



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 27 OF 2018**

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

**RAYMOND KIPLANGAT KIRUI ..... CLAIMANT**

**VERSUS**

**MOGOGOSIEK TEA FACTORY LIMITED ..... RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of claim dated 9th March, 2018. It does not disclose an issue of dispute in its face.

The respondent in a Response to Memorandum dated 7th March 2018 denies the claim and prays that it be dismissed with costs. This defence is however filed in ELRC Cause No.8 of 2018 which is consolidated with this cause.

This matter is consolidated with cause No's ELRC 7/2018, 8/2018, 9/2018, 10/2018, 11/2018, 12/2018, 13/2018, 14/2018, 15/2018, 16/2018, 17/2018, 20/2018, 22/2018, 27/2018, 28/2018, 29/2018, 30/2018, 32/2018 with this as the lead case.

The claimant's case is that on or about September, 1999 he was employed by the respondent in the Electrical Department as an Electrician at a gross salary of Kshs. 31,527.65.

The claimant's further case is that during his stint of service he involved in an accident and the respondent through her insurance cover settled the claim.

The claimant's other case is that he served the respondent with loyalty and diligence until August, 2014 when he was wrongfully and unlawfully dismissed without pay of terminal dues as follows;

- a) *One month salary in lieu of termination notice* Kshs.31,527.65
- b) *Unpaid leave for the years between 1999 – 2014 (15yrs\*Kshs.31,527.65)* Kshs 472,914.75/=
- c) *Gratuity/service pay (Kshs.31527.65\*15yrs)* Kshs.472,914.75
- d) *12 months wages compensation as per section 15 of the Labour Institutions Act (12mnts \* 23,483.60)*Kshs.378,331.8

**TOTAL Kshs.1,355,688.95**

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.1,355,688.95*
- b) *General damages*
- c) *Interest at court rates*
- d) *Certificate of Service.*
- e) *Reinstatement to his former Job at the Respondent's Company*
- f) *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. It is her other case that the claimant 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 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.

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

The issues for determination therefore are;

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

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. 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 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.*

The respondent in her written submissions dated 27th June, 2018 and in support of a case of casual employment sought to rely on the authority of **Persteeno Omondi v Steel Makers Ltd [2017] eKLR** where Makau, J. in finding that the claimant was a casual employee stated;

*“In view of the foregoing finding that the claimant was a casual employee who was not protected by the law from abrupt termination, the compensation sought in his claim cannot issue. Likewise, the prayers for leave and service pay are declined because the claimant never served for any 12 consecutive months. The NHIF and NSSF statement produced by the claimant is enough evidence that the claimant never worked continuously for any single year.”*

At the onset of the claim, the claimant annexed his payslips for the month of January, July, and August, 2014. All these indicate 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. This discounts the respondent’s case of casual/seasonal employment and diminishes her case.

The claimant’s case and submission is that the claimant worked for the respondent for fifteen (15) years. This has not been rebutted by the defence. I therefore agree with the claimant’s employment of section 37 of the Employment Act, 2007 as a build up for a case of permanent employment. This is tenable and supported by the documentary evidence of the claimant.

Curiously, and as noted earlier, the respondents did not specifically offer a defence on this lead case. She has not tendered any evidence whatsoever of the alleged seasonal or casual employment status of the claimant. Why? I would not tell. I therefore find a case of unlawful termination of employment of the claimant by the respondent and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes 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. 31,527.65
- ii. Twelve (12) months compensation for unlawful termination of employment Kshs. 31,527.65 x 12= .....Kshs.378,331.80
- TOTAL.....Kshs.409,859.50**
- 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.
- v. The costs of the consolidated claims shall be had in the lead case only.

**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. Miss Ngetich instructed by Ngetich Chira & Company Advocates for the respondent.