



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. 9B OF 2019

GEOFFREY CHERUIYOT KIRUI.....CLAIMANT

VERSUS

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

JUDGEMENT

1. The claimant brought this suit on 1.2.2019 alleging that he was employed by the respondent from March 2002 in the electrical workshop section earning Kshs. 28,000 per month. He averred that his employment was permanent and pensionable under the Collective Bargaining Agreement (CBA). He worked until April 2016 when he was unlawfully dismissed by the respondent. The suit seeks the following reliefs:-

- a) An award of Kshs. 1,148,000.
- 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 2.3.2020 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. The suit was heard on 14.12.2021 when both parties tendered evidence and thereafter filed written submissions.

Evidence

4. The claimant testified as Cw1 by basically adopting his written statement dated 29.1.2019 as his evidence in chief. He further produced the bundle of documents attached to the claim and further list of documents dated 20.2020 as his exhibits.

5. In brief the claimant reiterated that he joined the respondent in March 2002 and he was attached to the electrical workshop section. He was also a member of the Kenya Plantation Workers Union and his union dues were also deducted from his salary every month. His monthly salary was Kshs.28, 000 but the employer used to deduct NSSF, and NHIF contributions every month as indicated in the pay slips.

6. He further testified that he worked until April 2018 when his employment was unfairly terminated by the respondent. The termination, in his view, was contrary to the CBA between his union and KTDA managed Tea Company Factories. He denied the alleged seasonal employment and maintained that he was a permanent employee and therefore entitled to the reliefs sought in his suit.

7. On cross examination, he admitted that he signed the seasonal contract dated 1.3.2014 but he was not given a copy. He contended that he could not remember how many seasonal contracts he signed but he was clear that he never signed any contract for permanent employment.

8. However he stated that he worked continuously from 2002 as evidenced by the NSSF statement and pay slips which he had produced as his exhibits. He admitted that he had no payslips for 2002 to 2010 but for September 2012 and after.

9. On re-examination, he maintained that he was employed under permanent and pensionable terms under the CBA and that he signed the seasonal contract to avoid losing employment and income.

10. The respondent called its Factory Unit Manager Mr. KoskaTinega who testified as Rw1. He also adopted witness statement by is Unit Manager Mr. KoskaTinega dated 25.11.2021as his evidence in chief and produced 5 documents in the respondent's list dated 26.5.2021.

11. In brief, he stated that the claimant was employed by the respondentas a general worker under a seasonal contract of 3 months from March 2014 to May 2014 and again from February 2016 to April 2016. He further statedthat NSSF and NHIF are statutory deductions which do not constitute evidence of permanent employment. Again he contended that membership to a trade union is voluntary and it does not entitle an employee permanent employment.

12. He denied that the claimant worked continuously and explained that the industry in which the respondent is based operates on two seasons, the peak and low seasons. During the low season, there is little to no work and most general workers are disengaged, but during the peak season, there is much work and the general workers are re-engaged.

13. Rw1 also denied that the claimant was dismissed as alleged 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 for the period he was engaged and denied that he is entitled to the reliefs sought in the suit.

14. On cross examination, Rw1 contended that the claimant was deducted NSSF and NHIF from his salary only when he was in employment but the days when he was not in employment, NSSF was not deducted. He admitted that the claimant was deducted NSSF from November 2006 to April 2016. As regards union dues, Rw1 contended that they were deducted from both permanent and seasonal employees.

15. He admitted that the CBA was negotiated on behalf of all the employees and the claimant was a beneficiary of the same. He further admitted that an employee who works for six continuous months he becomes permanent. He also admitted that the claimant was not paid gratuity contending that clause 16 of the CBA provides for gratuity for permanent employees only. He also stated that seasonal employees were entitled to pro-rata leave.

16. On re-examination, Rw1 contended that evidence of employment is the contract and there were only two seasonal contracts for the claimant. He offered to issue the claimant with Certificate of service if goes for the same. He denied that the claimant worked for 4 months consecutively.

Submissions

17. The claimant submitted on three issues; whether his employment was unfairly and unlawfully terminated, whether he is entitled to the reliefs sought,and finally who pays the costs of the suit. He submitted that he was dismissed for no justifiable reason and without being accorded a fair hearing contrary to section 45 of the Employment Act.

18. For emphasis, he relied on the case of **Walter Anuro v Teachers Service Commission [2013] eKLR**where the court held that for termination of employment to pass the fairness test, there must be both substantive and procedural fairness.

19. He contended that he worked for 14 years continuously and had become permanent and pensionable under the CBA. Therefore he contended that he was entitled to be treated fairly before termination under section 35 and 45 of the Employment Act.

20. Finally, the claimant maintained that he is entitled to the reliefs sought in his Claim plus costs.

21. On the other hand, the respondent also submitted on three issues; whether the claimant was a permanent and pensionable employee, whether the claimant was unfairly dismissed and whether he is claimant is entitled to the reliefs sought.

22. On the first issue, 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 exhibits. It also submitted that the claimant has also not tendered evidence to prove that he worked for the company continuously since 2002.

23. The respondent further submitted that it has not denied that it deducted and remitted NSSF and union dues but it maintained that it only did so during the periods when the claimant was in employment. It reiterated that NSSF statement and union membership are not evidence that the claimant was a permanent employee of the company.

24. The respondent further submitted that section 37 of the Employment Act did not apply to the claimant because his seasonal contracts could not convert to permanent employment. According to the respondent, the claimant's contracts clearly stated that they were for a non-renewable term of three months.

25. As regards the issue of unfair termination, the respondent submitted that the burden of proof is on the claimant under section 47(5) of the Act and contended that the same has not been discharged. It maintained that the claimant was engaged under seasonal contract which expired after effluxion of time.

26. For emphasis it relied on **Elizabeth Washeke & 62 others v Airtel Networks (K) Limited & another [2013] eKLR** where the court held that termination of a contract of service occurs as agreed by the parties in the contract and defined under section 10(3)(b) of the Employment Act.

27. In view of the foregoing matters, the respondent submitted that the claimant is not entitled to the reliefs sought and urged for the dismissal of the suit with costs.

Issues for determination

28. There is no dispute that the claimant was employed by the respondent up to April 2016. The issues in contest are:-

- (a) Whether the claimant was employed on seasonal contract basis or permanent and pensionable basis 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

29. The claimant alleges that he joined the respondent in November 2002 as a permanent employee but the respondent contends that he worked for the company under 3 months separate seasonal contracts from March 2014 to May 2014 and again from February 2016 to April 2016.

30. 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.

31. The respondent produced only copies of the two seasonal contracts dated 1.3.2014 and 1.2.2016, plus the claimant's pay slips for March and April 2014. I wonder why the other records were withheld from the court by the respondent who is the custodian of the claimant's employment records by dint of section 74 of the Employment Act.

32. The said default notwithstanding, I find and hold that the NSSF statement and pays slips produced by the claimant corroborates the claimant's verbal allegation that he stated working for the respondent as early as November 2006 and not in March 2014 as alleged by the respondent. The question that arises is whether he worked continuously or seasonally.

33. I have again considered the said NSSF statement and the bundle of pay slips produced by the claimant and found that from November 2006 to February 2007, the claimant worked continuously which formed one of the claimant's employment period. Again from April 2007 to January 2010 the claimant worked continuously and that formed the second period of his employment while the third phase was from March 2010 to August 2010. In 2011 he worked in January and February and jumped to December then continued to July 2012. He served again continuously from September 2012 to February 2013 then thereafter the pattern of employment changed to two months periods followed by three months upto April 2016. All the above employment periods were punctuated by breaks ranging one month to more than a year.

34. The above analysis corroborates the respondent's case that the claimant was employed on seasonal contracts and that NSSF was only deducted from his salary during the periods when he was in employment. It further corroborates the respondent's allegation that between 2014 and 2016, it engaged the claimant under two seasonal contracts from March – May 2014 and from February – April 2016. The claimant did not adduce any evidence whether documentary or oral testimony from his colleagues to rebut the respondent's allegation that the claimant was on seasonal contracts until April 2016.

35. The said Seasonal contract employment in accordance with the law and it was provided for under Clause 22 of the CBA. The CBA limited the contract period to a maximum of three months only but it did not state what would happen if the period exceeded that period. All what it provided for was that in case termination was done after three months continuous service, thus: -

“(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.”

36. Even if the claimant was entitled to any other rights accruing after the extension of the seasonal contracts beyond three months, the same would not be enforceable in this suit because the same would be time barred. The last such extended contract ran from September 2012 to February 2013 which translates to about six years from the time the contract lapsed. Section 90 of the Employment Act provides that:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the

act, neglect or default complained or the case of continuing injury or damage within twelve months next after the cessation thereof.”

Unlawful dismissal or expiry of contract

37. The burden of proving unfair or wrongfully dismissal is upon the employee by dint of sections 47 (5) of the employment Act while the employer has the burden of justifying the reason for the termination. In this case, the claimant did not rebut by evidence the allegation that he was under a three months seasonal contract as at the time of separation.

38. 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 claimant’s pleadings and evidence including his written statement and the NSSF statement produced, the separation occurred in April 2016 and therefore corroborating the respondent’s case that the contract lapsed automatically by effluxion of time that time.

Reliefs sought

39. The claimant prayed for Kshs.28,000 as one-month salary in lieu of notice. The claimant completed three months in his last contract and therefore I award him one month salary in lieu of notice being Kshs.20800 guided by his pay slip for February 2016.

40. The claimant further seeks leave for 14 years and gratuity or service pay for the same period. No particulars have been given for the said claims. In view of my earlier finding that the claimant did not serve continuously for the alleged 14 years, he had the burden of precise pleading so as to give of the particulars of the said claims. He did not do so and no evidence has been presented to support the same. Therefore the said claims must fail.

41. Besides, there is evidence to show that 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.

42. 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.

43. In conclusion I enter judgment for the claimant in the sum of Kshs. 20800 plus costs of the suit and interest at court rate from the date hereof. The award is subject to statutory deductions.

Dated, signed and delivered at Nakuru this 30th day of March, 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