



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2062 OF 2011**

**STEPHEN MWANDWARE NDIGHILA .....CLAIMANT**

**VERSUS**

**STEEL MAKERS LIMITED .....RESPONDENT**

**JUDGMENT**

By Memorandum of claim dated 5<sup>th</sup> December 2011 the Claimant who was acting in person, alleges that his employment was unfairly terminated by the Respondent on 9<sup>th</sup> February 2009 and prays as follows:

- a. That this Honourable Court should order and direct the Respondents to pay his earnings and allowances for the period he has been kept out of employment to date.
- b. That this Honourable Court should order and direct the Respondents to pay him terminal benefits according to Appendix II (a), (b) if the Respondent does not want to reinstate him back to his job.
- c. That this Honourable Court should order and direct the Respondents to pay him 12 months salary as compensation for loss of employment according to Labour Institutions Act 2007 Section 15 (c).
- d. That the Respondents to pay the costs of this suit.

The Respondent filed a Memorandum of response which is not dated but filed in court on 30<sup>th</sup> January 2012 through its Human Resources Officer, Sammy K. Chesongol. In the Memorandum of response it is alleged that the Claimant absconded duty on 20<sup>th</sup> December 2008 and that he was not terminated. The Respondent prays that the claim be dismissed with costs.

The Claimant appointed Ombogo & Co. Advocates by Notice of Appointment dated and filed in court on 1<sup>st</sup> February 2012.

The Respondent filed a Memorandum of Appearance and Memorandum of Defence through Goa & Company Advocates on 27<sup>th</sup> February 2014.

The case was heard on 5<sup>th</sup> June 2014. The Claimant testified on his behalf while the Respondent called BILIA KEMUNTO ASETA, its Human Resources Assistant. The Claimant was represented by Mr. Omboga while the Respondent was represented by Mr. Goa.

The Claimant testified that he was employed on 15<sup>th</sup> May, 2003 and was terminated on 9<sup>th</sup> February 2009. He was employed as a tongsman. His duty was to feed hot metal into a rolling mill. His starting salary was Kshs.5,720 per month while his last salary was Kshs.8,086 per month. At the time of termination he was a Crane Operator, a position he held from 2006. He testified that he was a member of the Union and was works Committee Chairman. A manager Mr. Natubhai Patel told him to leave the

Union or his employment would be terminated.

On 9<sup>th</sup> February 2009 Mr. Patel instructed the security guards not to allow him into the work premises. He reported the matter to the Union who booked a meeting with the employer. On the day of the meeting the employer wanted to meet the Union officials without him but he refused. The meeting aborted. The Union thereafter reported a dispute to the Labour office and a meeting was fixed for 5<sup>th</sup> October 2009. The Respondent's personnel officer however arrived late and the meeting was rescheduled to 9<sup>th</sup> April 2010 when the Respondent's representative did not attend the meeting. The Labour officer then issued a certificate allowing the Union to file the claim in court. The Claimant testified that the Union did not file the dispute in court until December, 2011 when he decided to file the case in court in person. The Claimant testified that he was among 20 employees who were terminated on the same day. He prayed for payment of notice, leave, severance, overtime and compensation.

The Claimant stated that he was not issued with a letter of appointment as well as a letter of termination of employment.

For the Respondent, RW1 BILIA KEMUNTO ASETA testified that she was employed by the Respondent in 2007 and was familiar with the issues in dispute. She testified that the Athi River factory was opened in 2006 and the Claimant was a casual worker who worked on and off. She testified that in 2008 there was a lot of theft in the company and the management decided to enlist the services of the Criminal Investigation Department (CID) to take fingerprints of all employees with a view to issuing them with certificate of good conduct. The Claimant did not want his finger prints to be taken and sneaked out of the compound. She testified that the Claimant having deserted duty, is not entitled to any terminal dues. She prayed that the claim be dismissed.

The parties filed written submissions after the conclusion of the hearings. From the summary of evidence on record, the issues in dispute are the following:

1. Date of employment of the Claimant and terms of his employment;
2. Whether the claimant was terminated or absconded duty;
3. Whether the claimant is entitled to the reliefs sought.

#### **1. Date and terms of employment of claimant**

The Claimant alleges he was employed on 15<sup>th</sup> May 2003 as a tongsman and eventually as a crane operator. The Respondent in the Memorandum of Response filed on 30<sup>th</sup> January 2012 admitted that the Claimant was employed on 15<sup>th</sup> May 2003. However in the Memorandum of Defence filed on 27<sup>th</sup> February, 2014 (which I may add was without leave of the court), the Respondent alleges that the Athi River Plant was opened in 2006 meaning that the Claimant could not have been employed before 2006. RW1 testified that the Athi River Plant was opened in 2006. She however did not expressly state when the Claimant was employed. She produced a wage sheet for 22<sup>nd</sup> October 2005 in which the Claimant is one of the employees for the day. This is proof that the claimant was in the Respondent's employment before 2006.

I find that the Respondent is bound by its pleadings and that the Respondent admitted in the Memorandum of Response filed on 20<sup>th</sup> January 2012 that the Claimant was employed on 15<sup>th</sup> May 2003.

Both the Employment Act (1976) which was in force when the Claimant was employed and the Employment Act (2007) which was in force when the Claimant's employment was terminated define a casual employee as an individual who is not engaged for longer than 24 hours and is paid at the end of the day. Section 37 of the Employment Act, 2007 provides for conversion into monthly contract terms any person who works as a casual employee continuously for one month or intermittently for 3 months. Having worked from 2003 to December 2008 or February 2009 the Claimant was not a casual employee. He was on monthly contracts of service.

## **2. Whether the Claimant was terminated or absconded duty**

The Claimant alleged that he was dismissed on 9<sup>th</sup> February 2009 by a Manager Mr. Natubhai Patel who instructed the guards manning the gate not to allow him into the work premises. The Respondent however stated in the Memorandum of response filed on 30<sup>th</sup> January, 2012 that the Claimant absented himself from the place of work from 20<sup>th</sup> December 2008. RW1 stated that the claimant sneaked from the premises to avoid his finger prints being taken but does not state when the Claimant left employment.

According to Section 10 and 14 of the Employment Act 2007 employers are required to keep records with dates of commencement and dates of termination of employment. In the absence of such records Section 10(7) states that it will be the burden of the employer to disprove any allegation made by the employee. There being no record by the employer indicating date of termination of employment of the Claimant and the manner in which the termination occurred, I find that the Respondent has failed to disprove that the Claimant's employment was terminated by the Manager Mr. Patel on 9<sup>th</sup> February 2009 by instructing the guards at the gate to lock the claimant out of the employment premises.

This amounts to unfair termination as there was no observance of Section 41 and 43 of the Employment Act which provide for procedure and valid reason in termination of employment.

I therefore find the Claimant's employment was unfairly terminated.

## **3. Whether the Claimant is entitled to the reliefs sought**

The Claimant prayed for the reliefs which I address below. The Claimant submitted that he is entitled to all the reliefs while the Respondent submitted that the claimant is not entitled to any of the reliefs as he did not specifically plead any. The Respondent relied on the cases of **HCCC No. 253 of 2007 David Mburu Kamau V. National Industrial Credit Bank Limited** and **HCCC No. 7 of 2008 Francis Okeny Olaka V. Kenya Commercial Bank** both of which held that special damages are not payable unless specifically pleaded and proved.

I have considered the authorities and find them not applicable to this case as the Claimant pleaded all the heads of claim in the Memorandum of claim and the same are rights donated by the Employment Act which also expressly places the burden of proof on the employer, in this case the Respondent. I now address the Claimant's prayers.

### **i. Notice Pay**

Section 49(1) (a) provides that an employee whose dismissal or termination is unjustified is entitled to notice. Section 37(3) as read together with Section 35(1)(c) and Section 36 of the Employment Act provides for payment of 28 days notice. From the evidence on record, the Claimant was at the time of termination entitled to a daily rate of pay of Kshs.437.10 (refer to column 3 of the Regulation of Wages (General) Order 2006 under item 9 under the grade Crawler Tractor Driver). I will explain the reason for using this rate under the head of salary underpayment.

I therefore award the Claimant the sum of Kshs.12,238.80/= being 28 days pay in lieu of Notice.

### **ii. Accrued Annual Leave**

The Respondent did not deny that the Claimant did not take leave. Having started working on 15<sup>th</sup> May, 2003 to 9<sup>th</sup> February 2009, the Claimant worked for 5 years and 8 months. He is entitled to 119 days leave=. At the rate of Kshs.437.10 per day the Claimant is entitled to Kshs.52,014.90 which I hereby award him.

### **iii. Severance Pay**

The Claimant is not entitled to severance pay but to service pay in accordance with Section 35(5) as read with Section 35(6) of the Employment Act. This is because he was not declared redundant, but was never a member of NSSF or any gratuity or retirement benefits scheme.

I therefore award him 15 days for each year worked for 5 years which amounts to (15 x 437.10) Kshs.32,782.50.

#### **iv. Overtime worked on Saturday**

Although the Respondent did not specifically deny that the Claimant worked overtime on Saturdays and was not paid for the same, I find that the Claimant has not made a specific claim for overtime. He has not specified the days he worked overtime and the number of hours for each of the days. I find that this claim has not been proved and dismiss it.

#### **v. Underpayments**

According to the Regulation of Wages (General) (Amendment) Order 2006, the claimant who was a Crane Driver from 2006 was entitled to payment of Kshs.437.10 under column 3 thereof as Athi River where he was working falls under Mavoko Municipality. A Crane Driver is a Crawler Tractor Driver under the definitions in the Regulations of Wages (General) Order which is still in force under the Labour Institutions Act. He was however paid Kshs.311 (refer to sheet No.1 of Appendix 1 of Memorandum of Response filed on 30<sup>th</sup> January 2012). The Claimant is No.20 on the list and the daily rate of pay is Kshs.311. He was therefore underpaid from 1<sup>st</sup> May 2006 when the General Order came into force up to December 2008.

However, according to the Employment Act such claims must be made within 12 months and I will therefore award the Claimant only 12 months overtime. The difference between what he was paid and what he was entitled to is (437.10-311)= 126.1. This multiplied by 364 days (being 52 weeks in a year x 7 days) amounts to Kshs.45,900.40. I have included rest days by virtue of Section 37(2) which provides that an employee who works for 6 days in a week is entitled to payment for the rest days as well. Both the Claimant and the Respondent confirmed that the claimant worked for 6 days from Monday to Saturday every week.

I therefore award the claimant Kshs.45,900.40 as underpayments for 12 months.

#### **vi. Compensation**

The Claimant worked for 5 years and 8 months. Having been unfairly terminated he is entitled to compensation as provided in Section 49(1) (c) of the Employment Act. He has prayed for 12 months salary which is the maximum compensation. Having worked for only 5 years and 8 months, it is my opinion that 5 months salary is adequate compensation. I therefore award him Kshs.65,565/=-.

In summary therefore I enter judgment for the Claimant as follows:-

- i. Notice Pay - Kshs.12,238.80
- ii. Accrued Leave - Kshs.52,014.90
- iii. Service Pay - Kshs.32,782.50
- iv. Underpayments - Kshs.45,900.40
- v. Compensation - Kshs.65,565.00

The Respondent shall also pay the claimant costs of the suit and interest at court rates from date of judgment.

Orders accordingly.

Read in open Court this 10<sup>th</sup> day of October, 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the present of:**

No appearance for Claimant

No appearance for Respondent