



**REPUBLIC OF KENYA**

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

**AT MOMBASA**

**CAUSE NO. 574 OF 2017**

**(Formerly Civil Suit No.274 of 2004 in Chief Magistrate's Court at Mombasa)**

EVANS B. MABIYA.....1<sup>ST</sup> CLAIMANT

DOUGLAS KILONZO MATI.....2<sup>ND</sup> CLAIMANT

JOSEPH KIMANTHA MUTHOKA.....3<sup>RD</sup> CLAIMANT

**(Suing on their own behalf and on behalf of 15 others)**

**- VERSUS -**

AFRICAN MARINE GENERAL CO. LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> February, 2022)

**JUDGMENT**

The claimants filed the plaint on 12.01.2004 through Mungatana & Company Advocates. The claimants claimed that the respondent employed them and were declared redundant. The claimed terminal dues of Kshs. 993, 913.08. They pleaded that they would rely on various letters of termination of employment, agreements thereof, and any other employment documents. The defence was filed on 19.06.2006 through Omondi Waweru & Company Advocates. The respondent denied employing the claimants and if at all it employed them they were properly and lawfully terminated. The respondent prayed that the suit be dismissed with costs.

The amended memorandum of claim was filed on 08.06.2021 through J.M Makau & Company Advocates. The claimants alleged that they had worked for the respondent on permanent basis for a number of years. They stated that by notices of redundancy or termination they ceased to work for the respondent. It was alleged the redundancy was in breach of section 40 of the Employment Act, 2007. They claimed Kshs. 993, 913.80, costs and interest. They stated that they would rely on letters on the termination of employment, and agreements and other documents thereof. They pleaded that despite demand, the respondent had refused to pay their terminal dues now claimed.

The amended statement of defence was filed on 19.11.2021 through Okello Kinyanjui and Company Advocates. The defence was substantially similar to the earlier one. The respondent admitted receiving the demand letter but denied liability. The respondent repeated that the suit be dismissed with costs.

The **1<sup>st</sup> issue** for determination is whether the parties were in a contract of employment. The respondent urged that the parties were not in a contract of employment because the respondent had contracted independent contractors to provide casual labour to work in the respondent's engineering enterprise entailing repair of ships. The evidence is that the claimants' Counsel Mungatana & Company Advocates issued the demand letter dated 31.10.2003 and the respondent's Counsel Omondi Waweru & Company Advocates replied by the letter dated 11.11.2003 confirming that the respondent employed the claimants as casuals and their employment came to an end by effluxion of time and the duties for which they had been employed to perform. The reply stated that the claimants had not been unfairly terminated and being casual employees no terminal dues were payable. The Court returns that the parties were in a contract of employment. Further, under section 2 of the employment Act, an employer includes a person who has entered a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person. The evidence was that the respondent was the principal employer for whom the claimants worked but the respondent engaged agents through whom the respondent paid the claimants.

To answer the **2<sup>nd</sup> issue** for determination, the Court returns that the amount claimed for the claimants will be declined. It is trite law that special or liquidated damages are specifically pleaded and be strictly proved. The claimants have pleaded a global sum of money to be paid but have not provided the particulars of the claim and as it relates to each of the claimants. Claimant witness No. 1 (CW1) and claimant witness No. 2 (CW2) were unable to justify the alleged overtime and they were incoherent on the overtime claimed. They were particularly incoherent on the shifts and how possibly, the overtime could be computed. While urging for underpayment, CW2 then testified, "**I started working for the respondent January 2001. I left 30.05.2003. The wage order page C13 is dated 30.05.2007 could not apply to my service. By end of June 2003, all of us were already terminated....**" CW1 and CW 2 also consistently testified that the claimants were casual workers. In view of the evidence, the Court finds that the claimants have not specifically pleaded their claim, the casual service was inconsistent with the alleged redundancy, and even if the labour officer may have computed the claimant's terminal dues as was suggested, CW2 disowned the same as incomplete and, such computation not having been agreed to by the respondent, it did not aid the claimants' case. The Court finds for the respondent that the claimants have failed to establish the prayers made.

The Court has considered the long period that has lapsed since the filing of the suit and the respondent's failure to cooperate with the District

Labour Officer per the correspondence on record and the Court returns that parties will bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimants for the dismissal of the suit and parties to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.**

**BYRAM ONGAYA**

**JUDGE**