



**REPUBLIC OF KENYA**

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

**CAUSE NO 40 OF 2016**

**MWINYI ALI KABUNGU BABAYA.....CLAIMANT**

**VS**

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

**JUDGMENT**

**Introduction**

1. This is an employment dispute between Mwinyi Ali Kabungu Babaya and Steel Makers Limited. The Claimant's case is contained in a Memorandum of Claim dated 29<sup>th</sup> January 2016 and filed in court on even dated. The Respondent filed a Response on 14<sup>th</sup> March 2016.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Legal Assistant/Claims Officer, Charles Mutinda.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 7<sup>th</sup> January 2008 in the position of Machine Operator. He earned a daily rate of Kshs. 485. In December 2014, while in the course of his normal duty, the Respondent's Works Manager, one Mr. Menon told the Claimant that there was no more work, escorted him to the gate and ordered the watchman not to allow him into the company premises.

4. The Claimant further states that he was not given any reason for termination of his employment. He adds that the termination was unlawful and unfair. He therefore claims the following:

- a) Notice pay.....Kshs. 12,610
- b) Leave pay for 7 years.....71,295
- c) Service.....67,900
- d) 12 months' salary in compensation.....151,125
- e) Costs plus interest

**The Respondent's Case**

5. In its Response dated 14<sup>th</sup> March 2016 and filed in court on even date, the Respondent states that the Claimant was a casual employee engaged occasionally on a day to day basis as and when there was work to do. The Claimant's employment therefore started at the beginning and terminated at the end of each day.

6. The Respondent denies employing the Claimant for a continuous period of 6 years effective 7<sup>th</sup> January 2008 and maintains that the Claimant's employment was intermittent, depending on availability of materials for production.

7. The Respondent further denies terminating the Claimant's employment in December 2014 and states that it declined to take up the Claimant for casual employment owing to non-availability of materials for production. The Respondent adds that subject to availability of materials in future, the Claimant may be considered for casual employment if need arises.

8. The Respondent avers that owing to the casual nature of the Claimant's employment, it had no control over whether or not the Claimant

could take leave. The Respondent also avers that the Claimant was a contributing member of the National Social Security Fund (NSSF).

### **Findings and Determination**

9. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

10. The Claimant states that sometime in the month of December 2014, he was notified by the Respondent's Works Manager, Mr. Menon that there was no more work for him. In response, the Respondent states that the Claimant was a casual employee working from day to day on need basis. His employment was therefore capable of being terminated in the manner pleaded in the Memorandum of Claim.

11. The Claimant himself testified that he was a casual employee engaged when there was work. In support of his case, the Claimant produced his NSSF statement for period between 1<sup>st</sup> January 2004 and 30<sup>th</sup> June 2014.

12. The parties devoted a lot of time discussing whether the Claimant's employment had converted from casual to term employment as contemplated under Section 37(1) of the Employment Act, 2007. In advancing his case, the Claimant relied on two previous decisions of this Court (variously constituted) being *Nasoro Omar Mohammed v Kwale National Sugar Co. Ltd [2017] eKLR* and *Wilfred Bukachi Opwaka v Ready Consultancy Company Limited [2012] eKLR*.

13. On its part, the Respondent relied on *Simeiyu Martin Mumachi & 3 others v Steel Makers Ltd [2017] eKLR* and *Persteeno Omondi v Steel Makers Ltd [2017] eKLR*.

14. However, having considered the parties' pleadings and evidence adduced before the Court, I do not think the case turns on conversion of employment terms from casual to term contract. Rather, the question before the Court is whether the Claimant has proved a case of unlawful termination as required under Section 47(5) of the Employment Act, 2007 which provides that:

***(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

15. The Claimant pleads the month of December 2014 as the month in which his employment was terminated. It is instructive however that this month is not covered by the NSSF statement filed by the Claimant. It is not in dispute that although the Claimant may have worked for periods in excess of the threshold for conversion of casual employment to term contract, he did not work throughout.

16. The NSSF statement produced by the Claimant which terminates in June 2014 begs the question whether by December 2014, when the Claimant claims to have been terminated, he was still in the Respondent's employment. This is crucial evidence that the Claimant failed to adduce and his claim for unlawful termination, which presupposes the existence of an employment relationship on the accrual date cannot stand. The claims for compensation and notice pay therefore fail and are dismissed.

17. From the evidence on record, it is evident that the Respondent remitted the Claimant's NSSF dues for the periods he was in employment. The claim for service pay is therefore misplaced and is dismissed. In light of the Claimant's admission that he did not work throughout, his claim for leave pay for the entire period of 7 years is without basis and is dismissed.

18. Overall, the Claimant's entire claims fails and is dismissed.

19. Each party will bear their own costs.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wandera for the Claimant

Mr. Alwenya for the Respondent