



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

**AT MOMBASA**

**CAUSE NO. 37 OF 2016**

**PERSTEENO OMONDI .....CLAIMANT**

**VERSUS**

**STEEL MAKERS LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's contract of service by the respondent on 8/4/2015. The respondent denies the alleged unfair termination and avers that the claimant was a casual employee and his services were fairly terminated under the provision of law. She therefore prays for the dismissal of the suit with costs.

2. The suit was disposed of by written submissions on the basis of the parties' respective record.

**CLAIMANT'S CASE**

3. The claimant stated in his written statement that he was employed by the respondent in the year 2000 and worked in her different department including the cooling bed department where he ended his services while earning ksh.688 per day. He produced his NSSF and NHIF statements to show that he was employed by the respondent.

4. On 1/4/2015, he was informed by the work manager that there was no work for him until he cleared with the General Manager. When he went to see the latter, he was told by him that his services had been terminated.

5. The claimant contended that the termination of his services was unfair and unjustified because the respondent failed to pay him his terminal dues and issue him with a certificate of service contrary to the law.

**DEFENCE CASE**

6. The respondent's legal manager Mr. Charles Mutinda filed a written statement alleging that the claimant was employed by the respondent as a casual employee on diverse dates over the years. He contended that the claimant never worked continuously but only as and when required. He maintained that the claimant's services was interpreted and he never worked for any twelve consecutive months and as such he could not be issued with a formal contract. According to Mr. Mutinda, the claimant was paid

on daily basis for the work done and no arrears of wages are outstanding. He concluded by contending that she gave one day notice as she had always done whenever there was shortage of materials.

### **ANALYSIS AND DETERMINATION**

7. There is no dispute that the claimant was employed by the respondent as on casual basis. The issues for determination are:

- a. Whether or not the claimant's contract of service converted to regular term contract.
- b. If (a) above is affirmed, whether the contract was unfairly terminated by the respondent.
- c. Whether the reliefs sought should issue.

### **Conversion of contract of employment**

8. The respondent has maintained that the claimant never worked continuously for her but only when the need arose and she paid his wages on daily basis. The claimant has not contested the said allegation by the employer. He has not contended anywhere in his pleadings, witness statement or written submission that he worked continuously. In fact he has corroborated the respondent's counterclaim that he was a casual employee by stating in his statement and pleadings that he was employed for a daily wage. Consequently, I find that the claimant's contract of service never converted to regular term contract under Section 37 of the Employment Act.

9. Under Section 37 of the Act, casual employee's contract of service converts to regular term contract after serving continuously in the aggregate of not less than two months. The burden of pleading and proving continuous service rests with the casual employee. In this case however, the claimant has failed to discharge the said burden of proof on a balance of probability. The NSSF and NHIF statements produced clearly show that his remittances were not continuous and they were varying in figures. In view of the foregoing, I hold that the claimant was a casual employee as at the date of his termination.

### **Unfair termination**

10. The claimant having been a casual employee at the time of his termination, he was not entitled to the protection of the law from abrupt termination. It was enough that he was terminated without notice at the end of the day at work.

### **Relief**

11. In view of the foregoing finding that the claimant was a casual employee who was not protected by the law from abrupt termination, the compensation sought in his claim cannot issue. Likewise, the prayers for leave and service pay are declined because the claimant never served for any 12 consecutive months. The NHIF and NSSF statement produced by the claimant is **enough evidence that the claimant never worked continuously for any single year.**

### **DISPOSITION**

12. The suit is dismissed for lack of merits. Each party to bear his or her own costs.

**Dated, signed and delivered this 30<sup>th</sup> June 2017**

**O.N. Makau**

**Judge**