



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 347 OF 2014**

**(Before Hon. Justice Mathews N. Nduma)**

**LAWRENCE NYATENYA NYANGALA.....CLAIMANT**

**VERSUS**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. By a statement of Claim filed on 8<sup>th</sup> December 2014, the claimant prays for the following reliefs:
  - a. Declaration that claimant was a permanent employee of the respondent and that he be reinstated to the respondent employ.
  - b. In the alternative, he claimant be paid terminal dues calculated from the date of first employment in January 1999 up to August 2013
  - c. Damages
  - d. Costs of the suit and interest.
2. The respondent filed response to the statement of claim on 28<sup>th</sup> January 2015 in which it states that claimant was employed on causal basis in January 1999, as a security guard and thereafter kept renewing the employment of the claimant from time to time at basic daily rate of Kshs. 380 payable in arrears at the end of the month. That claimant left employment voluntarily without giving the respondent any notice or reasons.
3. Claimant testified as CW1 to the effect that he was a General labourer, Security Guard and finally cane guard at the respondent's sugar plantation. That he started working in January 1999. Between February 2002 and July 2002, he was stopped from working and was then given a contract. He worked up to 30<sup>th</sup> November 2009 and was laid off again. That he was re-engaged and given new contract. The contracts were said to be periodical but he worked continuously. In August 2013, the respondent stopped assigning CW1 work and so he stopped working. At the time he earned Kshs. 380 per day paid monthly. CW1 stated under cross examination that respondent started remitting NSSF dues in September 2001 but he was employed in January 1999. That he was given either three or six months contracts. Other times he worked without a contract. That between 2012 and 2013, he had no written contract. CW1 said contracts were just back dated otherwise he worked continuously. That in August 2013, CW1 came from leave and was not given more work. That his co-worker had been given a permanent contract. CW1 said he sought explanation from human resource department but got no work. CW1 denied he absconded work. CW1 wrote a demand letter but it was not responded to. That he was not paid his terminal dues. That he had no disciplinary issues. The claimant says he was unfairly treated. That the court should declare that CW1 was a permanent employee and reinstate him to work or he be paid as prayed. That he was 46 years old. That he was now unemployed. That he got no letter of termination.
4. RW1, Duncan Orwa testified that he was Industrial Relations Officer of the respondent. That CW1 was a cane guard. That he guarded cane against theft and destruction by humans and animals. That he was employed on a needs basis. That after harvesting the cane guards were not required. That cane was under 24 months cycle. So there was cane throughout the year but in different farms. That the claimant was not available to sign a contract for the period starting 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2014. That CW1 could not get permanent employment. He was not a union member.
5. That RW1 had worked for respondent for 18 years. That CW1 found him at the respondent's employ. That CW1 worked as a general labourer and later as a security guard. That he earned Kshs. 380 per day. That written contracts would be backdated for up to 3 weeks. That

at one time the claimant was on one year contract. The respondent prays the suit be dismissed.

### **Determination**

6. The issues for determination are:

- a. Whether claimant was a temporary or permanent employee.
- b. Whether the claimant's employment was terminated or he absconded from work
- c. Whether the claimant is entitled to the reliefs sought.

### **Issues (a) and (b)**

7. The court shall deal with the two issues together. The claimant has established that he was first employed as a labourer by the respondent in January 1999. That he would be laid off for some time and then recalled. That he was placed on fixed term contracts of varying length and sometimes he worked without any written contract but he would then sign backdated contract.

8. That at the time he stopped working in August 2013, he had no fixed term contract. That the respondent simply stopped giving him work and he left upon being frustrated. He had sought explanation from the Human Resource Manager without success. That his advocate wrote a demand letter but it was not responded to. That the claimant was paid a daily rate of Kshs. 380 at the end of each month. That he worked as a cane guard.

9. It is apparent that the claimant was treated as a temporary employee for the entire period he worked for the respondent from 1999 up to the year 2013 when he stopped working.

10. Going with the definition of a casual employee provided in the *Employment Act, 2007*, the engagement of the claimant from the year 2008 onwards could not be described as casual engagement. The claimant however was on varying fixed term contracts but at the time the respondent stopped giving the claimant work, he had not signed any fixed contract.

11. The claimant admitted that he was employed to guard cane and that once cane was harvested he would be disengaged and then re-employed again later.

12. The claimant has failed to prove that as at August 2013, he was employed by the respondent and that he was entitled to continue working for the respondent.

13. There is no evidence that the employment of the claimant was terminated for any disciplinary reason. The respondent simply failed to renew the fixed contracts under which the claimant had all along worked.

14. The claimant has in the circumstances failed to prove on a balance of probabilities that his employment was unlawfully or unfairly terminated by the respondent.

15. In answer to issue (c) above, the claimant has not made out a case for reinstatement to his work and/or an award of damages. The fixed terms contract enjoyed by the claimant up to July 2013 was simply not renewed in August 2013, and the respondent stopped giving him work.

16. The respondent is not mandated to renew the contract of the claimant in the circumstances of this case nor has a case for payment of damages been made out by the claimant. **See Peter Wambugu Kariuki and 160 others vs Kenya Agricultural Research Institute Petition No. 2 of 2013.** In terms of *Section 107 and 108 of the Evidence Act, Cap 80 laws of Kenya*, he who alleges bears the onus of proof.

17. The claimant has failed to discharge the onus placed on him on the issue of liability and the reliefs sought.

18. The claim by the claimant is dismissed in its entirety. The claimant has not been in employment for a long time. He was employed intermittently by the respondent overtime.

19. This is not an appropriate case to make an award of costs and the court dismisses the case with no order as to costs.

**Judgment Dated, Signed and delivered this 9<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Oduk for Claimant

Mr. Ouma for Respondent

Chrispo – Court Clerk