



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. 107 OF 2018

JOSEPH KIPKURUI CHIRCHIR.....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 Ksh 3,091,665/-
- b) Unpaid salary due to underpayment.
- c) General damages for violation of the claimant's Constitutional rights.
- d) Interest at court rates.
- e) Certificate of service.
- f) Reinstatement to his former job at the Respondent's company.
- g) 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 Packaging section in 1985 and worked until January, 2018 when his employment was unfairly terminated by the respondent. His gross salary was KShs 39,135 as at the time of termination. He was registered for er services were terminated in December 2017 contrary to the CBA. She was not served with prior notice as required under the CBA. She therefore submitted that the termination was wrongful and unlawful as there was no justifiable reason and no hearing was accorded to her as required under section 4e1 of the employment Act. NSSF contributions, which were deducted from her 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 January 2018 without being served with prior notice as required under the CBA. He submitted that the termination was wrongful and unlawful as there was no justifiable reason and no hearing was accorded to him as required under section 41 of the employment Act.

6. He denied the alleged seasonal employment and maintained that he was a permanent employee and therefore entitled to the reliefs sought

in his suit. He cited decisions of this court where it was held that, termination of employment is fair unless there is both substantive and procedural fairness.

Respondent's case

7. The respondent adopted witness statement by his Unit Manager Mr. KoskaTinega dated 19.10.2021 who stated that the claimant was employed by the respondent under a seasonal contract of 3 months from 1/6/2014. After the lapse of the contract the claimant applied for employment on 20/11/2016 and he was given another 3 months' contract from 1/12/2016 to January 2018 when it lapsed and the claimant took off. Therefore, he denied the alleged dismissal and maintained that the contract expired automatically as agreed.

8. He denied the claimant's allegation that he was a permanent employee of the respondent since 1985 and denied that the NSSF Statement and Staff Identification card produced constitute proof of permanent employment. Therefore he contended that under the CBA, the claimant is not entitled to the reliefs sought.

9. 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

10. 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

11. The claimant alleges that he joined the respondent in 1985 as a permanent employee but the respondent contends that he joined the company in June 2014 under 3 months separate seasonal contracts until January 2018 when the last contracts expired.

12. I have carefully considered the documents filed as exhibits. The claimant produced his staff identification card issued by the respondent dated 10/12/2008, payslips, NSSF Registration Card issued on 12/2/1985 and 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 it ought to produce the same to disprove the allegation by the claimant.

13. The respondent produced only one contract dated 1/12/2016 and two pay slips to show that he claimant worked from 2014. That, however, is deliberate concealment of material facts by the custodian of employment records and it is not healthy for administration of justice. Never the less, I find and hold that the claimant has produced sufficient documentary evidence, especially the NSSF Registration Card which show that he started working for the respondent at least as early as 12/2/1985.

14. The respondent has not rebutted the fact that the claimant worked continuously at least from November 2006 to June 2010 as evidenced by the NSSF statement which was produced as exhibit. It is only after June 2010 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 up to June 2010 when her services were terminated. I further find that she was reengaged from August 2010 to January 2018 under 3 months fixed term seasonal contracts, which were all punctuated by breaks in between. Such seasonal contract employment were in accordance with both the law and Clause 22 of the CBA provides for seasonal contracts.

Unlawful dismissal or expiry of contract

15. The burden of proving unfair or wrongful dismissal is upon the employee by dint of sections 47 (5) of the employment Act. In this case, the claimant did not rebut 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.

16. 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.

RELIEFS SOUGHT

17. 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.”

18. In this case, the respondent contends that the claimant was employed under 3 month’s seasonal contracts. He served up to the end of the 3 months and as such I find that he was entitled to 28 days’ notice or salary in lieu of notice. Consequently I award him 28 days salary in lieu of notice being Kshs 20,090, under Clause 22(c) (ii) of the CBA, which is equal to the last salary paid in January, 2017.

19. The claimant also prayed for leave for 1985 – 2018. However, the same lacks particulars and it is declined. Besides the claim for leave for 1985 -2010 is now time barred because the separation in respect of the said permanent employment contract occurred in June 2010, more than 3 years before filing the suit.

20. The claimant further prayed for gratuity/service pay but the same is declined first because the period when the claimant worked for complete year ended in 2010 under the CBA, which claims, is now time barred considering the separation date in June 2010. Secondly from that time the employer contributed NSSF for him and as such under section 35(6) of the Employment Act, he is disqualified from claiming services pay.

21. 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.

22. In conclusion, I enter judgment for the claimant for the same of Kshs 20,090 less statutory deductions. The claimant will also have costs plus interest at court rate from the date of filing the suit.

Dated, signed and delivered at Nakuru this 18th 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 15th 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