



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2232 OF 2012**

**IRENE TERESIA MUKOTI.....CLAIMANT**

**- VERSUS -**

**EAST AFRICAN GROWERS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 31<sup>st</sup> May, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.11.2012 through Kurura Omangi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Kshs. 541, 368.00 being Kshs.12, 360.00 pay in lieu of notice; rest days per week for 7 years Kshs.276, 864.00; unpaid annual leave 21 days for 7 years Kshs.60, 564.00; service pay 15 days for each year served Kshs. 43, 260.00; one year salary being compensation under section 49(1) (c) of the Employment Act Kshs. 148, 320.00.
- b) Interest on (a) from 06.09.2012 until payment in full.
- c) Certificate of service.
- d) Any other suitable relief that the Honourable Court may grant.

The response to the claim was filed on 13.02.2013 through Omwoyo, Momanyi Gichuki & Compant Advocates. The respondent prayed that the claim be dismissed with costs. The claimant filed a reply to response on 22.02.2013.

The claimant's case is that she was employed by the respondent on 16.05.2005 as a cleaner or hygienist. She was not given a letter of appointment. She worked without a break in service until 06.09.2012 when her employment was terminated. On that day after work in the evening, the claimant testified that her supervisor told her not to report to work the following day. It was her testimony that she was not given a notice or an opportunity to be heard. No reasons were advanced for the termination.

The respondent's case was that the claimant was a daily worker hired on ad hoc basis as a casual employee at Kshs. 300.00 per day but the rate of payment must have increased over time. That she was employed on daily basis on need basis. It was the respondent's case that in such circumstances, the prayers made for the claimant were not justified. The respondent's case was that the account or circumstances of the termination as given by the claimant would therefore not amount to unfair termination. RW did not dispute the account or circumstances of termination as given by the claimant.

The **1<sup>st</sup> issue** for determination is whether the claimant served without a break in service from 16.05.2005 to 06.09.2012. The respondent's witness (RW) testified that the respondent maintained a check-in and check-out register. The claimant testified as much. Section 10 (7) of the Employment Act, 2007 states thus, **"(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."** The Court returns that the respondent has failed to discharge the burden of proving that the claimant had a break in service. In the Court's opinion, nothing prevented the respondent from filing the relevant check-in and check-out registers to establish any breaks in service. In the circumstances, the Court finds that the claimant has established on a balance of probability that she served throughout the period and without a break.

To answer the **2<sup>nd</sup> issue** for determination the Court returns that as submitted for the claimant, the claimant's purported casual service converted to a service subject to the minimum statutory terms of service as envisaged in section 37 of the Employment Act, 2007. RW confirmed that the respondent's Hygiene Department was very large with some permanent and other casual employees. The work could not be completed in less than three months and the claimant has established that she worked throughout the period without a break. Accordingly,

the Court returns that the present case was a clear case of conversion of purported casual service to one subject to minimum terms under the Act as per section 37 of the Act. In any event the rate of pay was on daily basis but not paid on daily basis but on monthly intervals. There was no doubt that the respondent had issued an ATM pay point card in favour of the claimant for purposes of the pay.

To answer the **3<sup>rd</sup> issue** for determination, the Court returns that the verbal termination of the claimant's employment on the evening of 06.09.2012 was unfair. The respondent did not advance any reason for the termination and it was unfair as per section 43 of the Act. If the reason was that the claimant was a casual employee as submitted for the respondent, and therefore not requiring a notice or due process, the Court returns that such was an invalid reason as the claimant's service had since converted to one subject to the provisions of the Act in all respects.

The court has considered that the claimant desired to continue in employment, she had served for over 7 years, and the termination was sudden and without reason. The Court considers that in such circumstances including that the claimant never contributed to the termination, 12 months' pay as provided under section 49 of the Act will meet the ends of justice. The claimant is awarded **Kshs. 148, 320.00** as prayed for. While making that award the Court considers that the last daily rate for pay was **Kshs.412.00** as per the claimant's evidence because in any event, RW testified that initially the daily rate had been Kshs.300.00 and it kept on increasing to an amount she could not establish since the last pay sheets had not been filed.

The **4th issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

- a) The termination notice was not issued and the court returns that the claimant is entitled to **Kshs.12, 360.00** being pay in lieu of the termination notice, the claimant having been paid on monthly intervals at the time of termination.
- b) The claimant gave no evidence on the prayer for rest days and the same will fail for want of evidence.
- c) The claimant testified that throughout her service she was not given annual leave or paid in lieu of leave. The Court returns that she has established her claim for pay in that regard and is awarded **Kshs.60, 564.00** as prayed for.
- d) The claimant prays for service pay of **Kshs. 43, 260.00** at 15 days for each year served. There was no evidence of alternative pension arrangement or evidence that the claimant was a member of the NSSF. The Court returns that the prayer for service pay is reasonable in the circumstances of the case and is awarded accordingly in terms of section 35(5) of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs.264, 504.00** by **01.08.2018** failing interest to run at court rates from the date of the judgment till full payment.
- 2) The respondent to deliver a certificate of service to the claimant by 01.07.2018.
- 3) The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday 31<sup>st</sup> May, 2018.**

**BYRAM ONGAYA**

**JUDGE**