



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 92 OF 2018

REGINA CHEPKIRUI MARITIM.....CLAIMANT

VERSUS

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

JUDGEMENT

1. The claimant brought this suit on 19.9.2018 alleging that she was unlawfully dismissed from employment by the respondent. The suit seeks the following reliefs:-

- a) An award of Kshs. 2,047,199.2/-
- 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 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 contending that she was never a permanent staff under the collective agreement (CBA). Consequently, it prayed for then 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 she joined the respondent in the Watering and Sorting section in 1997 and her gross earning was Kshs 38,626.40. She was registered for her 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 41 of the employment Act. NSSF contributions, which were deducted monthly from her pay. She was also a member of the Kenya Plantation Workers Union and her union dues were deducted from her salary.

5. She stated further that her services were terminated in December 2017 without being served with prior notice as required under the CBA. She 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 41 of the Employment Act.

6. She denied the alleged seasonal employment and maintained that she was a permanent employee and therefore she is entitled to the reliefs sought in her suit. She cited decisions of this court where it was held that termination of employment is unfair unless there is both substantive and procedural fairness.

Respondent's case

7. The respondent adopted the witness statement by its Unit Manager Mr. Josiah M. Ndegwa dated 9.2.2020 who stated that the claimant was employed by the respondent on 1/11/2016 as a factory worker on seasonal bases. He contended that the claimant was engaged on 3-months seasonal contracts with beakoffs in between. Therefore, he denied the alleged dismissal and maintained that the contract expired automatically after the term agreed by the parties lapsed.

8. He denied the claimant's allegation that she was a permanent employee of the respondent since 1997 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 Steel 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 2017. 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 her contract expired automatically,*

(c) *Whether the claimant is entitled to the reliefs sought.*

Nature of employment

11. The claimant alleges that she joined the respondent in 1997 as a permanent employee but the respondent contends that she joined the company in November 2016 under 3 months separate seasonal contracts until December 2017 when the last contracts expired.

12. I have carefully considered the documents filed as exhibits. The claimant produced her staff identification card issued by the respondent dated 10/12/2008, pays slips and NSSF statement showing that she started to work for the respondent earlier than 2016. All the claimant's records of employment are in the custody of the respondent by dint of section 10 (7) and 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 1/11/2016 and a few pay slips to show that he claimant worked from 2016. That 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 proved by documentary evidence that she started working for the respondent at least as early as 10/12/2008.

14. The respondent has not rebutted the fact that the claimant worked continuously from 10/12/2008 until February 2011 as evidenced by the NSSF statement which was produced as exhibit. It is only after June 2011 that she was engaged under 3 months' seasonal contracts as per the said NSSF statement and the contract dated 1/11/2016. Consequently, I find and hold that the claimant was initially employed on permanent basis up to February 2011 when her services were terminated. I further find that she was reengaged from June 2011 until December, 2017 under 3 months fixed term seasonal contracts, which were all punctuated by breaks in between. Such seasonal contract employment was in accordance with both the law and Clause 22 of the CBA which provided for such contracts.

Unlawful dismissal or expiry of contract

15. 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 the allegation that she was under a 3 months seasonal contract as at the time of the separation. She also did not call any witness to support her evidence that she worked continuously up to December 2017.

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 contract of service between the parties was a seasonal one and it expired automatically after the 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 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. She served up to the end of the 3 months and as such she was entitled to 28 days' notice or salary in lieu of notice. Consequently I award her 28 days salary in lieu of notice being Kshs 22,095, which is equal to the last salary paid in December, 2017.

19. The claimant also prayed for leave for 1997 – 2017. However, the same lacks particular and it is declined. Besides the claim for leave for 1997-2011 is now time barred because the separation in respect of the said permanent employment contract occurred in February 2011, more than 3 years after the separation.

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 February 2011 under the CBA, which claims, is now time barred considering the separation date in February 2011. Secondly from that time the employer contributed NSSF for her and as such under section 35(6) of the employment Act, she 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 22,095 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