Catherine v Mogogosiek Tea Factory Co Ltd (Cause 19 of 2019)
[2022] KEELRC 3988 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3988 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE 19 OF 2019

ON MAKAU, J

SEPTEMBER 22, 2022

BETWEEN

TERER CHEBET CATHERINE ..... CLAIMANT

AND

MOGOGOSIEK TEA FACTORY CO LTD ..... RESPONDENT

JUDGMENT

1. The claimant brought this suit on March 29, 2019 alleging that she was unlawfully dismissed from employment by the respondent. The suit seeks the following reliefs:-
    a. An award of kshs 1,083,420.70
    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 March 7, 2022 denying the alleged unfair dismissal of the claimant from employment and averred that the termination was fairly done in accordance with the law. It also averred that the claimant is not entitled to the reliefs sought contending that she was never a permanent staff under the collective agreement (CBA). Consequently, it prayed for the suit to be dismissed with costs.
3. On May 10, 2022 the parties agreed to adopt the pleadings, witness statements and documents filed as their respective cases and proceeded to file written submissions to dispose of the suit.

Claimant's case

4. The claimant stated that she joined the respondent in the sorting section in 1998 and her gross earning was kshs 20441.90. She was registered for er services were terminated in December 2017 contrary to the CBA. She was not served with prior notice as reqired under the CBA. She therefore submitted that the termination was wrongfl and unlawful as there wasno justifile reasonand no heaing was accored to heras required unde section 41 of the *employment Act*.NSSF and NHIF contributions, which were deducted monthly from her salary. 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 August 2018 without being served with prior notice of 28 days as required under the CBA.

6. In her submissions, the claimant contended that the termination was wrongful and unlawful since there was no justifiable reason and no hearing was accorded to her as required under section 41, 43 and 45 of the *Employment Act*. For emphasis, she relied on the case of *Walter Anuro vs Teachers Service Commission* [2013] eKLR where the court held that termination of employment is unfair unless there is both substantive and procedural fairness

7. She denied the alleged seasonal employment and maintained that she was a permanent employee, entitled to the reliefs sought in her suit since the termination was unfair and unlawful.

Respondent's case

8. The respondent adopted the witness statement by its factory unit manager Mr Koska Tinega dated March 1, 2022 who stated that the claimant was employed by the respondent on seasonal basis as a general worker. He was only engaged during the peak seasons on six occasions from March 2014 to May 2014, September 2014 to November 2014, May 2015 to July 2015, November 2017 to January 2016, November 2017 to January 2018, and July 2018 to September 2018.

9. He denied knowledge of the claimant's employment from 1998 and contended that deduction of NHIF and NSSF from his salary was not full proof that he was a permanent employee. He maintained that the claimant was engaged on 3-months seasonal contracts with breaks in between and clarified that the renewal was subject to application.

10. He denied the alleged dismissal and maintained that the contract expired automatically after the term agreed by the parties lapsed in September 2018. Therefore, he contended that under the CBA, the claimant is not entitled to the reliefs sought and the claim for kshs.1,083,420 is not justified.

11. In its submissions, the respondent reiterated the facts in its witness's written statement that the claimant was a seasonal employee and not permanent; and that the seasonal contract lapsed automatically by effluxion of time. For emphasis, it relied on the case of *Julius Arisi & 90 others v Research International East Africa Limited* [2019] eKLR where the court held that there is no permanent employment even where the same is pensionable because every employment is terminable.

12. The respondent further submitted that the claimant has failed to discharge the burden of proving unfair termination. For emphasis, it relied on the case of *Emily Migwa v Seventh Day Adventist Church Central Kenya Conference (CKC) & another* [2020] eKLR where the court held that under section 47(5) of the *Employment Act*, the burden of proof of unfair termination rests on the employee and that burden does not shift until the employee proves that the termination was done by the employer without a valid reason and without following a fair procedure.

13. It further relied on the case of *Ronald Ongori Gwako v Styroplast Limited* [2022]eKLR where the court declined to award any relief because the fixed term contract in issue lapsed automatically by effluxion of time.

Issues for determination and analysis

14. 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.

Seasonal or permanent employment

15. The claimant alleges that she joined the respondent in 1998 as a permanent employee but the respondent contends that she worked for the company from March 2014 under 3-months separate seasonal contracts until September 2018 when the last contracts expired.

16. I have carefully considered the documents filed as exhibits. The claimant produced her pays lips and NSSF statement showing that she started to work for the respondent as far back as January 2005 and not 2014 as alleged by the defence witness. 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.

17. The respondent produced only one contract dated September 1, 2014 and a few pay slips for 2014 to 2018 to show that the claimant worked from 2014. However, I find and hold that the claimant has proved by documentary evidence that she started working for the respondent at least as early as January 2005.

18. The respondent has also not rebutted the fact that the claimant worked continuously from November 2006 until September 2010 as evidenced by the NSSF statement which was produced as exhibit. Thereafter, there was a break of a few months followed by contracts of three months period punctuated by breaks of similar months. The first such contract started from March to May 2011 and the last ran from July to September 2018. The said NSSF Statement corroborates the evidence by the respondent that as at the time of the separation, the claimant was engaged as a seasonal employee on need basis.

19. Consequently, I find and hold that although the claimant was initially employed for an indefinite period from November 2006, such engagement was terminated in September 2010, and thereafter the claimant was engaged under seasonal contracts of three months 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

20. 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 witnesses to support her evidence that she worked continuously up to December 2017.

21. 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

22. 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."

23. 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 20,441.90 which he pleaded as his salary although his pays lips shows a higher amount.

24. The claimant also prayed for leave for 20 years but the same is declined for lack of particular. Since she was serving under separate contracts, she ought to have computed the claim on pro rata basis for each respective period. As regards the claim for period between 2006 and 2010 when she worked continuously, it is obvious that the same is time barred by dint of section 90 of the *Employment Act* since the separation occurred in September 2010, more than 3 years before the suit was commenced.

25. The claimant further prayed for gratuity/service pay but the same is declined first because the period when the claimant would have earned the same ended in September 2010 and as such that claim is also time-barred.

26. 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.

27. In conclusion, I enter judgment for the claimant for the sum of kshs 20,441.90 less statutory deductions. The claimant will also have costs plus interest at court rate from the date of filing the suit. Finally, the claimant will be issued with a certificate of service as prayed since it is her right under section 51 of the *Employment Act*.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 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 Rule28 (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

JUDGE1