



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO**

**CAUSE NO. 13 OF 2018**

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

**NAUMY CHELANGAT BIRIR.....CLAIMANT**

**VERSUS**

**KAPKOROS TEA FACTORY COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of claim dated 6th February, 2018. It does not disclose an issue of dispute on its face.

The respondent in a Response to Memorandum of Claim dated 7th March, 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that on 1st August, 1994 he was employed by the respondent in sorting and withering sections (GL) at a gross salary of Kshs. 23,238.60.

The claimant's further case is that he served the respondent with loyalty and diligence until 30th November, 2017 when he was wrongfully and unlawfully dismissed without pay of terminal dues as follows;

- a) *One month salary in lieu of termination notice Kshs.23,238.60/=*
  - b) *Unpaid leave for the years between 1994 – 2017 (23yrs\*Kshs. 23,238.60) Kshs 534,487.8/=*
  - c) *Gratuity/service pay (Kshs.31527.65\*15yrs) Kshs. 534,487/=*
  - d) *12 months wages compensation as per section 15 of the Labour Institutions Act (12mnts \* 22,238.60)Kshs.278,863.2/=*
- TOTAL Kshs.1,371,077.4**

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;

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

He prays as follows;

a) Kshs.2,096,840.53/=

b) *Interest at court rates*

c) *Certificate of Service.*

d) *Reinstatement to his former Job at the Respondent's Company*

e) *Cost of this suit.*

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

The matter came to court variously until the 21st of June, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was there a case of termination of the employment 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 employment 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 introduces a new angle to his case. This is to the extent that the claimant was unionized with Kenya Plantation of Workers Union (KPAWU) and Central Organization of Trade Unions (COTU). The respondent would on a monthly basis deduct and remit union dues in accordance with the subsisting CBA *inter partes*.

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;

*...provides that where a casual employee works for a period or number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service for the casual employee shall be deemed to be one where wages are paid monthly and section 35(1) (c) shall apply to the contract of service. The claimant worked for the respondent continuously for a period of more than fifteen years since September 1999 thus their term of employment cannot be termed as seasonal contract employment.*

At the onset of the claim, the claimant annexed his payslip for the month of november, 2017 where she earned a gross pay of 35,539.67. It does not indicate the number of days worked. Others are payslips for the month July and September 2015, September and October 2017 where the respondent earned the following gross pays respectively; Kshs.26,502.00, Kshs.26,982.80, Kshs.24,350.00 and Kshs.29,220.00.

The respondent in her written submissions dated 27th June, 2018 reiterates her case of the claimant being a casual employee and therefore not befitting a case of unlawful termination of employment. On this she sought to rely on the authority of **Rashid Odhiambo Allogoh & 245 Others v Haco Industries Limited [2015] eKLR** the court of appeal in dismissing the claim stated;

*“We therefore, with a lot of empathy, find that the appellants were casual workers within the prevailing laws despite the mode of payment and continuous service with the respondent. This is more so in the wake of lack of provisions similar to section 37(1) in the repealed Employment Act.”*

The respondent annexes copies of her Identity, National Social Security Fund and National Hospital Insurance Fund cards in defence.

Is this a safe case of entrenching section 37 of the Employment Act, 2007 and pronouncing a case of permanent employment? I think so. The claimant submits that she had worked for the respondent for a period of more than three months since August, 1994. This, combined with the provisions of collective bargaining agreement *inter partes* culminated in a case of permanent employment per section 37 of the Employment Act, 2007. This is the submission of the claimant and in the absence of any rebuttal by the respondent, I would agree with it. It makes sense. I therefore find a case of permanent employment and therefore termination of the employment of the claimant by the respondent.

The respondent merely denies termination. In this she annexes a Seasonal Workers Contract as at 1st September, 2017 stipulating the terms and conditions of employment *inter partes*. She does not account for the long periods of engagement as presented by the claimant. This therefore would not suffice to discount a case of permanent employment and unlawful termination as pleaded and presented by the claimant.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. This comes out clearly from the analysis of the respective cases of the parties above. I therefore find a case of unlawful termination of employment of the claimant by the respondent.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment she is entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. One (1) months salary in lieu of notice.....Kshs.23,238.60

ii. Twelve (12) months compensation for unlawful

termination of employment Kshs. 23,238.60 x 12= .....Kshs.278,863.20

**TOTAL.....Kshs.302,101.80**

iii. The respondent be and is hereby ordered to issue a Certificate of Service to the claimant.

iv. The costs of this claim shall be borne by the respondent.

**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.