



**REPUBLIC OF KENYA**

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

**CAUSE NO 41 OF 2016**

**RUNE ONDEGO GRAHN.....CLAIMANT**

**VS**

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

**JUDGMENT**

**Introduction**

1. On 29<sup>th</sup> January 2016, the Claimant filed a Memorandum of Claim seeking compensation for unfair termination of employment and payment of terminal dues. The Respondent responded by a Response dated 14<sup>th</sup> March 2016 and amended on 18<sup>th</sup> May 2017.

2. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its 6<sup>th</sup> Rolling Mills Foreman, Evanson Muchiri. The parties subsequently filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a tongsman in 2011, initially on casual basis at a daily rate of Kshs. 730 for night shift and Kshs. 650 for day shift. The Claimant adds that on 2<sup>nd</sup> June 2015, his employment was terminated by the Respondent through its Foreman, Mr. Muchiri, without justifiable cause. He was not issued with a termination letter.

4. The Claimant further states that he was not allowed to go on leave and was required to work on public holidays.

5. The Claimant now claims the following from the Respondent:

- a) One month's salary in lieu of notice.....Kshs. 18,980
- b) Leave pay for 4 years.....61,320
- c) Years of service.....42,300
- d) 12 months' salary in compensation.....227,760
- e) Certificate of service
- f) Costs plus interest

**The Respondent's Case**

6. In its Response as amended on 18<sup>th</sup> May 2017, the Respondent states that the Claimant was a casual employee whose services were engaged occasionally on a day to day basis, whenever there was work to do. The Respondent states that the Claimant's employment started at the beginning of each day and terminated at the end of each respective day worked.

7. The Respondent denies having employed the Claimant in 2011 and maintains that the Claimant's employment was intermittent and dependent on availability of materials for production. The Claimant therefore did not and cannot have worked continuously for a period of 4 years as implied in the Memorandum of Claim.

8. The Respondent further denies dismissing the Claimant on 2<sup>nd</sup> June 2015 and states that it is the Claimant who, on his own volition and for reasons only known to himself, failed to report on duty from 3<sup>rd</sup> June 2015 to date.

9. The Respondent contends that whereas materials for production were available and other employees in the department reported to work, the Claimant failed to report on duty for reasons only known to himself.

10. The Respondent avers and maintains the following:

a) That by the casual nature of the employment which was intermittent and on a day to day basis whenever there was work to do, it was not possible to issue a notice of termination to the Claimant;

b) That this being a casual employment where the Claimant came to seek employment whenever he wanted to and stayed away whenever it suited him, issues of taking leave were entirely within the Claimant's absolute discretion and the Respondent had no control over whether or not the Claimant could take leave;

c) That the Claimant had displayed in his list of documents evidence that he was a contributor to the National Social Security Fund (NSSF) from where he should recover his service pay, if any, by dint of Section 35(6) of the Employment Act, 2007;

d) That the issue of compensation for unfair termination does not arise in the circumstances of the Claimant's casual employment. There was no termination; the Respondent merely declined to re-hire owing to lack of sufficient materials for production. In any event, the Claimant is still at liberty to seek casual employment in future and may be considered if there is available work to do.

11. From the pleadings, evidence and submissions of the parties, the following issues emerge for determination before the Court:

a) Whether the Claimant was a casual employee;

b) Whether the Claimant has made out a case of unlawful termination of employment;

c) Whether the Claimant is entitled to the remedies sought.

### **Casual Employment?**

12. In response to the Claimant's claim, the Respondent states that the Claimant was a casual employee paid a daily wage and hired as and when the need arose. Section 2 of the Employment Act, 2007 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.”***

13. The Claimant pleads that he worked for the Respondent from sometime in 2011 until 2<sup>nd</sup> June 2015, when his employment was terminated. The Court observed that although the Claimant had the exact date of termination, he could not even tell the month of his employment. The Court found this evidential gap significant.

14. Moreover, the contribution gaps in the Claimant's National Social Security Fund (NSSF) statement, which he himself produced, do not show consistent employment from 2011 to 2015. This Court is fully aware of Section 37(1) of the Employment Act, 2007 which allows for conversion of casual employment to term contract, where the one-month threshold has been established.

15. I think however, that the protection provided under Section 37(1) is for employees who are continuously employed but are denied accrued benefits that go with permanency in employment. I do not think the drafters of this provision intended to cover employees who come and go at will. I say so because conversion presumes continuous employment from the first to the last day. To see it any other way would create an absurdity where an employee's first day keeps shifting.

16. Take the Claimant's case for example; discerning from his NSSF statement, he entered employment in May 2011 and worked up to January 2012. He then broke his service and started work again in March 2012 and stayed all the way up to September 2013. He broke his service yet again and resumed in November 2013 and worked until July 2014 after which he took a long break until April 2015 when he resumed, with his last month of work being May 2015.

17. In my view, a broken employment period does not count in conversion of employment from casual to term contract. To this extent, I agree with the holding by my brother **Makau J** in ***Simeiyu Martin Mumachi & 3 others v Steel Makers Limited [2017] eKLR***.

18. I find it necessary at this point to digress a little and offer guidance to employers who for one reason or another are unable to provide long term employment. Such employers do themselves a great disservice by failing to document the employment relationship because when that happens, the terms of employment are subject to interpretation by the Court. If the Human Resource Departments of these employers spend a little time crafting simple fixed term contracts which expire by effluxion of time, a lot of time and money will be saved, to say nothing about precious judicial time that is spent fixing problems that should really be addressed by Human Resource Managers.

19. Back to the Claimant's case; it seems to me that he failed to prove that he was in continuous employment with the Respondent from 2011 until the 2<sup>nd</sup> June 2015. Indeed, at paragraph 4 of his Memorandum of Claim, he concedes that he was employed on casual basis. He

did not tell the Court if and when his terms of employment may have changed from casual to term contract. At any rate, according to his NSSF statement, in 2015 the year he claims to have been terminated, the Claimant worked for not more than two months.

20. It follows therefore that even if the Court were to apply the provisions of Section 37(1) of the Employment Act to the Claimant's case, only two (2) months' of service would be secured to his credit.

#### **Unlawful Termination?**

21. In his witness statement dated 29<sup>th</sup> January 2016, the Claimant states that he decided to quit employment because of too much frustration. He blamed the departmental Foreman, Evanson Muchiri for his woes. Even assuming this was true and Muchiri vehemently denied it before the Court, it was not enough to force the Claimant out of employment.

22. From the evidence on record, the Claimant did not escalate his issues with Muchiri. He simply walked away and did not return. Such an employee cannot come to court and claim unfair termination. The Claimant failed to discharge his burden under Section 47(5) of the Employment Act. The claims for compensation and notice pay are therefore without basis and are dismissed.

23. In light of the finding that only two months of service would be secured to the Claimant's credit under Section 37(1) of the Employment Act, the claim for leave pay fails and is dismissed. From the evidence on record, the Respondent remitted the Claimant's NSSF dues for the periods he was in employment. The claim for years of service is therefore without basis and is also dismissed.

24. In the end, the Claimant's entire claim fails and is dismissed.

25. Each party will bear their own costs.

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

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wandera for the Claimant

Mr. Alwenya for the Respondent