



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 897 OF 2013

BERNARD MUTUKU KIMOLO.....CLAIMANT

VERSUS

EAST AFRICAN GROWERS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent in February, 2000 until February, 2012 when his employment was terminated. Such termination was without reason, notice or hearing and contrary to statutory provisions and thus unfair.
2. At the time of his termination of employment, the claimant was earning as salary of Ksh.9, 000.00 per month. This was at the rate of Kshs.300.00 per day. The respondent failed to make NSSF and NHIF payment for the claimant.
3. The claimant is seeking the following;
 - a. Notice pay of Kshs.9,000.00;
 - b. Unpaid leave at Kshs.108,000.00;
 - c. Service pay Kshs.54,000.00;
 - d. Compensation for leave days not taken at kshs.108,000.00; and
 - e. Costs.
4. The claimant testified in support of his claims. The evidence is that In February, 2000 the claimant was employed as a permanent casual employee of the respondent where he served for 11 years. He was never issued with a letter of appointment and would be allocated general duties and paid Kshs.300.00 per day without any other benefit. No pay slip was issued and the salary was sent to Diamond Trust Bank every week and he was issued with an ATM card to access his wages. The ATM card also served as the job card. Not all employees we issued with such card.
5. The human resource officer of the respondent called the claimant and was informed that his work had ended and directed to leave the respondent premises. There had been no disciplinary case, notice or reason given for such drastic action. The due daily wages earned until February, 2012 were paid.
6. The claimant also testified that while working for the respondent he would have time off for up to two days. When there was high demand for work, he would work continuously without a break. The respondent kept a master roll where all employees got registered. The claimant would report at the gate each day together with others and got recruited. The ATM card issued would only be used within the respondent premises.

Defence

7. In response, the respondent's case is that they are involved in the business of exporting vegetables and fruits and which is dependent on orders the respondent gets for a particular day as the market is not consistent and fluctuates every day. The respondent therefore contacts casual employees on a daily basis as and when there is work. The casual workers camp at the respondent's gate every morning to be picked for work when available. When there is work, some are informed the day before. The fact that a person or casual worker was picked or allocated work on a particular day does not entitle such a worker to be picked the next day.

8. In the year 2005 the respondent proposed to Diamond Trust Bank on how it would pay its consistent workers by issuing ATM cards and installing an ATM machine with its premises so that each end of day the casual workers would use their cards to get their wages. This card would not be used outside the respondent premises. This mode of payment was invented to each manual payment of casual workers. The respondent has since stopped the use of such ATM cards.

9. The defence is also that the claimant was retained by the respondent as a casual worker from the year 2005 in accordance with the master roll. The allegations that employment started in the year 2000 is without merit. The claimant did not attain the status of an employee to seek the claims made. His services were not required on a daily basis. The claimant stopped looking for work with the respondent and there was no legal basis for the respondent to go looking for him as there was no employment relationship.

10. The claims set out are without justification and should be dismissed.

11. In evidence to support the defence, the respondent called Joceline Kibaya the human resource officer. She testified that the respondent is engaged in the horticulture farming; exportation and required workers gather at the gate and are randomly picked each day. There are no permanent casuals. The claimant was picked from other job seekers at the gate and paid a daily wage. Wages were paid through an ATM machine installed within the respondent premises. The respondent filled the master roll for work attendance each day. The claim appears on some days and when absent he is marked as absent – ‘x’ = present at work and ‘o’= absent from work. On several pages the claimant is marked as absent.

12. The witness also testified that she is 3 months old on her job with the respondent. The marks of ‘x’ or ‘o’ on the master roll are not done by her and was not present. The master roll is not filed in court.

At the close of the hearing, both parties filed written submissions.

The court has taken into account the pleadings, the evidence of the parties and the written submissions. The issues which emerge for determination can be summarised as follows;

Whether there was an employment relationship between the parties;

Whether the claim for unfair termination of employment is justified;

Whether there are any remedies.

13. The claim herein is premised on the basis that the claimant was a permanent casual and who was dismissed without notice, reason or hearing and thus the same is unfair and terminal dues should be paid. The respondent's defence is that the claimant was picked and paid on a daily basis as a casual employee, he was only taken when there was work and his status did not change to an employee and the claims made are not justified.

14. In evidence the respondent's witness testified that there was a master roll for all employees on a daily basis but this was not produced. In this regard, section 10(6) ad (7) of the Employment Act, 2007 provides that;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

15. Once a claim is filed, the employer has the statutory duty to keep and submit with the court employment records and indeed the burden to produce particulars of employment. Without the master roll indicated by the respondent as having existed and where records of the claimant's days at work were recorded, the court is left with the word of the claimant.

16. The Employment Act, 2007 defines a casual employee to be;

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

17. Where such a casual employee remains in the continuous work of an employer for not less than one month and the casual employee continues to undertake work which in its nature cannot reasonably be expected to be completed within a period and such practice continuous in the aggregate and equivalent to 3 months or more, the casual status of such a person is changes to be that of an employee with all rights set out for an employee under the Employment Act, 2007. In addressing the provisions of section 37 of the Employment Act, 2007 with regard to who a casual employee and seasonal contract employee is, the Court of Appeal in **Krystalline Salt Limited versus Kwekwe Mwakele & 67 others [2017] eKLR** held that;

.....casual employment entails engagement for a period not longer than 24 hours at a time and payment made at the end of the day... parliament intended to draw this distinction and that is why section 37 does not mention piece rate work employees.

18. Section 37 of the Employment Act, 2007 thus converts casual employment to term contract under the principles that such casual employment does not end each day, such employment is continuous, and fundamentally such work cannot reasonably be expected to be

completed within a period and ultimately, such work continues for days in the aggregate to the equivalent of 3 months or more.

19. The Court of Appeal as set out above took cognisance that an employer has the prerogative of issuing its employees with piece rate contract. Such a contract is specific, time bound and seasonal. The Employment Act, 2007 also allow the employer the prerogative to issue a fixed term contract with specific terms and conditions as where no contract is issued, there is no seasonal contract issued and the employee is retained as a casual employee undertaking such work that does not end and continuous for period of up to 3 months or more, such an employee is protected under the law, section 37 of the Act.

20. The respondent’s witness testified that the claimant was taken as a casual worker form the year 2005. Without any record to support such a claim, the statutory duty being vested upon the employer to produce such a record, I take the evidence by the claimant that he was employed from February, 2000 to February, 2012 when his employment was terminated without notice, reason or hearing. Such amounted to unfair termination of his employment pursuant to the provisions of section 35, 41, 43 and 45 of the Act which required notice, hearing, and reasons to be given and the same to be genuine reasons. The respondent failed these statutory requirements. There was unfair termination of employment.

21. On the claims made, compensation is due to an employee unfairly terminated from his employment. The claimant had worked for 11 years with the respondent; a compensation of one (1) month is hereby found appropriate and awarded kshs.9, 000.00.

22. Notice pay is due in a case of unfair termination where there was no fair procedure in ensuring notice was given, there was hearing and there were valid reasons. The claimant is awarded one months’ notice pay at Kshs.9, 000.00.

23. The claim for leave due for 11 years is based on the fact that the claimant was taken as a casual employee and thus not entitled to annual leave. Section 37 of the Employment Act, 2007 upon the conversion of casual employment to protected employment also provides for all right under the Act as due to the employee who is entitled to notice under section 35 of the Act, and other benefits. Section 28(4) on the provision of annual leave required the respondent to allow the claimant his annual leave at 21 days. Such leave should be secured within 18 months of employment. Such is a right the claimant as entitled to claim but failed to do so. The leave due shall be computed taking into account these provisions ad hereby awarded at 18 months leave due all at Kshs.13,500.00.

24. Service pay is due to an employee whose statutory dues are not remitted pursuant to the provisions of section 35 of the Employment Act, 2007. Where the claimant remained in the employment of the respondent for 11 full years, service pay is due and awarded at kshs.49, 500.00.

Accordingly judgment is hereby entered for the claimant against the respondent in the following terms;

- (1) A declaration that the claimant was the employee of the respondent;**
- (2) A declaration that termination of employment was unfair;**
- (a) Compensation awarded at kshs.9, 000.00;**
- (b) Notice pay Kshs.9, 000.00;**
- (c) Leave pay Kshs.13, 500.00;**
- (d) Service pay Kshs.49, 500.00; and**
- (e) Costs of the suit.**

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:.....

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