REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 339 OF 2015

DOUGLS MULANYA ALAKONYA.....CLAIMANT

VS

AFRICA MARINE GENERAL ENGINEERING LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the respondent from 6.1.2014 as a Grinder man earning kshs.635 per day but payable weekly in arrears. He worked well until 22.7.2014 when he sustained injuries due to an industrial accident while on duty and he was taken to the Aga Khan Hospital where he was admitted until 26.7.2014. It is the claimant's case that on 26.7.2014, his services were terminated by the respondent for reasons unknown to him. That according to him the termination was unfair and prays for damages amounting to Kshs. 274,320 made up of one month salary in lieu of notice, unpaid house allowance unpaid sick off, certificate of service and twelve months salary as compensation for unfair termination.

2. The Respondent admits that she employed the Claimant from 6.1.2014 to 26.7.2014 but avers that the engagement was on casual basis because her business is seasonal in nature. She further avers that the wage of kshs.635 per day was inclusive of house allowance. She denied that she terminated the Claimant's employment and avers that the ship she was contracted to repair was completed and went away. She therefore prayed for the suit to be dismissed with costs.

3. The hearing of the suit was dispensed with and the parties agreed to dispose of the suit by written submissions on the basis of the pleadings, witness statements and the documentary evidence.

Claimant's case

4. Claimant stated that he was employed by the respondent on 6.61.2014 and worked continuously until 26.7.2014 when he was terminated for reasons unknown to him. Before then he had sustained bodily injuries from an industrial accident while on duty and was admitted in the Aga Khan Hospital for 3 days. Thereafter the employer began to mistreat him and refused to pay his medical bills at the Aga Khan hospital. That when he instructed a lawyer to pursue compensation for the injuries suffered the respondent terminated his services. He contended that the termination was unfair because there was no justifiable reason for the termination and that he was not accorded a fair hearing as required by section 41 of the Employment Act. He therefore prayed for twelve months salary as compensation for unfair termination plus one month salary in lieu of notice, salary for 6 off days and House allowance for 8 months of service.

Defence case

5. The respondent has admitted that she employed the claimant but on casual basis. She has produced employment records to prove that contention. She has further contended that her business is seasonal in nature and as such she only employs workers on casual basis. That the ship she had employed the claimant to work on was completed and it undocked and as such she is not the one who terminated the claimant services. She produced further employment records to prove that the claimant was never in continuous service but worked in less than 20 days in every month. That the daily wage of Kshs.635 was inclusive of house allowance.

Analysis and Determination

6. After considering the pleadings, evidence and submissions filed, it is clear that the claimant was employed by the Respondent as a Grinder man earning kshs. 635 per day. It is not in dispute that he never served continuously but only for less than 20 days in a month. There is further no dispute that the claimant served the respondent for only 7 months before the termination on 26.7.2014. The issues for determination are whether the termination of the Claimant's contract of employment was unfair and whether the reliefs sought by the Claimant should be granted.

Unfair termination

7. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure. In this case however, the nature of employment was such that the requirement for substantive and procedural fairness guaranteed under section 40, 41 and 45 of the Employment Act was not applicable. The employment records produced by the employer herein prove on balance of probability that the claimant was serving on casual basis. That his employment was not continuous enough to qualify for conversion to regular terms contract under section 37 of the Employment Act. Under section 47(5) of the Act, the onus of proving unfair termination of employment is on the employee. In this case, the said burden of proof has not been discharged and consequently, I find that the claimant has failed to prove on balance of probability that he was unfairly terminated.

Reliefs

8. The Claimant has prayed for damages amounting to Kshs. 274,320 made up of one month salary in lieu of notice, unpaid house allowance unpaid sick off, certificate of service and twelve months salary as compensation for unfair termination.

Notice and compensation for unfair termination

9. In view of the foregoing finding that the claimant has not proved that termination of his employment was unfair I decline to award him salary in lieu of notice and compensation for the unfair termination of his employment contract.

Unpaid house allowance

10. I agree with the respondent that the daily wage of kshs.635 was inclusive of House allowance. That contention is confirmed by the General wage Order published under the Labour Institutions Act.

Unpaid 6 sick off days

11. The claim for 6 sick off days lacks particulars and evidence to substantiate and as such I dismiss it.

Certificate of service

12. The claim for certificate of Service is granted because it is a right guaranteed under section 51 of the

Employment Act.

Disposition

13. For the reasons stated above the suit is dismissed save for the claim for a Certificate of service that is allowed. Each party shall bear his or her own costs.

Signed, dated and delivered at Mombasa this 18th day of November 2016.

O.N. MAKAU

JUDGE