



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 19 OF 2018

(Before D. K. N. Marete)

PATRICK BETT.....CLAIMANT

VERSUS

TIRGAGA TEA FACTORY COMPANY LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 16th February, 2018. It does not disclose any issue in dispute.

The respondent is a Memorandum of Response dated 11th June, 2018 denies the claim and prays that the same be dismissed with costs.

This matter is consolidated with ELRC No. 18 /2018 and 33/2018 with this as the lead case.

The claimant’s case is that on or about July, 2007, he was employed by the respondent as a stocker under the boiler stock section. He earned Kshs.31,621.00 per month but has not been issued with payslips.

The claimants other case is that he served with loyalty and diligence until October, 2016 when he was wrongfully and unlawfully dismissed and with a refusal to pay her full terminal benefits. These are;

- a) One month salary in lieu of termination notice Kshs.30,000/=
- b) Unpaid leave for 11years (11 years *Kshs30,000.00)Kshs.330,000/=
- c) Gratuity/service pay (Kshs 30,000/= * Kshs.330,00/=
- d) 12 Months wages compensation as per Section 15 of the Labour Institutions Act (12 Mths*30,000) Kshs.360,000/=

TOTAL **Kshs.1,050,000/=**

6. The claimant submits that the Respondent terminated his services summarily without following the right procedure laid down in the Employment Act 2007.

7. The Respondent violated Section 41(1) of the Employment Act 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employees shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The Claimant contends that the Respondent never explained to him the reasons for the intended dismissal.

8. Section 44(4) of Employment Act lists matter which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusation. The Claimant submits that the Respondent did not give him a chance to dispute the correctness of the accusation before dismissing him.

Further, the claimant raises the following as grounds of unfairness and unlawfulness;

- 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 regulate the working hours, the Claimant worked day and night;*
- f) *The Respondent failed or neglected to give the Claimant a Certificate of Service as required by the Employment Act.*

He prays as follows;

- a) *Reinstatement back to his position of employment in the company.*
- b) *Kshs.1,050,000/=*
- c) *Interest at court rates*
- d) *Certificate of Service*
- e) *Cost of this suit*

The respondent's case is a succinct denial of the claim. She posits as follows;

4. *The Respondent employed the Claimant as a seasonal employee on a three month renewable contract.*
5. *The contract was renewable upon application and the Claimant's contract has been renewed over the years in the same manner.*
6. *The nature of the Claimant's job as a general worker depends on the season of the tea crop and availability of the jobs the Respondent only requires the said workers as and when the season demands.*
7. *The Claimant's contract expired and was not renewed.*
8. *In response to paragraph 4 of the Claim, the Respondent avers that the claimant received his dues as per the terms of the last contract he held with the Respondent*

The respondent in the penultimate denies the claim and avers that she is in compliance with the Employment Act in entirety.

The matter came to court variously until the 13th June, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was there a 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 there a termination of the employment of the claimant by the respondent. The claimant in his written submissions submits that the claimant worked for the respondent for a period of more than three months since July, 2007 and therefore was not a seasonal employee. It is his further submission that his term of engagement is deemed to be one where wages were paid on monthly basis and therefore fits onto section 37 of the Employment Act, 2007.

The claimant further submits a violation of section 35 (1) (c), 36, 41 (1), 44 (4) and 49(1) (c) of the Employment Act, 2007. Notable however is lack of demonstration or evidence of these allegations of breaches of the employment Act by the claimant. The claim only has the claimant's Identity card and a copy of a Provisional Member Statement of Account of the NSSF for the claimant for the years 2007 to 2016. This is not indicative of continuous remittances and this perhaps also indicate discontinuous employment.

The claimant has not also demonstrated or led evidence in support of a reliance on section 37 of the Employment Act, 2007 which deems an employee who has been in continuous employment for long periods a permanent employee. This would not be automatic or formed of mere speculation or allegation but must be demonstrated in evidence.

All this time, the respondents submit a case of the claimant being a seasonal employee whose contract was terminated by a effluxion of time and therefore no termination of employment.

This matter is desolate in several senses of the word. The parties do not take any meaningful efforts to demonstrate their respective cases. Both the claimant and the defence are scanty in the demonstration of the respective cases.

Section 47 (5) of the Employment Act, 2007 burdens the parties to demonstrate their cases or loose them. It provides as follows;

47 (5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"

Section 47 above at the onset lays the burden of prove of unlawful termination of employment of the claimant/employee. The respondent/employer thereon takes the burden of rebutting unlawful termination. In the instant case the claimant has not established a case of any termination of employment. I therefore find a case of no termination of employment and hold as such.

With a finding of no termination of employment of the claimant by the respondent, the other issues for determination fall by the way side. They become non issues and not worth of any consideration.

I am therefore inclined to dismiss the claim with costs to the respondent.

Delivered, dated and signed this 26th day of June, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mugumya instructed by P. Sang & Company Advocates for the claimant.
2. Miss Mogun holding brief for Mr. Ngetich instructed by Ngetich Chira Associates Advocates for the respondent.