



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 900 OF 2016**

**DOMINIC PATROCLUS KILONZO.....CLAIMANT**

**VS**

**SGS KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The genesis of this claim is the termination of the Claimant’s employment on 15<sup>th</sup> September 2015. The Claimant sets out his claim in a Memorandum of Claim dated 8<sup>th</sup> November 2016 and filed in court on 25<sup>th</sup> November 2016. The Respondent filed a Response on 14<sup>th</sup> December 2016.
2. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Operations Manager, Jacob Munyeki. The parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant pleads that he was employed by the Respondent as a casual worker sometime in the year 2011. He earned a daily rate of Kshs. 527 which was paid weekly.
4. The Claimant avers that his employment was terminated verbally on 15<sup>th</sup> September 2015, contrary to laid down procedure. The Claimant adds that the termination of his employment was triggered by allegations that he had fought with his colleague, Patrick Mulevi.
5. After the incident, which the Claimant describes as an altercation, the Claimant and Mulevi were sent on two weeks’ suspension by the Operations Manager, Jacob Munyeki. After two weeks, the Claimant and his colleague went back to the Respondent’s offices but were not assigned any duty.
6. The Claimant’s case is that he was not accorded fair hearing before the termination of his employment and that he had no prior notice of the termination.
7. The Claimant now claims the following from the Respondent:

- a) Notice pay.....Kshs. 14,756.00
- b) 12 months’ salary in compensation.....177,072.00
- c) Accrued leave for 5 years.....73,780.00
- d) Unpaid NSSF dues (2011-2015).....20,200.00
- e) House allowance for 5 years.....132,804.00
- f) Salary arrears for May 2013 and 6 months in 2014.....7,188.48
- g) Certificate of service

h) Costs

### **The Respondent's Case**

8. In its Response dated 10<sup>th</sup> December 2016 and filed in court on 14<sup>th</sup> December 2016, the Respondent admits having employed the Claimant as a casual worker in 2011. The Respondent states that the Claimant's employment was not continuous but depended on availability of work.

9. The Respondent further states that while engaged as a casual and assigned to work in the premises of a client, the Claimant was engaged in a violent physical fight with Patrick Mulevi. Consequently, the Claimant's weekly engagement was not renewed.

10. The Respondent's case is that because the Claimant was a casual employee, then there was no obligation to follow procedural fairness requirements.

### **Findings and Determination**

11. There are three (3) issues for determination in this case:

- a) The nature and status of the Claimant's employment;
- b) Whether the Claimant has made out a case of unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

### **Nature and Status of Claimant's Employment**

12. In its defence, the Respondent states that the Claimant was a casual employee and was therefore not entitled to the procedural fairness requirements set out in the Employment Act.

13. Section 2 of the Employment Act defines a casual employee as:

***“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”***

14. In his Memorandum of Claim, witness statement and further testimony before the Court, the Claimant was unequivocal that he was a casual employee. He told the Court that there were times when there was no work and that he was only paid for days worked.

15. The Claimant's testimony was consistent with the temporary entry documents allowing him and his colleagues entry into clients' premises for purposes of carrying out specific assignments on behalf of the Respondent. This was further supported by the intermittent nature of remittances to the National Social Security Fund and the National Hospital Insurance Fund.

16. The Court was referred to the decision in *Livingstone Oundo v Polypipes Ltd (Steel Division) [2016] eKLR* where it was held that a casual employee is engaged on a daily basis and he cannot therefore lay a claim based on entitlements for regular employees. This is the law as I understand it.

17. The Claimant in this case, being evidently a casual employee cannot sustain a claim for compensation or statutory dues. For this reason, the Claimant's entire claim fails and is dismissed.

18. Each party will bear their own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2020**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Anaya for the Claimant

Ms. Kitoo h/b Mr. Obura for the Respondent