



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1370 of 2011

SAMUEL LUKAYU AGUMI
CLAIMANT

-VERSUS-

STEEL STRUCTURES LIMITED **RESPONDENT**

JUDGMENT

By a Memorandum of Claim dated 11th August 2011 and filed in Court on the same day the Claimant alleges that he was employed by the Respondent on 2nd April 2008 as a Painter and thereafter promoted to the position of Machine Operator at a Salary of Kshs.11,010 which was later increased to Kshs.12,720.00. That the Respondent has refused to pay his terminal benefits. He claims the following:-

1. Salary in lieu of notice Kshs.12,720.00
2. Leave Kshs.3,200
3. NSSF Kshs.3,200
4. House Allowance Kshs.68,000

Total:- Kshs.103,688.00

5. Maximum compensation of 12 months wages Kshs.152,640.00.
6. Costs and Interest

The Respondent filed a Memorandum of Reply on 5th September 2011 and a supplementary Memorandum of reply on 7th December, 2012 in which it submits that the Claimant was on numerous occasions employed as a casual worker whenever the need arose at a daily wage of Shs.424, that any overtime was paid for at one and a half times the daily wage, that the Claimant sustained soft tissue injury on or about 23rd February 2011 while at work and was treated. That the Claimant was put on light duty on 7th March 2011 and was assigned light work on 8th March 2011 That the Claimant failed to turn up for work from 4th April 2011, that he was never terminated. The Respondent further alleges that the cumulative days worked by the Claimant is less than 11 months.

The Respondent denies wrongfully terminating the Claimant or owing the Claimant the sums claimed. The Respondent further submitted that it remitted Claimants NSSF Contributions and annexed a Statement from NSSF for the period September 2007 to February 2011.

The parties were heard on 11th February 2013 when the Claimant testified on his own behalf while the

Respondent called **SAMUEL NJOGU MUNGAI** as Human Resources Administrative Assistant.

The Claimant was represented by Mr. Kariuki while the Respondent was represented by Ms. Makori.

The Claimant testified that he was employed by the Respondent as a Painter on 2nd April 2008 and later promoted to Grinder Machine Operator at a salary of Shs.11,010 as Painter and shs.12,720 as Machine Operator, that he was not given a payslip or any documents to confirm payment. He relied on a bank statement and notification of injury form as proof of payment of salary. He testified that he was injured while working on 23rd February 2011 and was thereafter put on light duty, that on 4th April 2011 he was told verbally by Samuel Mungai, the HR Assistant to go home for 7 days and was not given any reason. That when he came back on 11th April 2011 he went back to the office but was turned away by the Security Guard without explanation and he was never allowed back to work after that. That he thereafter went to Kituo Cha Sheria who wrote a demand letter to the Respondent but the respondent did not respond. He testified that he did not take any leave and was not paid house allowance. He prayed for orders as prayed in the Memorandum of Claim. He denied that he was paid daily. On cross examination he admitted that he had filed a civil suit for compensation in June 2011. He denied that there was a meeting with the union to discuss his case on 24th May 2011.

SAMUEL NJOGU MUNGAI on behalf of the Respondent testified that the Claimant was employed as a casual labourer paid at the end of each day and later every 2 weeks because daily payment was too much work. The payment was made through the bank. He testified that the Claimant got injured while at work and was put on light duty but complained that he was not in a position to work. That the Claimant made complaints to Human Rights that he was not adequately compensated and also to the union both of whom sought explanations from the Respondent. The Respondent also received a letter from Muriuki Ngunjiri on the Claimants injury. The Claimant was paid Shs.424 per day.

I have considered the pleadings, the testimony of the witnesses and the evidence. In my opinion the issues for consideration are the following:-

1. Whether Claimant was employed continuously or as a casual.
2. What the Claimants salary was.
3. Whether the Claimant was unlawfully terminated or absconded duty.
4. Whether the Claimant is entitled to the reliefs sought.

1. Whether the Claimant was in continuous employment or was a casual

The Claimant alleges that he was in continuous employment while the Respondent alleges the Claimant was a casual. The NSSF records which were filed by the Respondent show that the Claimant was in more or less continuous employment from September 2007 to February 2011 with gaps in November 2007, January, March, May and June 2008 then January and August 2010. He worked continuously without a break from July 2009 to December 2009.

I therefore find that the Claimant was on monthly terms of employment by virtue of Section 37 of the Employment Act.

2. What the Claimant's salary was

From the evidence on record I am persuaded that the Claimant was paid daily at the rate of Shs.425 per day.

3. Whether the Claimant was unlawfully terminated or absconded duty

The Claimant alleges he was sent home verbally by RW1 while Mr. Mungai testified that the Claimant stopped coming to work upon being put on light duty after he complained that he was not well enough to work and that thereafter he reported to a human rights NGO, then to the union, then to Kituo Cha Sheria and at some point to Muriuki Ngunjiri and company advocates.

From the evidence on record the claimant has not discharged his duty to prove that he was sent away from employment. I therefore find that the Claimant has not proved that he was terminated by the Respondent.

4. Whether the Claimant is entitled to the reliefs sought.

(i) Salary in lieu of notice

Having found that the Claimant has not proved that he was terminated by the Respondent, his claim for payment in lieu for notice cannot succeed.

I therefore dismiss the claim.

(ii) Leave

From the records in the NSSF Statement, the Claimant worked for a total of 35 months on and off from September 2007 to February 2011. The Employment Act Section 28 provides for annual leave of 1.75 days for every month worked. The Respondent has not submitted any records to prove that the Claimant was ever given paid leave or payment in lieu.

Under Section 10(7) of the Employment Act, where an employer fails to produce records the burden of proof to prove or disprove a claim by an employee lies with the employer.

I therefore find that the Claimant is entitled to leave of 1.75 day per month for 35 months at the rate of Shs.425 per day amounting to Kshs.26,031.25. I award him the same.

(iii) NSSF

The Claimant has not proved that NSSF was not paid for any month when he worked. In any event a claim for NSSF contributions is the statutory responsibility of NSSF and not the Claimant.

The claim is dismissed.

(vi) House allowance

Having been paid a daily rate, the Claimant is not entitled to house allowance as daily rates of pay are inclusive.

The claim for house allowance is therefore dismissed.

(v) Maximum compensation

As I have found above, the Claimant was not unfairly dismissed from employment and is not entitled to compensation.

The claim is dismissed.

(vi) Costs and Interest

Having failed to prove the bulk of his prayers, the Claimant is not entitled to costs. Each party shall bear its costs.

In summary, I give judgement to the Claimant in the sum of Shs.26,031/= .

Each party shall bear its costs.

Orders accordingly.

Read in open Court and signed on this 29th day of April 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

KARIUKI

In the presence of:- _____ Claimant

KIRIMI

_____ Respondent