



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 38 OF 2016

SIMEIYO MARTIN MUMACHI & 3 OTHER.....CLAIMANT

VERSUS

STEEL MAKERS LTDRESPONDENT

J U D G M E N T

1. This is a claim for accrued benefits plus compensation for unfair termination of the claimants' contract of service by the respondent on 23/2/2015. The respondent has denied the alleged unfair termination and averred that the claimants were casual employees and their termination was fair within the law. She therefore prayed for the suit to be dismissed with costs.

2. The parties agreed to dispense with the oral hearing and instead adopted the respective records and disposed the suit by written submissions.

CLAIMANTS' CASE

3. Mr. Simeyo Martin Mumachi, the first claimant stated in his written testimony that he was employed by the respondent on 1/4/2004 as a Gas Cutter earning ksh.485 as his daily wage.

4. He further stated that on 23/2/2015, he was reported to work as usual but the supervisor told him that there was no work until he cleared with the manager. When he went to see the manager in his office, the latter told him to go home and until he was called back. After one week of waiting, he went to the office and the manager told him that there was no more job for him and that he should leave immediately. He was not paid any terminal benefits.

5. Mr. Alex Maitha Gowe, the second claimant repeated the statement by the first claimant verbatim save that his daily wage was ksh.522. I will therefore not duplicate it herein.

6. Mr.Chimera Ndegwa Chimera the third claimant stated in written testimony that he was employed by the respondent on 4/9/2008 as Furnace Liner earning a daily wage of ksh.307. That he used to work from Monday to Friday and rest on Saturday.

7. In February 2015, the claimant and his colleagues were informed that their rest day had been changed from Saturday to Friday. When they sought to know the reason for the change of their rest day, no explanation was given and they refused to comply until a valid reason was given for the change.

8. On 23/2/2015 Mr. Memon told him that there was no more work and ordered him to leave and never to

return because he had been terminated. He was also never paid his terminal dues.

9. Mr. Baya Kaingu Mwangutsi, the forth claimant stated in his written testimony that he was employed by the respondent as a Green Separator on 25/2/2002. In the department he was working with three colleagues. At the start of February 2015, the manager told them that they required only three employees in the department.

10. On 23/2/2015, he was terminated by the manager without any prior notice or payment of any terminal benefits. He therefore instructed a lawyer to bring this suit to recover damages.

11. The claimants produced NSSF and NHIF statements to support their case.

DEFENCE CASE

12. The respondent never filed statement herein but relied on the averments in her defence and filed submissions. The gist of the defence is that the claimants were casual employees who never worked continuously. That their engagement depended on availability of materials. Lastly they were lawfully terminated under Section 35(1) (a) of the Employment Act without notice and as such they are not entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

13. There is no dispute that the claimants were employed by the respondent as casual employees. The issues for termination are:

- (a) Whether the contracts of service converted to regular term contract.
- (b) If (a) is affirmed, whether the termination of the contract was unfair.
- (c) Whether the reliefs sought to issue.

Conversion from casual employment

14. The burden of proving that they worked continuously was upon the claimants. In this case however, the claimants have not specifically pleaded, testified or even submitted that they worked as casual employees continuously for the minimum term required for casual employment to convert to regular terms contract under Section 37 of the Act being two months. On the other hand, the respondent has contended that the claimants were only employed as casual employees as and when the need arose.

15. I have considered the NSSF and NHIF statements filed by the claimants to see the pattern of remittances. No statements from the first claimant were produced as exhibits although copy of his NHIF card was produced. He has therefore not proved on balance of probability that he worked continuously on casual basis to qualify for conversion to regular term contract employee.

16. The second claimant produced his NHIF statement for the period between May 2012 and February 2015. It revealed that from May 2012 he remitted NHIF continuously upto November 2013. He jumped December 2013 and resumed from January 2014 to November 2014 then jumped December 2014 and January 2015 and resumed in February 2015. The remittances fluctuated. The gaps in the remittances in December 2013 and December 2014 to January 2015 and the fluctuations have not been explained. Most probably the second claimant used to leave work and get re-employed after the said gaps. Assuming that the continuous remittances meant days worked, then the casual employment were enough to convert the second claimant's casual employment to regular term contract but he never enforced that right before February 2015. In my view the claimant was reemployed in February 2015 on casual basis but he was terminated on 23/2/2015 for lack of work. Had he worked continuously from February 2015 for the aggregate number of days required to qualify for conversion of the contract under Section 37 of the Act, or had he sued for the period ending November 2014 he would have arrived at a qualified conversion.

17. The third claimant NHIF statement reveals that from May 2012 to January 2013, he contributed continuously and jumped February 2013 and remitted in March 2013. Therefore he made no remittance upto February 2015. The gap in the remittance was not explained and I find that the gap represented the period when the claimant was not in employment. He was therefore not in employment from March 2013 upto February 2015 when he was reemployed but he was terminated before serving continuously for the minimum days required for conversion of his casual employment to regular term contract.

18. The fourth claimant's produced NSSF statement for 2009 to 2014 and NHIF statement for May 2012 to March 2013. He did not produce the NSSF statement for the period between January and February 2015. There is therefore no evidence to prove that he worked in January and February 2015. The NHIF statement for April 2013 to February 2015 was not produced to complement the NHIF statement.

19. After carefully considering the evidence by the claimants and identified the said unexplained gaps between the NHIF and NSSF statements, it is my considered opinion that the claimants have not proved on a balance of probability that they served the respondent's continuously from the dates cited on the commencement dates to 23/2/2015 when they were allegedly terminated for lack of work to do or refusing to accept change of rest day from Saturday to Friday. Although they had at one time qualified for conversion to regular term employees under Section 37 of the Act, the said periods were broken and they got reemployed thereafter.

Unfair termination

20. In view of the foregoing finding that the claimants were casual employees, it is my further finding that they were incapable of being unfairly terminated under Section 45 of the Act.

Reliefs

21. The claimants being casual employees on daily wage they are not entitled to salary in lieu of notice and compensation for unfair termination under Section 49 of the Act.

22. The claims for leave and service pay are dismissed for lack of evidence to prove that the claimants qualified for the same.

DISPOSITION

23. For the reason that the claimants were casual employees at the time of termination of their services, the suit is dismissed. Each party to bear his or her own costs.

Dated, signed and delivered this 30th June 2017

O.N. Makau

Judge