore award the Claimant the sum of $(424 \times 30 \times 12)$ Kshs. 152,640 as compensation for unfair termination.

vi. Compensation for Injury for the course of Employment (under Work Injury Benefits Act).

The Respondent admitted that the Claimant was injured in the course of employment. No evidence was adduced to the effect that the Claimant was compensated for the injury as provided by law.

Under the Work Injury Benefits Act Compensation is based on 96 months' salary. It is the duty of the employer to report injury and to compensate the employee. The Respondent did not report the injury as provided by law. Liability under the Work Injury Benefits Act is not dependent on a Claim by the employee but on report of the accident by the Respondent. The failure of the Respondent to report cannot bar the Claimant from being compensated as provided by law. In this case the Medical report states that the Claimant suffered compressed fracture of index and middle fingers. The doctor assessed permanent incapacity at 50%. The doctor further concluded that the Claimant was unable to resume duties as a loader and further that the condition of the Claimant is likely to get worse.

I therefore award the Claimant 50% of 96 months' salary in the sum of

$(96 \times 424 \times 30 \times 50 / 100)$ Ksh. 610,560/- .

The total claim is therefore as follows:-

1. Notice	- Kshs. 11,872.00
2. Leave	- Kshs. 28,938.00
3. Compensation for unfair termination	- Kshs. 152,640.00
4. Compensation for injury	- Kshs. <u>610,560.00</u>
5. N.S.S.F - Respondent to regularize	
Total	Kshs. <u>804,010.00</u>

Orders accordingly.

Read in open Court this 23rd day of May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Kimongoyo for Claimant

Nyangoro for Respondent