



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

**CAUSE NO. 108OF 2018**

**ROTICH VICTOR.....CLAIMANT**

**VERSUS**

**MOGOGOSIEK TEA FACTORY CO. LTD.....RESPONDENT**

**JUDGEMENT**

1. The claimant brought this suit on 8.11.2018 alleging that he was unlawfully dismissed from employment by the respondent. The suit seeks the following reliefs:-

- a) An award of Kshs. 915,109.50
- b) General damages for violation of the claimant's Constitutional rights.
- c) Interest at court rates.
- d) Certificate of service.
- e) Reinstatement to his former job at the Respondent's company.
- f) Costs of this suit.

2. The respondent filed defence on 15/2/2019 denying the alleged unfair dismissal of the claimant from employment. On the contrary it averred that the claimant was engaged under a seasonal contract of service that lapsed automatically by effluxion of time. It denied that the claimant is entitled to the reliefs sought and contended that he was never a permanent staff under the collective agreement (CBA). Consequently, it prayed for the suit to be dismissed with costs.

3. On 1.11.2021 the parties agreed to adopt the pleadings, witness statements and documents filed as their respective cases and disposed of the suit by written submissions.

**Claimant's case**

4. The claimant stated that he joined the respondent in the Withering section in January 2010 and worked until January, 2018 when his employment was unfairly terminated by the respondent. His gross salary was Kshs. 31,555.50 as at the time of termination. He was registered for er services were terminated in December 2017 contrary to the CBA. She wasnot served with prior notice as required under the CBA. She therefore submitted that the termination was wrngfl and unlawful as there wasno justifile reasonand no heaing was accorded to heras required unde section 4e1 of the employment Act.as a member of NSSF and NHIF and he made contributions, which were deducted from his pay every month. He was also a member of the Kenya Plantation Workers Union and his union dues were also deducted from his salary every month.

5. He stated further that his services were terminated in January2018 contrary to the CBA because he was not served with any notice informing him that his services had been terminated. Further, he was not accorded a hearing as provided by section 41 of the Employment Act.He denied the alleged seasonal employment and maintained that he was a permanent employee and therefore entitled to the reliefs sought in his suit.

**Respondent's case**

6. The respondent adopted witness statement by is Unit Manager Mr. Koska Tinega dated 19.10.2021 who stated that the claimant was employed by the respondentunder a seasonal contract of 3 months from 1/6/2014 and again from 1.11.2016. As such he contended that the

claimant could not enjoy the permanent and pensionable status under the CBA. He denied the alleged dismissal and maintained that the claimant's contract of employment expired automatically upon the expiry of the agreed period. He further stated that the claimant was paid all his dues.

7. The respondent submitted that the claimant has not proved by evidence that he was a permanent employee and maintained that he was a seasonal contract employee as indicated in the contracts produced as MTFC-1. It also submitted that as per the payslips produced as MTFC-2, the claimant's salary was Kshs.26,090 and not Kshs.31,555 as alleged by the claimant.

8. Finally it submitted that since the claimant was a seasonal contract employee, he is not entitled to the reliefs sought under the CBA. For emphasis it relied on **Rashid Odhiambo and 245 others V Haco Industries Limited [2015] e KLR, Persteeno Omondi V Steal Makers Limited [2017] e KLR and Emmanuel Musembi Nthambi V Tamar Wire Products Limited [2017] e KLR**

#### **Issues for determination**

9. There is no dispute that the claimant was employed by the respondent up to January, 2018. The issues in contest are:-

- (a) *Whether the claimant was employed on seasonal contract basis or permanent engagement under the CBA.*
- (b) *Whether the claimant was unlawfully dismissed or his contract expired automatically,*
- (c) *Whether the claimant is entitled to the reliefs sought.*

#### **Nature of employment**

10. The claimant alleges that he joined the respondent in January 2010 as a permanent employee but the respondent contends that he worked for the company under 3 months separate seasonal contracts starting 1.6.2014 and again from 1.11.2016.

11. I have carefully considered the documents filed as exhibits. The claimant produced his NSSF statement showing that he started to work for the respondent earlier than 2014. All the claimant's records of employment are in the custody of the respondent by dint of section 74 of the Employment Act and under section 10(7) of the Act, it ought to produce the same to disprove the allegation by the claimant.

12. The respondent produced only copy of two seasonal contracts dated 1.11.2016, claimant's pay slips for December 2016 and January 2017. However, I wish to state that the default to avail all the employment records was deliberate concealment of material facts by the respondent who is the custodian of employment records. Never the less, I find and hold that the NSSF statement produced by the claimant establishes on a balance of probability that he started to work for the respondent as early as January 2010 and not in June 2014 as alleged by the respondent.

13. The respondent has not rebutted the fact that the claimant worked continuously from January to September 2010 and again from November 2010 to February 2011 as evidenced by the NSSF statement which was produced as exhibit. It is only after June 2011 that he was engaged under 3 months' seasonal contracts as per the said NSSF statement. Consequently, I find that the claimant was initially employed on permanent basis or at least his causal employment had converted to permanent employment by dint of section 37 of the Employment Act, up to February 2011 when such services were terminated. I further find that from June 2011 to October 2017 he was engaged under 3 months fixed term seasonal contracts, which were all punctuated by breaks in between. Such seasonal contract employment were lawful in accordance with both the law and Clause 22 of the CBA provides for seasonal contracts.

#### **Unlawful dismissal or expiry of contract**

14. The burden of proving unfair or wrongfully dismissal is upon the employee by dint of sections 47 (5) of the employment Act. In this case, the claimant did not rebut by evidence the allegation that he was under a 3 months seasonal contract as at the time of separation. He also did not call any witness to support his evidence that he worked continuously up to January 2018.

15. The claimant did not also explain the circumstances under which the termination occurred. Therefore, I believe the evidence by the employer that as at the time when the separation occurred, the claimant's contract of service was seasonal and it expired automatically after lapse of the period agreed by the parties. Going by the said NSSF statement, the last 3-months contract lapsed in October 2017.

#### **Reliefs sought**

16. The claimant prayed for one-month salary in lieu of notice.

Clause 22 of the CBA provided as follows:-

***“(c) Seasonal employees are entitled to special terms of contract as follows:-***

***(i) Seasonal employee shall be paid their wages at the end of each month***

***(ii) Seasonal employees shall be entitled to twenty eight (28) days' notice or twenty eight (28) days' pay in lieu of such notice in case of termination after three (3) consecutive months' continues service.***

***(iii) Seasonal employees shall be paid pro-rata leave for each completed months of service.”***

17. As observed above, the claimant has pleaded that he was dismissed in January 2018 but no evidence has been adduced to prove that he worked upto that date. It means that the pleadings are in conflict with the evidence and therefore that prayer must fail.

18. The claimant also prayed for leave for 8 years. However, the same lacks particulars and it is declined. Besides the claim for leave for the period between 2010, and October 2015 is now time barred because the separation in respect of the said several distinct contracts occurred more than 3 years before filing the suit.

19. The claimant further prayed for gratuity/service pay but the same is declined first because the claimant never worked for complete year as required under the CBA. Secondly from the start of his engagement, the employer contributed NSSF for him and as such under section 35(6) of the Employment Act, he is disqualified from claiming service pay.

20. In view of the finding that the claimant was not wrongfully dismissed, I decline to order reinstatement or award salary compensation. Likewise, the prayer for General damages for breach of constitutional rights is declined for lack of legal or factual basis. In conclusion therefore, I dismiss the suit with no costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF JANUARY, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**