



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 41 OF 2018

(Before D. K. N. Marete)

KIPKURUI KOECH.....CLAIMANT

VERSUS

MOGOGOSIEK TEA FACTORY COMPANY LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of claim dated 21st May, 2018. It does not disclose an issue of dispute on its face.

The respondent in a Response to Memorandum dated 20th June, 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that on 18th May, 2000 he was employed by the respondent in the production section at a gross salary of Kshs. 29,989.25.

The claimant's further case is that he served the respondent with loyalty and diligence until 29th February, 2016 when he was wrongfully and unlawfully dismissed without pay of terminal dues as follows;

- | | |
|---|------------------|
| a) One month salary in lieu of termination notice | Kshs.29,989.25/= |
| b) Unpaid leave for the 16 years (16yrs*Kshs. 29,989.25) | Kshs 479,828/= |
| c) Gratuity/service pay (Kshs.31527.65*15yrs) | Kshs. 479,828/= |
| d) 12 months wages compensation as per section 15 of the Labour Institutions Act (12mnths * | |

TOTAL Kshs.1,349,516.25

It is his further case that the termination of his employment violated section 41 (1), 44 (4) and 45 (2)(a) and (4) (b) of the Employment Act, 2007 and was unlawful and unfair for the following grounds;

- The Respondent terminated the Claimant's employment without following the procedure laid down in the Employment Act;*
- 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.*

He prays as follows;

- a) Kshs.1,349,516.25/=*
- b) Interest at court rates*
- c) Certificate of Service.*
- d) Cost of this suit.*

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

It is the respondent's further case that the claimant had on various occasions been employed as a seasonal employee as a general worker. He had never been on permanent employment but was employed for duration of time at the end of which term he was relieved for a break off and would be recalled back on a need basis. Salary payment was dependent on the number of days worked in a month.

The respondent's other case is a denial of dismissal of the claimant as alleged or at all. It is her case that the claimant was entered into a three month employment contract with the respondent beginning the month of August, 2016 and ending at the end of October, 2016 following her application dated 1st July, 2016. This contract came to an end through lapse of time and therefore no case of dismissal arose. He is deemed on a break off.

The matter came to court variously until the 18th of June, 2018 when the claimant in the absence of the respondent proposed a by way of written submissions. This was accepted and directions issued by court.

The issues for determination therefore are;

1. Was there a case of termination of the claimant by the respondent?
2. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was a case of termination of the claimant by the respondent. The claimant in his written submissions dated 20th June, 2018 and in support of his case of unlawful termination of employment submits non compliance with section 41(1) of the Employment Act, 2007 in the termination of the employment of the claimant in that the claimant was not explained to the reasons why he was dismissed in the presence of another employee or a shop floor union representative of his choice.

Further, the respondent violated section 44 (4) of the Employment Act, 2007 in that the claimant was never afforded an opportunity to dispute the truthfulness of the accusation or accusations before him.

The claimant submits and seeks reliance of section 37 of the Employment Act, 2007 as follows;

...the claimant worked for the respondent continuously for a period of more than three months since 18th May, 2000 until February, 2016 and Respondent as no evidence stating otherwise has been brought forth and as such by virtue of his term of engagement is deemed to be the one where wages are paid monthly by virtue of Section 37 of the Employment Act.

The respondent did not file any written submissions in answer.

At the onset of the claim, the claimant annexed his payslip for the month of October, 2014. This indicates that the claimant worked for 27 days and earned a basic pay of Kshs.20,800.00. Other emoluments included overtime and benefits pay which culminated in monthly gross pay dependent on these valuables. The claimant further annexes a copy of his identity card and a staff identity card with the respondent, Roll No. 12978 valid from 10th December, 2008.

Is this a safe case of entrenching section 37 of the Employment Act, 2007 and pronouncing a case of permanent employment? I do not think so. The claimant submits that he had worked for the respondent for a period of more than three months since 18th May, 2000 to february, 2016. Beyond stating this, he does not support it in evidence or at all. I am therefore unable to find a case of permanent employment or even a case of unlawful termination, or at all. These are not supported by any evidence whatsoever.

The respondent at all times denies termination. This is not rebutted by the claimant.

The expression of the claimant's case is, with due respect, muddled up. It does not come out clear. Does he intend to present a case of having worked for more than three months between 18th May, 2000 to february, 2016? This, he should tell us and clearly so. I do not find a case of termination of employment and find as such.

On a finding of a case of no termination of employment, the other salient issue for determination fall by the way side. They are not worthy of determination.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 29th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mugumya instructed by P. Sang & Company Advocates for the claimant.
2. No appearance for the respondent.