



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 74 OF 2018**

***(Before D. K. N. Marete)***

**STEPHEN KIRWA MELLY.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim dated 4th September, 2018. It does not disclose any issue in dispute on its face.

The respondent in a Reply to Memorandum of Claim dated 4th October, 2018 denies the claim and prays that the same be dismissed with costs.

This matter is consolidated with ELRC Cause No.73 and 75 to 90 of 2018 with this as the lead case.

The claimant's case is that on or about the 13th May, 1994, he was employed by the respondent in the packaging section at a gross salary of Kshs.20,157.20 as at the date of termination.

The claimant's further case is that he was unionized and a beneficiary of the existing Collective Bargaining Agreement. His NSSF was paid by the employer.

The claimant's other case is that he served the respondent with loyalty and diligence until April, 2016 when he was wrongfully and unlawfully dismissed with no pay of terminal benefits as follows;

- |                                                                           |                  |
|---------------------------------------------------------------------------|------------------|
| a) One month salary in lieu of termination notice                         | Ksh.20,157.20    |
| b) Unpaid leave for the years between 1994 – 2016 (22yrs * Kshs.20,157.20 |                  |
|                                                                           | Kshs.443,458.4/= |
| c) Gratuity/service pay (Ksh20,157.20 * 22Yrs)                            | Kshs.443,458.4/= |
| d) 12 months wages compensation as per                                    |                  |
| e) Section 15 of the Labour Institutions Act (12Mths*20,157.20)           |                  |
|                                                                           | Kshs.241,886.4/= |

**TOTAL**

**Kshs.1,148,960.4/=**

This termination of employment was a violation of section 41 (1), 44 (4), 45 (2) (a) and 4 (b) of the Employment Act, 2007 in that;

- a) *The Respondent terminated the Claimant's employment without following the procedure laid down in the Employment Act and*

*the collective bargaining agreements;*

- b) The Respondent terminated the Claimant's employment without proving that the reason for the termination was valid;*
- c) The Respondent did not give the Claimant termination notice as provided in the Employment Act;*
- d) The Respondent did not give the Claimant his lawful leave days contrary to the Employment Act;*
- e) The Respondent did not give the Claimant his lawful rest days contrary to the Employment Act;*
- f) The Respondent did not regulate the working hours, the Claimant worked day and night;*
- g) The Respondent did not pay the Claimant our overtime and/or night shifts;*
- h) The Respondent rejected, neglected and/or refused to pay the claimant's his gratuity for the period he worked for the company;*
- i) The Respondent failed or neglected to give the Claimant a Certificate of Service as required by the Employment Act.*
- j) The Respondent failed to recognize that the claimant herein was on permanent and pensionable terms by virtue of the collective bargaining agreement.*

He prays as follows;

- a. Kshs.1,148,960.4*
- 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*

The respondent's case is a denial of the claim.

The respondent's further case is that at all times to this cause, the claimant was engaged on intermittent seasonal contract renewable on mutual agreement subject to the respondent's prevailing leaf processing capacity on load. This was recognized and covered under clause 22 of the subsisting CBA.

The respondent's other and penultimate case is that the termination of the claimant's employment was occasioned by effluxion/lapses of his seasonal contract and therefore neither wrongful nor unlawful. The contract's date is 1st February, 2016.

The matter came to court variously until 12th October, 2018 when this court issued directions on the way forward to a determination of this suit.

The issues for determination in this cause therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.
2. Whether the claimant is entitled to the relief sought.
3. Whether the claimant is entitled to the costs of the cause.

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances. The claimant in his written submission dated 20th December, 2018 and in support of a case of unlawful termination of employment seeks to rely on the statutory authority of sections 41 (1) and 44(4) of the Employment Act, 2007 which stipulates the ingredients of procedural fairness and summary dismissal in cases of termination of employment.

He cites the following as grounds of unprocedural and unlawful termination of his employment;

- a) The respondent did not follow the procedural laid down in the Employment Act;*
- b) The respondent did not give the claimant a termination notice as provided for in the Employment Act;*
- c) The respondent termination the claimant without paying his lawful leave days contrary to the Employment Act;*

- d) *The respondent did not give claimant his lawful rest days contrary to the Employment Act;*
- e) *The respondent did not pay Gratuity/service pay to the claimant;*
- f) *The respondent did not give the Claimant a certificate of service;*

The respondent in her written submissions dated 28th November, 2018 opposes the claim by relying on the authority of **Samuel Chacha Mwita v Kenya Medical Research Institute [2014]eKLR**, where the court observed as follows;

*“...Under these provisions of the law, parties entering into an employment relationship can enter into a written contract that is permanent, fixed term, periodic or seasonal contract based on the need, purpose or the interests of both parties or the persons involved. Once there is a written contract, the court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract...fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not act by the employer. There a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract. (Emphasis ours.)*

This was a reinforcement of dictum in the authority of **Ruth Gathoni Ngotho Kariuki vs. Prebyterian Church of East Africa and Presbyterian Foundation Industrial Cause No.509 of 2010**, that employers are not under any obligation to give employees reasons for a renewal of fixed term contract unless this is an obligation stipulated in the terms of the expiring contract.

The respondent sums her case in reliance on the authority of **Joseah Kipkorir Langat vs. Kapkatet Tea Factory Company Ltd (2016)eKLR**, where this court observed thus;

*“...The fairest indicator for the terms of service of the claimant are his pay advise slips annexed to the claim. These indicate that he was paid at the end of the month but for days worked in the course of the month and this varied from month to month. This corresponds with the submissions of the respondent that the claimant was employed as a seasonal employee and no on permanent basis. The evidence of the parties tilts in favour of the respondent’s case and I therefore find a case of not termination of the employment of the claimant by the respondent.*

*With a finding of no termination of the employment of the claimant, the other issues for determination eclipse into nothingness.*

*I am therefore inclined to dismiss the claim...”*

This is another such case. Here, the claimant miserably fails to meet the test of section 47 (5) of the Employment Act which provides as follows;

*“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”*

This is a sad case for the claimant. The respondent’s case overwhelms his. The claimant has indeed failed to plant a case of unlawful termination of employment. This is *in toto* rebutted by the ample evidence adduced by the respondent in favour of the opposite case: lawful termination of employment: that indeed, this was a fixed term contract which lapsed by effluxion of time. I therefore hold a case of no termination of the employment of the claimant by the respondent. The termination, if at all, can only have been lawful termination. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent.

**Delivered, dated and signed this 1st day of February, 2019.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Mugumya instructed by Ms P. Sang & Company Advocates for the claimant.
2. Mr. Koech instructed by Bett & Company Advocates for the respondent.