



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 210 of 2009**

**SAMUEL MUSEE GIDEON .....CLAIMANT/APPLICANT**

**VERSUS**

**STEEL STRUCTURES LIMITED.....RESPONDENT**

**JUDGMENT**

The claimant has brought suit against the Respondent, his former employer seeking declaration that his dismissal from employment was unlawful and that he should be paid his terminal dismissal follows:-

(a) Unpaid salary	-	5,699.70
(b) Service/gratuity (11,339 x 13 x 2/3 98,275.25)	-	98,275.25
(c) Two months in lieu of notice	-	22,198.90
Unpaid leave 2½ days for 6 months	-	5,129.75
Salary wrongly deducted	-	<u>7,280.00</u>
	=	<b><u>Kshs.139,183.58</u></b>

In defence, the Respondent has denied the allegation of wrongful dismissed of the claimant from job. She blames the claimant for irregular payment of fictitious overtime to himself. That as at the time of termination the claimant owned the respondent Kshs. 41,302.00

That the claimant, final dues were computed as follows:-

- (i) Days earned up to and including 14/3/05.
- (ii) Overtime earned up to 14/3/05.
- (iii) Net prorata leave as at 14/3/05.
- (iv) 2 months salary in lieu of notice.

(v) Gratuity(11 years x 14 days 154 days)

Less:- (a) Advances

(b) Statutory deductions

(c) Company loans and liabilities

(d) Miscellaneous deductions.

That the computation was based on Appendix 4 which the claimants refused to acknowledge. The matter came up for hearing on 3/10/12 but the parties agreed to rely on the pleadings and their written submissions. I have considered the pleadings and the submissions carefully. The following issues arise:-

(a) Whether the Respondent terminated the claimant's contract of services wrongfully, unfairly and unlawfully?

(b) What remedies are available to the claimant?

In answer to the first issue, I have considered the letter of appointment marked Appendix A in the claim and Collective Bargaining Agreement (CBA) marked Appendix 1 in the response. Appendix A provides that the notice period for termination by either party to the contract is one month. That must have been replaced by the CBA in Appendix 1, which provided for two months notice period except for summary dismissal. In the present case, the termination was not a summary dismissal but a normal termination but taking effect immediately. In compliance with the contract (CBA) the respondent undertook to pay two month's salary in lieu of notice. The letter of termination however did not state the reason for dismissal. It is therefore, not possible to tell whether the respondent had any lawful course to terminate the contract or not. It is also obvious that the claimant was not given a hearing to defend himself against any charges that led to his termination.

Consequently the termination was unlawful. Luckily for the Respondent, the new Employment Act 2007 had not come into force, otherwise the employee would have been entitled to compensation for unfair dismissal.

The next issue to consider is what remedies are available to the claimant. It is not in dispute that the claimant was entitled to two (2) months salary in lieu of notice. It is also not in dispute that the claimant was entitled to salary and overtime for 14 days worked upto 14-3-2005 and also net prorata leave up to 14-3-2005.

In addition there is consensus that the claimant was entitled to service gratuities for the period of service. There is however no consensus on the number of years and the number of days per year of service. The claimant has calculated using 13 years at the rate of 20 days per year of service. The Respondent has applied 11 years as the rate of 14 days per year.

The CBA marked Appendix 1 produced by the Respondent covers the period between 1-1-2005 to 31-12-2006. (See page 19). On page 13, clause 18(iv), the CBA provides that if termination is done by the employer, the employee who has completed two years of service shall be entitled to gratuity at the rate of 14 – day's salary per year of service for every completed year of service based on employee's wages at the time of termination.

Clause 19 (a) provides that on completion of four years' service with an employer, an employee shall be entitled to twenty (20) days pay for every completed year of service by way of gratuity based on the employee's wages at the time of termination of his services.

The question is how many completed years of service are there between 11-9-1992 and 14-3-2005? In my simple calculation, it is 12 completed years of service. Since the claimant had completed 4 years of

service with the Respondent, the rate is 20 – days pay per year of service.

As regards the prayer for unlawful deductions of salary for February 2005, the claimant did tender evidence to support that prayer. Appendix B in the claim reflects deduction of Kshs.7,280 as miscellaneous. It doesn't say for what purpose. It is interesting how an employer can deduct the whole of an employee's salary and pay a net of only Kshs.200/-. No plausible explanation was tendered to explain that anomaly. The only explanation given by the Respondent is that the claimant paid himself overtime. How can he have done that? Was he the paymaster? Who else was involved? Is there any counter claim of criminal prosecution undertaken to prove him guilty? Was that the reason for sacking the claimant? Did he ever admit liability in any forum? What is the relevance of Appendix 3 in the Response to this case? All the above questions arose in my mind while agonizing over that item in the claim. The burden of proving that the claimant was in the wrong lies on the Respondent. I am satisfied that the claimant worked for the Respondent and earned the whole salary for February 2005 but the Respondent unlawfully deducted and withheld it. The Respondent was the custodian of work records and was the manager of the Human Resource. He should have been careful to ensure that the claimant was on duty and paid for only hours worked. Consequently the Kshs.7,280/- wrongfully deducted from the employee's salary is due and owing to the claimant from the Respondent.

**In summary the Respondent shall pay to the claimant the following:-**

<b>(a) Unpaid Salary of 14 days in March 2005</b>	<b>-</b>	<b>Kshs. 5,699.70</b>
<b>(b) Two months' salary in lieu of notice</b>	<b>-</b>	<b>Kshs.22,798.90</b>
<b>(c) Net prorata leave for 6 months up to 14 arch 2005</b>	<b>-</b>	<b>Kshs. 5,129.75</b>
<b>(d) Salary wrongfully deducted in February 2005</b>	<b>-</b>	<b>Kshs. 7,280.00</b>
<b>(e) Service Gratuity for 12 years@20 days per year</b>	<b>-</b>	<b><u>Kshs. 90,715.60</u></b>
		<b>= <u>Kshs.131,623.95</u></b>

The above figure will be subject to the statutory deductions. The claimant will also have costs and interest orders accordingly.

**Orders accordingly.**

**DATED and DELIVERED** at Nairobi this **26<sup>th</sup>** day of **October, 2012.**

**Onesmus Makau**  
**JUDGE**